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# First Draft Pick or Benched Indefinitely? The Future of the Single-Entity Doctrine in Sports Antitrust

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# FIRST DRAFT PICK OR BENCHED INDEFINITELY? THE FUTURE OF THE SINGLE-ENTITY DOCTRINE IN SPORTS ANTITRUST

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## INTRODUCTION

This paper argues that attempts to conceptualise professional sports leagues in the United States as "single entities" for antitrust purposes constitutes a fundamental misapplication of basic antitrust principles. Instead, professional sports leagues are more correctly treated as consortia of competitors, through which anticompetitive arrangements could well be reached. The United States Supreme Court arguably reached this conclusion in *American Needle*,[1] but its judgment left the future of the so-called "Single-Entity Doctrine" unsatisfactorily unclear. Analysing *American Needle* in the context of modern antitrust, it is clear that like professional sports leagues in other jurisdictions, leagues in the United States are not "single entities," but horizontal arrangements to which Rule of Reason analysis can and should be applied.

The paper first briefly canvasses the history of the Single-Entity Doctrine in United States antitrust law through to the early 2000s, with particular focus on the development of the doctrine in relation to the professional sports industry. It next discusses the Supreme Court's decision in *American Needle*, arguably a turning point for the doctrine but a judgment that leaves some questions about the doctrine's future unanswered. It then attempts to reconcile the theory underlying the Single-Entity Doctrine (both before and after *American Needle*) with contemporary antitrust law, both in

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1. Am. Needle Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

the United States and in other jurisdictions. It then looks to the future, asking if (and if so, how) the Single-Entity Doctrine should survive, as well as how the courts might instead apply antitrust principles to sports leagues. It concludes that, although professional sports leagues do have special characteristics unlike many other markets, treating them as "single entities" is a misapplication of antitrust principles that effectively, and incorrectly, immunizes them from scrutiny under section one of the Sherman Act. Instead, leagues are complex yet traditional horizontal arrangements to which Rule of Reason analysis ought always to be applied.

## I. SETTING THE SCENE: ANTITRUST AND THE SINGLE-ENTITY DOCTRINE

The fundamental goal of antitrust law—regardless of whether one's focus is on prices or output; or whether one sees antitrust through the Chicago, Harvard, or post-Chicago Schools—is to ensure the maintenance of competitive markets for the long-term benefits of consumers.[2] Antitrust law regulates both unilateral and multilateral conduct, but antitrust statutes, beginning with the Sherman Act,[3] recognise a clear difference between the unilateral exercise of market power by one single entity[4] and the anticompetitive collaboration or collusion between two or more competitors in the same market.[5]

Multilateral contracts, arrangements and understandings between competitors attract antitrust liability if they have either anticompetitive purpose or effect. The most egregious forms of cartel conduct, including "naked" restraints such as price-fixing and bid-rigging, are generally prohibited *per se*;[6] whereas other types of arrangements are subject to a more rigorous competition analysis. In the United States, analysis of such

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2. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 2, 31–33 (2005); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L. J. 25, 49 (1991); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). For a statutory restatement of this objective in one of the jurisdictions discussed below, see Commerce Act 1986, s 1A (N.Z.). Note that antitrust law is commonly referred to as "competition law" outside of the United States. Since this paper is primarily grounded in United States professional sports and United States law, it will generally use the term "antitrust."

3. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (2004).

4. This concept is sometimes referred to, particularly in American case law and literature (due to the wording of section 2 of the Sherman Act), as "monopolization." This paper will refer to the concept as "exercise of market power" in order to make it clear that it is not strictly necessary for an entity to be a "monopoly" in order for it to face antitrust scrutiny under these sections (for example, Sherman Act, 15 U.S.C. § 2 (1890); Competition Act, R.S.C. 1985, c C-34, ss 78–79 (Can.); Commerce Act 1986, s 36 (N.Z.); *Competition and Consumer Act 2010*, s 46 (Austl.).

5. HOVENKAMP, *supra* note 2, at 140–49. Note that antitrust laws also restrict anticompetitive conduct as between two entities in separate, but related, markets; but that such "vertical" multilateral restraints are outside of the scope of this paper.

6. See, for example, in the United States context, Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211 (1898); in the Canadian context, Competition Act, R.S.C. 1985, c C-34, s 45 (Can.); and in the New Zealand context, Commerce Act 1986, s 30 (N.Z.).

arrangements is on a net basis under the "Rule of Reason," a three-step test under which (in short): a plaintiff must prove a degree of market power such that competitive harm is possible; the burden shifts to the respondent to then establish the arrangement's procompetitive goals (or effects) outweighing any anticompetitive effects; and finally the burden shifts back to the plaintiff, who must show that the agreement is overly restrictive, i.e. that the procompetitive benefits could be obtained through less restrictive means.[7] Under other countries' antitrust laws, for instance those of Canada,[8] Australia,[9] and New Zealand,[10] the analysis is generally similar, but undertaken through the framework of an arrangement between competitors needing to have the purpose, effect, or likely effect of "substantially lessening competition in a market" to attract liability.

On the other hand, one cannot anti-competitively collude or conspire with oneself: multiple actors within the same legal entity, for example attorneys within the same law firm or salespeople on the same car-yard, can "collude with impunity."[11] Instead, an entity acting alone can only be liable if it has engaged in the unilateral exercise of a substantial degree of market power (or, actual or threatened "monopolization") to actually harm competitive rivals or potential entrants through mechanisms that also harm consumers and the competitive process, a much higher standard than for multilateral conduct.[12]

The distinction between unilateral and multilateral conduct is therefore significant: regardless of jurisdiction, unilateral conduct claims are much more rare, being harder for a plaintiff to prove and "comparatively easy to defend."[13] Accordingly, whether the conduct of entities under antitrust scrutiny is viewed as multi-firm, multilateral conduct or single-firm

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7. The classic statement of the Rule of Reason is in the United States Supreme Court's judgment in Bd. of Trade Chi. v. U.S., 246 U.S. 231, 238 (1918); and a recent restatement can be found in Leegin Creative Leather Prod. Inc. v PSKS Inc., 551 U.S. 877 (2007). *See generally* Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 4 WIS. L. REV. 835, 840–44 (2009); Stephen F. Ross, *The Single-Entity Doctrine of Antitrust as Applied to Sports Leagues*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 225, 227–28 (Michael A. McCann ed., 2017), dx.doi.org/10.1093/oxfordhb/9780190465957.013.11.

8. Competition Act, R.S.C. 1985, c C-34, s 90.1 (Can.).

9. *Competition and Consumer Act 2010*, s 45 (Austl.).

10. Commerce Act 1986, s 27 (N.Z.).

11. J. Matthew Schmitten, *Antitrust's Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule*, 46 COLUM. J.L. & SOC. PROBS. 93, 98–105 (2012). *See also* Alan Devlin & Michael Jacobs, *Joint-Venture Analysis After American Needle*, 7 J. COMPETITION L. & ECON. 543, 547–52 (2011); OECD COMPETITION COMMITTEE, POLICY ROUNDTABLES: COMPETITION AND SPORTS 29–30 (2010), http://www.oecd.org/daf/competition/competition-and-sports-2010.pdf.

12. Sherman Act, 15 U.S.C. § 2 (1890); Competition Act, R.S.C. 1985, c C-34, ss 78–79 (Can.); *Competition and Consumer Act 2010*, s 46 (Austl.); Commerce Act 1986, s 36 (N.Z.). *See also* HOVENKAMP, *supra* note 2, at 150–55; Ross, *The Single-Entity Doctrine*, *supra* note 7, at 226.

13. Nathaniel Grow, Note, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183, 185 (2006). *See also* Ross, *The Single-Entity Doctrine*, *supra* note 7, at 226–27.

unilateral conduct makes a considerable difference to those firms' potential liability.[14] Being able to characterise joint-firm conduct as the unilateral actions of a "single entity" rather than as multilateral agreements between competitors effectively allows those firms to escape antitrust scrutiny, and therefore liability, for what may well be anticompetitive (but not monopolistic) actions.

Given the above, subjecting the actions of a joint venture operation between two or more competitors to antitrust scrutiny raises issues. Are such operations better characterised as one single firm, only subject to scrutiny under the stricter unilateral conduct standard; or are they instead by their very nature a multilateral arrangement subject to the *per se* rules and/or the Rule of Reason? To be sure, some joint venture-type arrangements create massive efficiencies such that entire markets would not exist without them,[15] for instance the joint venture at the heart of the *Broadcast Music Inc*. case that concerned the modern recorded-music copyright licensing system.[16] On the other hand, the threat is that much like any other (non-structural) anticompetitive arrangement, a joint venture between competitors will facilitate inefficient behaviour, and result in higher prices and lower output than would have been the case had those entities continued to act, and compete, independently.

Moreover, the unique structure of the professional sports industry raises more conceptual concerns about the application of antitrust rules to teams and leagues. Sport by its very nature is a competitive exercise, and unlike most industries, simply to exist, the business of professional sport requires a degree of cooperation among entities that may otherwise be competitors.[17] Indeed, the very formation of a league involves the coming together of, and contracting between, independently organised teams to agree on (at the very least) the rules of the game.[18] Robert Bork referred to professional sports as one of the rare commercial activities that "can only be carried out jointly,"[19] and various United States courts have affirmed the "special characteristics"

14. Devlin & Jacobs, *supra* note 11, at 544.

15. Sherman J. Clark, *Why Sports Law?* 28 STAN. L. & POL'Y REV. 151, 157 (2017); Devlin & Jacobs, *supra* note 11, at 547–49.

16. *See generally* Broad. Music Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979). *See also* HOVENKAMP, *supra* note 2, at 29; Jacobs, *supra* note 2, at 50–51.

17. *See generally* Oliver Budzinski & Stefan Szymanski, *Are Restrictions of Competition by Sports Associations Horizontal or Vertical in Nature?*, ILMENAU ECON. DISCUSSION PAPERS , 9 (2014); Clark, *supra* note 15, at 153; HOVENKAMP, *supra* note 2, at 29–30.

18. James L. Brock, Jr., Comment, *A Substantive Test for Sherman Act Plurality: Applications for Professional Sports Leagues*, 52 U. CHI. L. REV. 999, 1009–15 (1985); Budzinski & Symanski, *supra* note 17, at 409–10; OECD, *supra* note 11, at 15–17; Warren Pengilley, *Restraint of Trade and Antitrust: A Pigskin Review Post Super League*, 6 CANTERBURY L. REV. 610, 628–29 (1997).

19. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 278 (1978).

of professional sports distinguishing sports from other markets.[20] The valuable product—the sport itself—could not exist without some degree of collaboration, agreement and joint action between teams; and in turn the teams would have little independent purpose without the existence of the league.[21] Conversely, though, teams are independent economic entities that compete with each other for viewership, ticket sales, and athletes (that is, labour), amongst other things.[22] Accordingly, professional sports teams may well, through the artifice of a league, jointly adopt anticompetitive rules that reduce output and quality, and increase price, exploiting consumers.[23]

The question, then, is how to treat a professional sports league and its constituent teams for antitrust purposes. Although comprised of individual teams, is a league one single entity acting collectively; or instead, is a league merely a set of agreements between the individual teams, all of whom are entities in competition with each other? In the United States (where the vast majority of antitrust assessment of professional sports has occurred), if it is the latter, then a league's actions—and the actions of its constituent teams—are able to be assessed as horizontal multilateral actions subject to *per se* liability and the Rule of Reason; whereas if it is the former, the league can only be subjected to antitrust scrutiny for actual or attempted monopolization. One can clearly see, then, why professional sports leagues might want to fashion a rule—a doctrine—that for antitrust purposes, their actions are always those of a "single entity."

## II. THE HISTORY OF THE SINGLE-ENTITY DOCTRINE

Although this paper examines the Single-Entity Doctrine as applicable to professional sports leagues, the doctrine is not confined to the sports context. Instead, it is an application of general antitrust principles to situations in which entities linked in some fashion—for instance, joint venture partners; or, indeed, entities in joint ownership and membership of a professional organisation—act in a collaborative fashion. Tracing the history of the doctrine, it is apparent that once antitrust began looking at the substance rather than the form of joint venture operations—after *Copperweld*[24]—the doctrine became applicable to professional sports

20. Brown v. Pro Football, Inc., 518 U.S. 231, 252 (1996) (Stevens, J., dissenting). *See also* Am. Needle Inc. v. Nat'l Football League, 560 U.S. 183, 202 (2010); N. Am. Soccer League v. Nat'l Football League, 670 F.2d. 1249, 1251 (2nd Cir. 1982); Nat'l Coll. Athletic Assoc. v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984); Smith v. Pro Football Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978).

21. Devlin & Jacobs, *supra* note 11, at 544; Feldman, *supra* note 7, at 844–46; Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 U. CAL. L.A. L. REV. 219, 226–29 (1984).

22. Brock, *supra* note 18, at 1009–15; Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L. J. 75, 77–78 (2015).

23. Ross, *The Single-Entity Doctrine*, *supra* note 7, at 225.

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

leagues and was engaged by those leagues in an attempt to immunise their decisions from antitrust scrutiny.

The doctrine as applied to professional sports in the United States stems from the Supreme Court's creation and subsequent severe limiting of a general exemption from the antitrust laws for professional sports leagues. In the early days of the Sherman Act, the Supreme Court's interpretation of "interstate commerce" in that Act was sufficiently narrow such that in 1922, the Court did not consider the (national) operation of professional baseball to fall within the scope of the Act.[25] However, despite efforts on the parts of both the National Football League[26] and inter-state boxing promoters,[27] the Court later refused to apply the same logic to other professional sports. Accordingly, Major League Baseball's common-law exemption from the antitrust laws, although still in existence,[28] is somewhat of an aberration.[29] Unable to secure a common-law exemption, and unsuccessful in persuading Congress to enact a statutory blanket exemption to all professional sports in the 1950s and 60s,[30] professional sports leagues looked to fashion such an exemption through the operation of the antitrust laws themselves – in particular, through the "single-entity" treatment of joint venture-type operations.

Until the 1980s, in assessing the antitrust liability of joint venture-type arrangements, United States courts tended to look solely at the form of the relevant entity rather than the substance of the entity, its actions, and the relevant market(s).[31] For instance, the Supreme Court held in *Yellow Cab*,[32] *Kiefer-Stewart*,[33] and *Perma Life*[34] that separately-incorporated yet jointly-controlled businesses, including wholly-owned subsidiaries, were separate entities able to collude with one another despite their common control. In the joint venture context, a key example is the United States Supreme

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25. Fed. Baseball Club of Balt. Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922).

26. Radovich v. Nat'l Football League, 352 U.S. 445 (1957); *see also* Smith v. Pro Football Inc., 593 F.2d. 1173 (D.C. Cir. 1988).

27. U.S. v. Int'l Boxing Club, 348 U.S. 236 (1955).

28. Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953); Flood v. Kuhn, 407 U.S. 258, 282–83 (1972).

29. *Flood*, 407 U.S. at 282. Also, see discussion in Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Market?*, 60 TENN. L. REV. 263, 264–67 (1993); Farzin, *supra* note 22, at 80, 85–88; and Ross, *The Single-Entity Doctrine*, *supra* note 7, at 225–26, 228–29.

30. Ross, *The Single-Entity Doctrine*, *supra* note 7, at 229.

31. *See generally* discussion in Nathaniel Grow, *American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L. J. 449, 456–57 (2011); and Schmitten, *supra* note 11, at 104–13.

32. *See* U.S. v. Yellow Cab Co., 332 U.S. 218 (1947).

33. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 213–14 (1951).

34. Perma Life Mufflers v. Int'l Parts Corp., 392 U.S. 134, 141–42 (1968).

Court's 1967 judgment in *United States v Sealy*,[35] in which it poured cold water on a "single entity" claim by a joint venture engaging in market allocation in contravention of section one of the Sherman Act. Sealy, a mattress and bedding manufacturer, was owned collectively by its downstream licensees, mattress retailers in competition with one another. The majority refuted Sealy's claim that it and its licensees were one single entity unable to collude with itself, noting that "Sealy was a joint venture of, by, and for its stockholder-licensees [in competition with one another] . . . we are moved by the identity of the persons who act, rather than the label of their hats."[36]

On the other hand, there were indications even at this early stage that the form of the relevant entity may not be the sole consideration. In the sports context, in 1974, the United States District Court for the Central District of California held that the National Hockey League and the San Francisco Seals, a member team of the NHL, were "acting together as one single business enterprise, competing against other similarly organized professional [hockey] leagues."[37] That is, that the NHL and its member teams were effectively one single entity, unable to collude with itself. In so holding, the Court noted that teams within leagues (and the league as an entity) may "compete" with each other in the sporting sense, but they could not be construed to be competitors in the economic sense.[38] The Court distinguished the NHL from the co-operative association of supermarkets in *Topco* that had recently been found to violate section one of the Sherman Act due to the professional sports context,[39] putting particular weight on the fact that although the supermarkets could exist independently of the association, the existence of the NHL "makes possible a segment of commercial activity which could hardly exist without it."[40] The *San Francisco Seals* case is somewhat of an anomaly in an era where courts appeared concerned more with an entity's form than its substance.

However, the Second Circuit Court of Appeals came to effectively the opposite conclusion in 1982, in *North American Soccer League v. NFL*.[41] In that case, the NFL attempted to restrain its member teams from investing in the nascent North American Soccer League ("NASL"), which brought suit against the NFL under section one of the Sherman Act. The Court, in that case, emphasised that although the NFL was a joint venture and its member teams had a broader joint interest in the success of professional football as a whole, and indeed jointly produced the product of professional

35. *See* U.S. v. Sealy Inc., 388 U.S. 350 (1967).

36. *Id.* at 353–54.

37. S.F. Seals, Ltd. v. Nat'l Hockey League, 379 F.Supp 966, 969 (C.D. Cal. 1974).

38. *Id.* at 969–70.

39. U.S. v. Topco Assocs. Inc., 405 U.S. 596 (1972).

40. *S.F. Seals, Ltd.*, 379 F.Supp. at 970.

41. N. Am. Soccer League v. Nat'l Football League, 670 F.2d. 1249 (2nd Cir. 1982).

football, its member teams were also individually-owned legal entities with distinct economic interests independent from those of the league as an organisation.[42] The Court noted that the restraint was not simply to protect the NFL from competition from the NASL, but also allowed its individual teams to be insulated from competition from NASL teams in their localities.[43] The Court refused to allow the NFL and its teams to escape antitrust liability on the basis that they were one "single entity," instead subjecting the restraint to Rule of Reason analysis.[44] The Ninth Circuit subsequently came to a similar conclusion in the *Oakland Raiders* case in early 1984.[45]

By the early 1980s, general antitrust literature had grown sceptical of the formalistic (rather than substantive) assessment of what was at that point referred to as the "intraenterprise conspiracy" doctrine.[46] In mid-1984, the Supreme Court followed suit in *Copperweld*, a case concerning alleged collusion between a steel tubing company and its wholly-owned subsidiary.[47] The majority of the Court stated that parents and subsidiaries, "not unlike a multiple team of horses drawing a vehicle under the control of a single driver," share a "unity of purpose or common design."[48] Such situations did not concern separate economic actors pursuing separate and divergent economic incentives.[49] Accordingly, provided there were such unified interests in their objectives, coordinated behaviour between parent and subsidiary entities could be treated as the actions of one single entity, outside of the scope of section one of the Sherman Act.

In line with the discussion in the previous section of this paper, after *Copperweld*, it was clear that "single entities" such as the commonly-owned tubing companies in that case could not engage in concerted conduct within the purview of section one of the Sherman Act. However, over the ensuing years, various joint venture-type arrangements were also able to utilize the "unity of purpose" theory in order to immunize what would have otherwise been clearly collusive activity from section one liability (notwithstanding the fact that the court in *Copperweld* did not clearly state that non jointly-owned entities could so avail themselves of the *Copperweld* test).[50] Two examples include, franchisor/franchisee relationships (perhaps suggesting that *Sealy* would have been decided differently after *Copperweld*) and

42. *Id.* at 1250-52.

43. *Id.* at 1257.

44. *Id.* at 1257-58.

45. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d. 1381, 1401 (9th Cir. 1984).

46. That is, concerning joint ventures generally, not just in the sports context. See discussion in Schmitten, *supra* note 11, at 109, citing in particular Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983). *See also* Grow, *American Needle*, *supra* note 31, at 457.

47. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 755-57 (1984).

48. *Id.* at 771-72.

49. *Id.* at 769, 775. *See also* Brock, *supra* note 18, at 1002-04.

50. Brock, *supra* note 18, at 1004–05; Grow, *American Needle*, *supra* note 31, at 459.

agreements between trade associations and their members.[51] In the same vein, professional sports leagues seized the occasion to build on the conclusion in *Copperweld*, reject the contrary reasoning in *North American Soccer League* and *Oakland Raiders*, and create the exemption from the antitrust laws that they had been seeking since at least the 1950s.[52]

In 1996, the NBA was effectively successful in creating such an exemption through the Seventh Circuit Court of Appeals' decision in *Chicago Professional Sports v NBA* ("*Bulls II*").[53] In that case, Judge Easterbrook wrote that, despite previous confusion on this point,[54] under the *Copperweld* doctrine, professional sports leagues were clearly able to be treated as single entities and thus immune from antitrust suit under section one of the Sherman Act. He noted that although the NBA's member teams were individually owned, this did not imply that they were economic competitors "any more than separate ownership of hamburger joints [as franchises] . . . implies that McDonald's is a cartel."[55] Although there may have been "conflicts" between member teams, these were analogous to conflicts between different units of large firms "such as General Motors or IBM," rather than those between economic competitors.[56] Judge Easterbrook stated that *Copperweld* had *not* in fact held that there needed to be "complete unity of interest" between the parties in order for them to be treated as a single entity; only that in *Copperweld* the parent-subsidiary relationship of the "single entity" in that case had *resulted in* such a complete unity.[57] Although he left open the possibility of member teams being economic competitors in the labour services market for players,[58] under Judge Easterbrook's analysis, sports leagues ought to be treated as single entities producing one single product—the sport—with cooperation between member teams being essential to the creation of that product.[59]

Accordingly, by the late 1990s, United States antitrust jurisprudence had developed to the point where it was accepted that, as discussed above, professional sports leagues could well be treated as "single entities" that

51. Schmitten, *supra* note 11, at 113 (citing, respectively, Williams v Nevada, 999 F.2d. 445 (9th Cir. 1993) and Levi Case Co. v ATS Prods. Inc., 788 F.Supp. 428 (N.D. Cal. 1992)). *See also* Grow, *American Needle*, *supra* note 31, at 459–64.

52. Donald G. Kempf Jr., *Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DEPAUL L. REV. 625, 628–31 (1983).

53. Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d. 593, 596 (7th Cir. 1996).

54. *See* Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d. 667, 673 (7th Cir. 1992).

55. *Chi. Prof'l Sports Ltd. P'ship*, 95 F.3d. at 598.

56. *Id.*

57. *Id.*

58. *Id.* at 600.

59. *Id.* at 598-99.

could not conspire or collude with each other, and could accordingly be exempt from the operation of section one of the Sherman Act.[60]

## III. AMERICAN NEEDLE: MUCH-NEEDED CLARITY?

Despite the above, the question of whether professional sports leagues were "single entities" for antitrust purposes was not entirely settled through the late 1990s and early 2000s,[61] until it was directly considered by the United States Supreme Court in *American Needle v NFL*.[62]

*American Needle* concerned a challenge to the NFL's granting of an exclusive intellectual property license for the manufacture and sale of NFL-branded apparel. In 1963, the NFL and its member teams had formed a separate legal entity, National Football League Properties ("NFLP"), to hold, develop, license, and market all teams' intellectual property, revenues from which were shared amongst the teams.[63] In 2000, the teams for the first time voted to grant an exclusive license over all teams' intellectual property in a specific area, granting Reebok an exclusive license to manufacture headwear featuring all thirty-two teams' trademarks. American Needle, which had previously shared a nonexclusive license to the relevant intellectual property, filed suit under sections one and two of the Sherman Act. The NFL argued, citing *Bulls II*, that it ought to be treated as a "single entity" for section one purposes: the District Court for the Northern District of Illinois agreed, noting that the teams had "so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose."[64] The Seventh Circuit Courts of Appeals affirmed, stating that it was irrelevant whether the teams could have competed with one another to licence their IP, and in line with the reasoning in *Bulls II*, it would be "silly" to consider the teams a single entity *only* if they had completely unified interests (to use the *Copperweld* language).[65] American Needle appealed, with the NFL supporting its petition for *certiorari* in an attempt to have the Supreme Court finally declare the Single-Entity Doctrine applicable to sports leagues to immunize its actions from section one scrutiny.[66]

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60. Notwithstanding the potential exception to this perceived immunity from the ambit of section one of the Sherman Act in the labor market for player services, mentioned above: *Id.* at 600. *See also* Kempf, *supra* note 52, at 628. For the primary point, see Grow, *There's No I in League*, *supra* note 13, at 186-88.

61. Feldman, *supra* note 7, at 837; Grow, *There's No I in League*, *supra* note 13, at 187.

62. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187 (2010).

63. *Id.* at 187-88.

64. Am. Needle Inc. v. New Orleans La. Saints, 496 F.Supp.2d. 941, 943 (N.D. Ill. 2007).

65. Am. Needle Inc. v. Nat'l Football League, 538 F.3d. 736, 743 (7th Cir. 2008).

66. Roger D. Blair & Wenche Wang, *Will American Needle Burst the NFL's Balloon?*, 38 MANAGERIAL & DECISION ECON. 664, 666 (2017).

The Supreme Court sharply, and unanimously, disagreed with the lower courts, holding that that in the context of selling rights to manufacture apparel, the NFL was not one single entity, but instead a combination of competitors.[67] The Court canvassed the history of the Single-Entity/intraenterprise conspiracy doctrine, synthesising its previous decisions, including *Copperweld*, to state that what is most important in determining whether a joint venture is a single entity is a "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[68] The Court rejected a formalistic approach: if the creation of a joint venture in fact "deprives the marketplace of independent centers of decisionmaking," the decisions of the venture ought to be scrutinised, as cartelists should not be able to "evade" antitrust laws simply by forming a joint venture to put their anticompetitive agreement into practice.[69]

Previous cases, particularly *Bulls II*, had attempted to analogise sports leagues to large organisations such as GM and IBM, businesses within which different branches may nominally compete but could not collude. The Supreme Court rejected that analogy; unlike other organisations operating as a combination of smaller entities, the NFL does not have one single CEO or Board of Directors making all decisions, with concomitant economic incentives and fiduciary duties to the broader company.[70] Instead, teams within the NFL are independent, profit-maximising "separate economic actors pursuing separate economic interests," and those economic interests are not necessarily always aligned.[71]

Moreover, in the context of the creation and marketing of intellectual property, teams clearly did actually compete with each other: "[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks."[72] Despite ostensibly operating through the joint venture company, when making decisions concerning intellectual property licensing, each team was in fact making decisions "reflect[ing] not only an interest in NFLP's profits but also an interest in the team's individual profits."[73]

The Supreme Court was unmoved by the NFL's submissions regarding the sporting context of the joint marketing arrangements. For instance, the NFL submitted that "without [the teams'] cooperation, there would be no football"; but the Court responded that "a nut and bolt can only operate together, but an agreement between nut and bolt manufacturers is still

67. *Am. Needle*, 560 U.S. at 202–03.

68. *Id.* at 191.

69. *Id.* at 197–99 (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

70. Ross, *The Single-Entity Doctrine*, *supra* note 7, at 231.

71. *Am. Needle*, 560 U.S. at 197-98 (citing *Copperweld*, 467 U.S. at 769).

72. *Id.* at 197.

73. *Id.* at 201.

subject to §1 analysis."[74] Similarly, even though the joint marketing arrangements dated back to 1963 and were in the teams' collective economic interests, cartel behaviour is generally in the cartelists' economic interests at the expense of those who are not parties, and that the longstanding nature of a anticompetitive arrangement does not immunise it from scrutiny.[75]

The Court did not conclude that leagues could never be considered to be single entities, however, noting that the "special characteristics" of the sports industry may, at times, allow for cooperation between teams and some degree of collective decision-making.[76] In this case, however, the separate entity the teams had used, NFLP, was an "instrumentality of the teams," much like the joint venture between the mattress manufacturers had been in *Sealy* over 40 years prior.[77] Accordingly, the relevant intellectual property licensing arrangement was subject to Rule of Reason scrutiny under the Sherman Act.

## IV. AMERICAN NEEDLE, THE SINGLE-ENTITY DOCTRINE, AND MODERN SPORTS ANTITRUST

The text of Supreme Court's judgment in *American Needle* is clear: sports leagues are not to be treated as single entities—that is, when the constituent teams are making purely commercial licensing decisions operating through a separate, jointly-controlled corporation. Despite the narrow question of law put to it in *American Needle*,[78] the Supreme Court was remarkably vague about when, outside of the specific fact scenario in that case, leagues may in fact still be able to be treated as single entities for section one purposes. This section situates the Single-Entity Doctrine in the context of antitrust law as of 2018. First, it analyses the Supreme Court's reasoning in *American Needle*, attempting to clarify what the Court actually concluded about the doctrine. It then briefly canvasses relevant law in some other jurisdictions for further perspective on the Supreme Court's reasoning, laying the framework for the final section discussing the future of the doctrine.

### *A. Unpacking American Needle*

The issue before the Supreme Court in *American Needle* was, by its own words, narrow: whether the licencing activity "must be viewed as that of a single enterprise for [the] purposes of §1."[79] It is remarkable that in

74. *Id.* at 198-99.

75. *Id.* at 198-99, 201.

76. *Id.* at 202, 204. In particular, see citation to Brown v. Pro Football Inc., 518 U.S. 231, 252 (1996) (Stevens, J., dissenting).

77. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 201 (2010).

78. *Id.* at 189.

79. *Id.*

answering that fact-specific question, the Supreme Court did not at the same time construct a legal test for when sports leagues will be treated as a single entity. In this respect, Nathaniel Grow has described the Court's decision as "unnecessarily and justifiably vague."[80] The discussion below of two key problems with the Court's judgment indicates that *American Needle* did not, in fact, provide the clarity that the Single-Entity doctrine needs moving forwards.

One issue with the Supreme Court's judgment is that it did not clearly discuss, or distinguish, *Dagher*, a 2006 case in which it suggested that the "core activity" of a joint-venture ought to be treated as single-entity conduct. Accordingly, such conduct was effectively immune from section one analysis.[81] In the case of some joint-ventures—Manufacturers A and B joining to develop new Product C—the "core activity" of a joint venture may well be clear, and surely decisions regarding the pricing of Product C ought to be treated as those of a single entity. On the other hand, operating in the modern world, the A/B joint venture is also likely to need to licence, or at least deal with, intellectual property regarding Product C (whatever that product may be). Following that logic, it is at least arguable that the "core activity" of a sports league might encompass the licencing of intellectual property—but the Supreme Court ruled in *American Needle* that this was not the case. Determining the bounds of a "core activity" is consequently a difficult question for a court,[82] not at all assisted by the Supreme Court's lack of guidance in the sports context in *American Needle*.

Another issue with the Supreme Court's judgment in *American Needle* is that although it implores courts to look beyond the form of a joint-venture-type operation and towards its substance,[83] it provides no framework for such analysis. It is clear that competitors cannot simply incorporate a jointly-owned entity to escape scrutiny, but what level of integration short of merger could lead to a "single entity"? In the sports context, Devlin and Jacobs have suggested that the Court's focus on the "economic substance" of the situation could lead to perverse results based on *status quo* market conditions rather than the efficiency of the actual venture's operations.[84] For instance, they consider that the Court would likely view many of the actions of a sports league that had historically been tightly centrally controlled as those of a "single entity"; but would treat the same actions by a league with decentralised power and ownership differently—due to a quirk of history (that then created the dynamics of the 'market') rather than actual

80. Grow, *American Needle*, *supra* note 31, at 486.

81. Texaco Inc. v. Dagher, 547 U.S. 1, 6-7 (2006); *see also* Devlin & Jacobs, *supra* note 11, at 554–56; Grow, *American Needle*, *supra* note 31, at 468-70, 480-83, 486.

82. Devlin & Jacobs, *supra* note 11, at 547, 564.

83. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010).

84. Devlin & Jacobs, *supra* note 11, at 557-62.

efficiency.[85] In the latter example, would the re-centralisation of power at a later date then change the Court's analysis of its actions from concerted to unilateral? It is entirely unclear.

### *B. Squaring the Single-Entity Doctrine with International Antitrust*

The Supreme Court's lack of clarity in *American Needle* is even more striking considering that international jurisdictions have considered similar issues and come to more precise conclusions. For instance, Antipodean cases involving another sports discipline with an oval-shaped ball—rugby—demonstrate a clearer method of analysing a sports league: as a consortium of competitors, to the actions of which Rule of Reason-type analysis can easily and should be applied. Similarly, recent European Union antitrust law demonstrates a move towards assessing sports leagues' conduct under a Rule of Reason-type approach despite the vastly different, vertical structure of European sports leagues.

#### 1. New Zealand

Despite its status as a sports-mad country, there is a death of sports-related competition law jurisprudence in New Zealand.[86] The key cases involve a succession of applications by the New Zealand Rugby Union ("NZRU") to the New Zealand Commerce Commission ("Commission") for authorisations of certain restrictive trade practices common to sports worldwide, including a salary cap and player transfer regulations.[87] The restrictions that were the subject of the authorisations do not strictly touch on matters central to the Single-Entity Doctrine,[88] however they broadly illustrate the Commission's approach to sporting matters.

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85. *Id.*

86. *See* Andrew F. Simpson, *Promoting 'Match Quality' in New Zealand Rugby: Authorisation of Salary Caps and Player Transfer Restrictions under the Commerce Act 1986 (NZ)*, 7 AUSTL. & N.Z. SPORTS L.J. 1, 1 (2012).

87. Under the Commerce Act 1986, the Commission can (on application from the relevant parties) authorise practices that would otherwise breach ss 27 or 30 of that Act. In granting an authorisation, the Commission first establishes whether the relevant arrangement in fact has the purpose, effect or likely effect of substantially lessening competition in a market; and if so, whether there is sufficient net public benefit (including a broader range of considerations than in the strict competition analysis) to grant the authorisation. Commerce Act 1986, s 58-65D (N.Z.). The relevant authorisation determinations are: New Zealand Rugby Football Union Inc. [1996] NZCC 281; New Zealand Rugby Football Union Inc. [2006] NZCC 580; Amendment of an Authorisation Granted to the New Zealand Rugby Union in Decision 580 [2007] NZCC 601; and Revocation of an Authorisation Granted to the New Zealand Rugby Union Incorporated in Decision 580 [2011] NZCC 721. For further detail relating to authorisations, see Simpson, *supra* note 86, at 7-9.

88. Simpson, *supra* note 86, at 3-4.

The NZRU[89] is an incorporated society that governs the game of rugby throughout New Zealand,[90] similar to United States sports leagues such as the NFL and NHL.[91] Its Board of Directors is elected by delegates from the provincial rugby unions. However, although the provincial unions that compete in local competitions, particularly the Air New Zealand Cup, are individually-owned incorporated societies with individual contracts with their players; all professional New Zealand players—in the All Blacks and in the Super Rugby transnational league—are employees of the NZRU directly.[92] Accordingly, the authorisations only concerned matters relating to the provincial game, in particular the imposition of a salary cap and the setting of transfer regulations.

In the *1996 Authorisation*, the Commission clearly described the relevant arrangements as between the provincial unions and the NZRU as a separate entity; and as occurring within a market for the buying and selling of player services, and more importantly, the *rights to* those services. In relation to these service markets, the Commission was also clear that the provincial unions compete with each other in the relevant market, a point which was upheld explicitly on appeal.[93] The Commission affirmed the above in the *2006 Authorisation*, although demurred on the point of whether there was a separate market between unions for the rights to player services.[94] Regardless, in both decisions, the Commission came to the conclusion that the arrangements between the provincial unions—independent entities notwithstanding their joint control of the NZRU—were likely to have the effect of substantially lessening competition in the relevant markets, both on their face as well as by virtue of limiting teams' abilities to freely determine the process by which they set prices (i.e., a *per se* price-fixing violation of the Commerce Act).[95]

Notably, nowhere in the four authorisation determinations or the High Court's upholding of the *1996 Authorisation* on appeal is there any

89. Previously the New Zealand Rugby Football Union.

90. Technically "rugby union," distinguishing the game from another discipline, "rugby league," discussed below in relation to Australia.

91. The following is drawn from New Zealand Rugby Football Union Inc. [1996] NZCC 281, *supra* note 87, at paras 5-12 and New Zealand Rugby Football Union Inc. [2006] NZCC 580, *supra* note 87, at paras 42-58.

92. *See generally* New Zealand Rugby Football Union Inc. [1996] NZCC 281, *supra* note 87, at paras 5-12; *Rugby Union Players' Ass'n Inc v. Commerce Comm'n (No 2)* [1997] 3 NZLR 301 at 303-304 (NZHC). Note that one reason for this arrangement is that contracts of service—employment contracts—are excluded from New Zealand competition law: Commerce Act 1986, s 44 (N.Z.). On the other hand, contracts for service, i.e. independent contracting arrangements, are not so excluded from the Act.

93. New Zealand Rugby Football Union Inc. [1996] NZCC 281, *supra* note 87, at paras 64-78, 151-54, 240; *Rugby Union Players' Ass'n Inc*, 3 NZLR at 305.

94. New Zealand Rugby Football Union Inc. [2006] NZCC 580, *supra* note 87, at para 407-10; Simpson, *supra* note 86, at 13.

95. Grégory Basnier, *Sports and Competition Law: The Case of the Salary Cap in New Zealand Rugby Union*, 14 INT. SPORTS L.J. 155, 158–59 (2014); Simpson, *supra* note 86, at 18.

suggestion that the NZRU and its constituent unions were a 'single entity' for competition law purposes. This is the case even though the authorisation determinations also briefly address the broader national (consumer) market for sports entertainment.[96] Further, the determinations—as required by the 'net benefits' framework for authorisations—do in fact engage in detailed economic analysis of the likely effects of the relevant arrangements.[97] The economic analysis is beyond the scope of this paper, but suffice to say that despite the nebulous nature of some of the benefits claimed, the Commission was able to quantify the actual likely benefits and detriments of the arrangements in dollar terms, undertaking a far more rigorous cost-benefit analysis on the point than United States courts do in applying the Rule of Reason. Hesitations, then, in applying traditional Rule of Reason analysis to sporting matters could well look to the Commission's rugby authorisation decisions for guidance.

2. Australia

Two Australian cases regarding rugby league provide a clearer picture as to how competition law in the South Pacific sees sports leagues. The first, *News Ltd v Australian Rugby Football League Ltd. [No 2]* ("*Superleague*")[98] concerned News Limited's attempt to set up a rival rugby league competition to the Australian Rugby League ("ARL") and its attraction of clubs to its league in breach of those clubs' "Loyalty Agreements" with the ARL. The second, *News Ltd v South Sydney Rugby Football Club Ltd.* ("*South Sydney*")[99] concerned the later merger between the Superleague and the ARL forming the current National Rugby League, in relation to which South Sydney was the only pre-existing team from either league not admitted into the merged NRL.[100]

Pengilley wrote that, "If ever there was doubt that professional sporting clubs were in trade and commerce or were competitive with each other, this doubt has been removed by the Full Federal Court decision in *Superleague*."[101] The ARL was, like American sports leagues, a body established by its constituent clubs for the purpose of running the professional game of rugby league in Australia, with similar profit-sharing

96. Simpson, *supra* note 86, at 12.

97. *Id.* at 20–31. *See also* Pengilley, *supra* note 18, at 651–53.

98. (1996) 64 FCR 410.

99. (2003) 215 CLR 563 (Austl.).

100. Note that both *Superleague* and *South Sydney* concerned the entering into of "exclusionary provisions," a separate offence under what was then the Trade Practices Act 1974 (Austl.), now the *Competition and Consumer Act 2010* (Austl.). For the purposes of this discussion, the framework of that offence is roughly analogous to the general offence of entering into an arrangement that substantially lessens competition in a market.

101. Pengilley, *supra* note 18, at 661.

provisions and league rules as leagues like the NFL and NHL.[102] In *Superleague*, the Court forcefully confirmed that sports leagues such as the ARL are purely commercial enterprises, and that in the context of professional sports, commercial matters involving competition between teams and leagues are not merely incidental to the creation of the product of sport.[103]

In *Superleague*, the Full Federal Court squarely addressed matters at the core of the Single-Entity Doctrine. As in *American Needle*, the Court looked not to the formal structure of the league, but to the content of the obligations the parties owed each other.[104] The Court found that the league and its constituent clubs had divergent and independent commercial interests, and in turn, their relationships were at heart commercial.[105] The Court found that there was competition between teams on commercial matters ("for spectators, sponsors, and television viewers")[106] as well as for players, but also that competition existed in a market between teams and the *league itself*, as clearly evidenced by the strict "Loyalty Agreements" between the teams and the ARL, which were clearly intended to restrict the supply of clubs and players to the nascent *Superleague*.[107]

The High Court of Australia's majority decision in *South Sydney* is less clearly directed towards the Single-Entity Doctrine, focusing more on the nature of "exclusionary provisions" under the Australian competition legislation.[108] However, Ross recently commented that the case raises the conceptual point that, not only is there a field of competition as between teams (and potential/entrant teams) within a league for "team services," but also there is also a broader field of competition as between leagues for "competition organizing services."[109]

The net effect of *Superleague* and, to a lesser extent, *South Sydney*, is that Australian antitrust law came to the same conclusion as *American Needle*, but sixteen years earlier and in a much clearer fashion. Unlike the United States Supreme Court, the Australian courts appear to have had no conceptual difficulty in applying antitrust principles to sports leagues.

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102. Damien Hazard, Note, *The Trade Practices Act, Equity and Professional Sport: News Limited and Ors v Australian Rugby Football League Limited and Ors*, 19 SYDNEY L. REV. 95, 95-96 (1997).

103. Pengilley, *supra* note 18, at 614-16, 628-31.

104. *News Ltd. v. S. Sydney Dis.t Rugby Football Club Ltd.*, (2003) 215 CLR 563, 538-39 (Austl.).

105. Hazard, *supra* note 102, at 98–101; *News Ltd.*, 215 CLR at 539-51.

106. *News Ltd.*, 215 CLR at 565.

107. Hazard, *supra* note 102, at 99, 102–05; *News Ltd.*, 215 CLR at 567-80.

108. *See generally* Chris Davies, *Case Note: News Ltd v South Sydney District Rugby League Football Club Limited: The High Court Decision*, 10 JAMES COOK U.L. REV. 116 (2003).

109. S. F. Ross, *Litigation as a Strategy to Overcome Monopolistic Inefficiency in Sports*, 38 MANAGERIAL & DECISION ECON. 644, 652 (2017).

3. Europe

A full discussion of sports antitrust across Europe is beyond the scope of this paper. However, a brief examination of some key themes reveals key differences between sports league structures and antitrust scrutiny between the European Union and the United States.[110] Unlike in the United States, sports in Europe are generally governed by central bodies ("SGBs") with wide-reaching powers to regulate both the professional and amateur game.[111] Accordingly, Budzinski and Syzmanski argue that unlike the purely horizontal agreements between teams that form the structure of leagues in the United States; European SGBs could be better characterised as vertical arrangements in the form of a pyramid, with athletes at the bottom and supranational associations at the top.[112]

Notwithstanding this, there are no statutory or common-law sporting exemptions from the EU competition laws, and although the special cooperative character of sports is taken into account, recent developments indicate that European authorities are beginning to subject SGBs to stricter competition scrutiny on a horizontal basis.[113] For instance, in *Meca-Medina*, the European Court of Justice (ECJ) overturned ten years of jurisprudence that SGBs' "purely sporting rules" were immune from scrutiny due to their special character.[114] Instead, the ECJ created a Rule of Reason-type proportionality test, under which the impugned rules were held to be legitimate, proportionate, and consistent with EU competition law.[115] More recently, the EC treated the International Skating Union's eligibility rules, although imposed vertically on skaters by an SGB, as a horizontal arrangement that illegally limited competition in speed-skating under the *Meca-Medina* test.[116] Accordingly, the European experience demonstrates that although professional sports markets might have special (non-

110. Although each EU member state has its own domestic competition laws, this section focuses on the EU competition laws under articles 101 and 102 of the TFEU. Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–02, 2008 O.J. (C 115) 47.

111. Budzinski & Szymanski, *supra* note 17, at 410-16.

112. And other parties, including national associations and individual clubs, in between. The arrangements are "vertical" in the sense that they cover multiple levels of the nominal "supply chain" for the relevant sport product. *Id.* at 411, 416, 422-28.

113. *See generally* Farzin, *supra* note 22; Geoff Pearson, *Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football 'Transfer System'*, 21 EUR. L.J. 220 (2015); Erika Szyszczak, *Competition and Sport: No Longer So Special?*, 9 J. EUR. COMPETITION L. & PRAC. 188 (2018).

114. Case C–519/04, *Meca-Medina v. Commission*, 2006 E.C.R. I–6991. *See also* Pablo Ibáñez Colomo, *The Application of EC Treaty Rules to Sport: The Approach of the European Court of First Instance in the Meca Medina and Piau Cases*, 3 ENT. & SPORTS L. J. 1, 1-3 (2005); Farzin, *supra* note 22, at 94-97; OECD, *supra* note 11, at 199-200; Szyszczak, *supra* note 113, at 191-92.

115. Anti-doping rules for swimming, adopted by the International Olympic Committee and implemented in the specific case by the Fédération Internationale de Natation Amateur.

116. That is, a cartel-type arrangement in breach of art 101 of the TEFU: European Commission, *International Skating Union's Eligibility Rules*, Case No. AT.40208 (Dec. 8, 2017). *See also* Szyszczak, *supra* note 113, at 189-91.

economic) characteristics, applying a Rule of Reason test to professional sports as an interconnected web of horizontal undertakings between parties is not only feasible, but actually enables antitrust law to take those characteristics into account in its scrutiny of conduct.

## V. LOOKING TO NEXT SEASON: THE FUTURE OF THE SINGLE-ENTITY DOCTRINE

What, then, is the future of the Single-Entity Doctrine as applied to sports leagues under United States antitrust law? In the wake of *American Needle*, the doctrine is in a state of flux. It is not yet confined to the dustbin of sports antitrust history; but at the same time, it is entirely unclear whether it could ever again be invoked by a sports league. This section canvasses several proposed alternatives to the Single-Entity Doctrine—both before and after *American Needle*—before concluding that the most principled approach is to leave the Single-Entity Doctrine behind and, rather than attempting to construct a sports-specific rule, simply apply well-tested Rule of Reason analysis to leagues' future decision-making.

As discussed above, while the scope of the Single-Entity Doctrine appears to have been curtailed, in the absence of the Supreme Court setting out a specific rule on the matter, *American Needle* does not preclude the possibility that a sports league other than the NFL could attempt to avail itself of the doctrine as a defence to a section one claim in future. A key way in which they could do this is by emphasising the structural differences between their leagues and the NFL.[117] Some sports have followed the European model and delegated total authority to a separate, independent commission, a model which could be sufficiently distinct from the NFL's as to perhaps still be a "single entity." For example, NASCAR was formed in the 1940s as "a central racing organization whose authority outranked all drivers, car owners, and track owners."[118] Traditional leagues such as the NBA and NHL could pursue a full delegation of this type to avoid section one scrutiny. On the other hand, Ross suggests that for traditional American leagues, delegating sufficient authority would then remove policy control over the sport from clubs, flying in the face of historical league structures and incentives, and removing what financial incentive there might be to collude, and thus seek the protection of the Single-Entity Doctrine, in the first place.[119]

In any event, such delegation might not even be commercially possible. For instance, Major League Soccer (MLS) was "designed to conform to the single entity exception" in the 1990s, by virtue of the league owning all

117. Grow, *American Needle*, *supra* note 31, at 495-98.

118. Ross, *The Single-Entity Doctrine*, *supra* note 7, at 234 (citing ROBERT G. HAGSTROM, THE NASCAR WAY: THE BUSINESS THAT DRIVES THE SPORT 28 (2001).

119. Ross, *The Single-Entity Doctrine*, *supra* note 7, at 235.

teams, all IP and sponsorship rights, employing all players, and selling all tickets and all broadcast rights.[120] However, commercial imperatives, particularly the need for independent investment in clubs, later led the MLS to grant franchises more autonomy and individual profit incentives. In turn, this devolving of autonomy "backfired" on the MLS in *Fraser v. MLS*, in which the First Circuit held that franchises were potential competitors and the MLS was, therefore, not a single entity under the rule in *Copperweld*.[121] Accordingly, it may not be possible to structure a team-based sports league in the modern economy of professional sports so as to fit within what remains of the Single-Entity Doctrine.

Subsequent to *American Needle*, Nathaniel Grow has proposed an alternative to the Single-Entity Doctrine based on the nature of control and the relevant spheres of competition between the parties to a joint venture-type operation.[122] Grow suggested that the Supreme Court's underlying focus in *American Needle* was to prevent competitors from shielding themselves from section one liability by coordinating behind the artifice of a nominally independent entity.[123] Consequently, he suggests that a joint venture-type operation ought to be viewed as a single entity *unless* it is "directly controlled by, or itself directly controls, any actual or potential competitors" in the relevant market.[124] To protect itself, a "joint venture would gain single entity status when its owners effectively merged their relevant operations in the venture, thus eliminating any actual or potential competition between themselves in that operational sphere."[125]

With respect, Grow's "solution" is not so much a fix for a problem as it is simply changing the character of the problem.[126] First, an agreement between two competitors to join operations through a new entity, and entirely cease actual or potential competition in a market, is really better characterised as a *merger*: an entirely different area of antitrust analysis and one that the parties are explicitly trying to avoid by using a joint-venture structure.[127] Second, even if not structurally a merger, if this is the standard Grow sets for the forming of a "single entity," then by definition the agreement that forms this entity—that "eliminate[es] any actual or potential

120. Farzin, *supra* note 22, at 88-89; Bryan A. Green, *Can Major League Soccer Survive Another Antitrust Challenge? Emerging Threats to its Single Entity Treatment*, 4 INT'L SPORTS L. REV. 79, 80-82 (2009).

121. Fraser v. Major League Soccer, 284 F.3d. 47, 57–58 (1st Cir. 2002); Grow, *American Needle*, *supra* note 31, at 496-97.

122. Grow, *American Needle*, *supra* note 31, at 484–86.

123. *Id.* at 484.

124. *Id.*

125. *Id.* at 485.

126. The analysis in this paragraph is inspired by the critical approach taken to the formation and structure of joint ventures in Stephen F. Ross, *The Supreme Court's Renewed Focus on Inefficiently Structured Joint Ventures*, 14 U. PA. J. BUS. L. 261 (2011).

127. A merger that is likely to substantially lessen competition, no less, in breach of the Clayton Act. Clayton Act, 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53 (1914); *see* 15 U.S.C. § 18.

competition" between the parties—is in itself an anticompetitive agreement that ought to be scrutinised at the point the joint venture is formed.[128] "Justice Stevens, [in *American Needle*] even noted that the central evil addressed by [section one] is the elimination of competition that would otherwise exist."[129] Grow argues that had the NFL teams ceded all ownership and control over their trademarks to an independent NFLP, his test "would result in a single entity finding," because NFLP would have neither been controlled by, nor controlled, actual or potential competitors in the licensing market.[130] But in this hypothetical, the teams would only not be actual or potential competitors *due to the agreement to form NFLP*, which in turn becomes an agreement attracting antitrust scrutiny. The problem is not solved—just recharacterized.

On the other hand, there does not appear to be any compelling reason why Rule of Reason analysis could not simply be applied to all arrangements entered into by sports leagues. In fact, courts have indeed subjected sports to the Rule of Reason on plenty of occasions, and the Court in *American Needle* indicated that many agreements between the NFL's teams are "likely to survive the Rule of Reason."[131] Becoming mired in assessing the structure or internal incentives of a venture in order to determine what level of scrutiny to apply risks reducing antitrust to the "formalistic" analysis the Supreme Court in *Copperweld* was trying to avoid. Judge Cudahy's concurring opinion in *Bulls II* made this clear in stating that "determining whether the potential for inefficient decision making survives within a joint venture because of the independent economic interests of the partners is extraordinarily complex and confusing . . . the inquiry into whether separate economic interests are maintained by the participants in a joint enterprise is likely to be no easier than a full Rule of Reason analysis."[132]

Of course, sports leagues have special characteristics, but so too do many other markets assessed under the Rule of Reason. The character of sport and the need for cooperation does not preclude the application of Rule of Reason analysis.[133] In fact, in *NCAA v. Oklahoma*, the Supreme Court expressly stated that some core sport-related horizontal restraints, including the rules of the game, rules regarding player eligibility, or the sharing of responsibilities within a league, "widen consumer choice . . . and hence can be viewed as procompetitive" within the Rule of Reason.[134] Leagues have attempted to craft themselves an exemption from the application of the Rule

128. Grow, *American Needle*, *supra* note 31, at 485.

129. Ross, *The Supreme Court's Renewed Focus*, *supra* note 124, at 279. *See also* Am. Needle v. Nat'l Football League, 560 U.S. 183, 195 (2010) (quoting 7 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 1462b, p. 193-94 (2nd ed. 2003).

130. Grow, *American Needle*, *supra* note 31, at 486.

131. *Am. Needle*, 560 U.S. at 203.

132. Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n., 95 F.3d 593, 605 (7th Cir. 1996).

133. Ross, *The Single-Entity Doctrine*, *supra* note 7, at 229-30.

134. 468 U.S. 85, 101–02, 117 (1984).

of Reason relying on this special character; whereas on a proper examination, the arrangements that are necessary to ensure this special character would not fall victim to the Rule of Reason in the first place, as they do not negatively affect competition in the antitrust sense.[135]

Any hesitations in applying the Rule of Reason to American sports leagues, stemming from a fear that the core workings of those leagues will be stymied by continuous frivolous antitrust challenges, are also misguided. Under the Supreme Court's heightened "plausibility" standard for antitrust pleadings, developed in *Bell v. Twombly*, plaintiffs must adduce actual plausible evidence of a demonstrable anticompetitive effect in a market;[136] and as evidenced by *Salvino*, the evidence required to prove market power—the first step in the Rule of Reason—is incredibly high.[137] In fact, *Salvino*, an antitrust challenge to the MLB's collective trademark licensing system, proved that leagues can successfully dismiss antitrust challenges in markets in which teams actually do compete in the economic sense, on the basis of compelling evidence of procompetitive cooperation rather than by trying to deviously evade scrutiny through structural means.[138]

## VI. CONCLUSION

Although collaboration and cooperation are essential to the modern business of professional sports, leagues in the United States have needlessly obfuscated sports antitrust over at least the past forty years by continually attempting to use this fact to immunize themselves from section one scrutiny. The Supreme Court fumbled a priceless opportunity to clarify this concept in *American Needle*, setting out a narrow ruling that creates more confusion than it settles, leaving the future of the Single-Entity Doctrine in flux. Traditional antitrust principles clearly show that sports leagues such as the NFL and NHL are not "single entities" to which only section two can be applied; instead they are a series of horizontal arrangements between competitors to which Rule of Reason analysis can, and should, be applied. Such analysis will allow the spirit of professional sports to endure, while ensuring that leagues cannot harm consumer welfare through anticompetitive behaviour.

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135. And of course, they are generally pro-competitive in the sporting sense. *See* Feldman, *supra* note 7, at 911.

136. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007). Also, see discussion in Feldman, *supra* note 7, at 902–04.

137. Major League Baseball Props. v. Salvino, 542 F.3d. 290, 316 (2nd Cir. 2008).

138. Feldman, *supra* note 7, at 909-15.