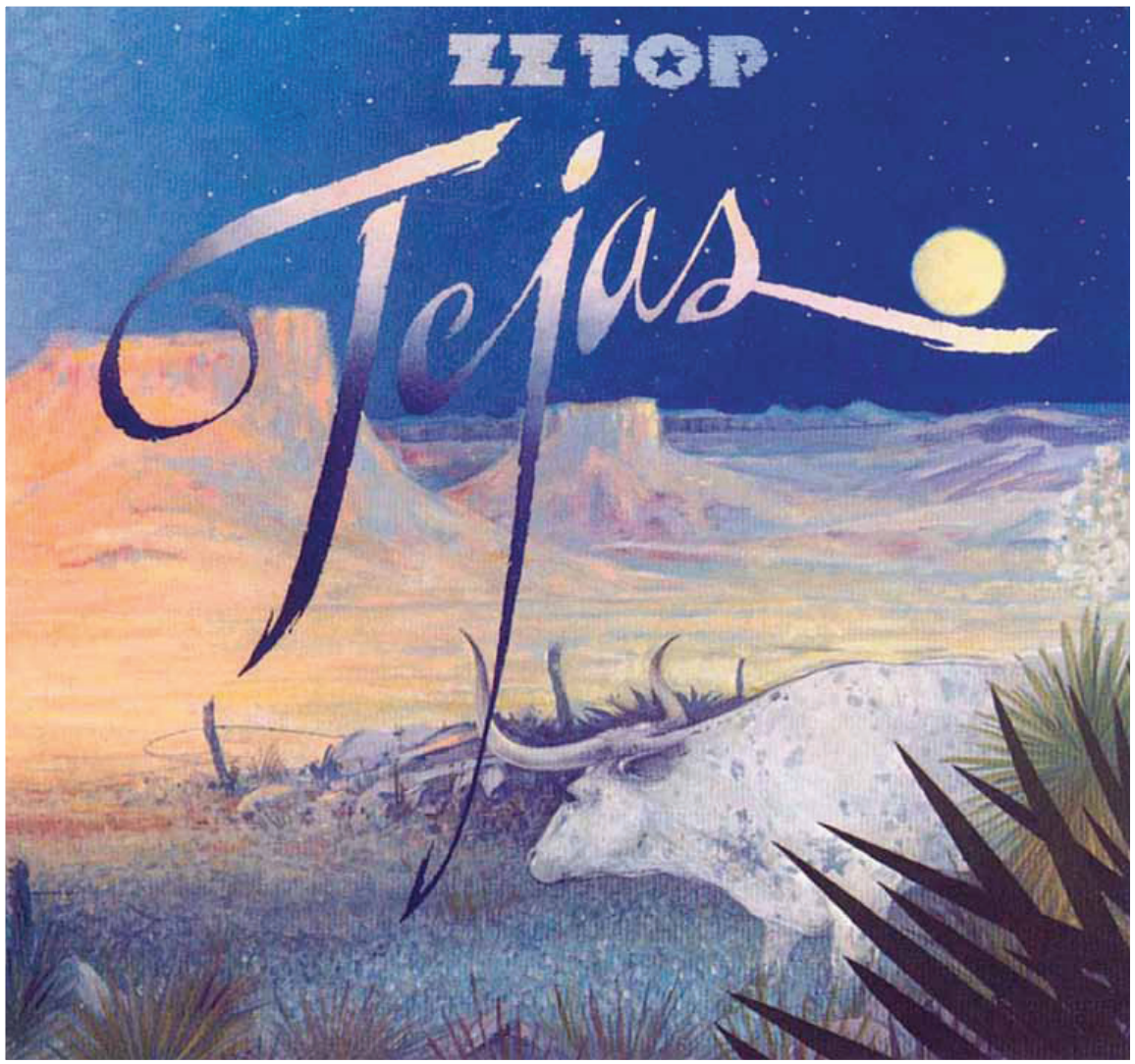
# Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Vol. 19 No. 2, Fall/Winter, 2010

## 20th Annual Entertainment Law Institute

**LIVE** **Austin** **October 7-8, 2010** **Radisson Hotel & Suites**




ZZ TOP's Tejas album art, created by Bill Natum.
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**IN THIS ISSUE:**

## CHAIR'S REPORT

Thank you for being a member of the State Bar of Texas Entertainment & Sports Law Section, also known as TESLAW! The 2010/2011 State Bar year is in full swing and the new TESLAW leadership plans to build on the successes of the past and work hard to increase the benefits you receive in exchange for your membership dues. As a member of TESLAW, you are currently entitled to: 1) receive the acclaimed Texas Entertainment and Sports Law Journal; 2) join the TESLAW list-serve; 3) earn free CLE credits; 4) receive a discount on the cost of the annual Entertainment Law Institute; and 5) become part of the growing Texas-based entertainment and sports lawyer community. In the year ahead, the TESLAW leadership will strive to make the www.teslaw.org website the first place for TESLAW members and out of state attorneys to visit to retrieve Texas, national, and international entertainment and sports lawyer resources. Also, the official TESLAW MySpace is the social e-hangout arm of the section for Texas entertainment and sports lawyers (http://www.myspace.com/teslaw). Additionally, the TESLAW list-serve acts as the primary source of communication among the TESLAW members and between the members and the TESLAW leadership (eandslawsection@yahoogroups.com).

This past summer TESLAW held its Annual Meeting and CLE during the State Bar Convention in Fort Worth on June 11, 2010. The Section elected new officers to serve during the 2010/2011 fiscal year. The current Council members and officers are identified on the front cover of this journal. Our CLE program featured three top nationally known attorneys, who presented interesting and informative sessions covering music and sports. Carlos Linares, Sr. VP, RIAA, Washington, DC, discussed "Protection of Music in Today's Viral Market Place; Joel Schoenfeld, Chief Legal Officer and General Counsel for eMusic.com, Inc. and for Dimensional Associates, the private equity fund that owns eMusic and other digital entertainment companies spoke on "U.S. and International Music Publishing Licensing Issues for Internet and Mobile Business Models; and Alec Scheiner, Sr. VP and General Counsel for the Dallas Cowboys Football Club and its affiliated entities (including merchandising, AFL, real estate, oil & gas and other holdings of the Jones family) addressed "Legal Issues Involved in the Day-to-Day Operation of One of the World's Most Famous Sports Teams." Looking ahead, the 20th Annual Entertainment Law Institute (ELI) will be held on October 7-8, 2010, at the Radisson Town Lake in Austin. ELI is the premier event for Texas entertainment lawyers. More detailed information about the program is found in the journal, but we want to specifically recognize this year's Texas Star Award recipient, Mike Tolleson, who will be speaking at the event. The award is given annual to one attorney, who over the course of his or her career, has made a major or noteworthy contribution to the practice of entertainment law. This year ELI offers 14 hours of CLE, including 2 hours of ethics. It is also provides a great networking opportunity and a chance to get your practice questions answered.

The demand for the "Rock Star Attorney" t-shirts continues. For any, repeat any, Texas entertainment lawyer the t-shirt is a "must have" and has been selling well to non-entertainment attorneys, who just want to be "cool." We have upgraded the fabric and will have them available at the ELI.

Finally, your officers and council have been working diligently to organize a TESLAW networking event to be held during SXSW to raise the visibility of Texas entertainment lawyers within our state, as well as nationally and internationally. You can anticipate receiving more information on this in the future.

## *Check out the Section's Website!*

Check it out at www.teslaw.org. The password for members is "*galeria3"*. Should you have any comments or suggestions to improve the site please feel free to e-mail Kenneth W. Pajak at ken@bannerot.com or the editor at srjaimelaw@clear.net …

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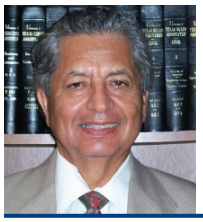

# FOR THE LEGAL RECORD ...

Sylvester R. Jaime, Editor

## The SECTION'S WEBSITE is www.teslaw.org

### *ELECTRONIC JOURNAL?*

The Section has gone to an e-journal. Those who would like a copy of the Journal are requested to go to the Section's website and download the Journal for reading at you leisure or to copy an issue of the Journal. Any comments should be directed to your editor and they will be passed on to the Council.

## HELD TO THE RULES

### *STORIED PROGRAM GETS SANCTIONS –*

Southern California got a 2-year bowl ban, 4 years probation, loss of scholarships and forfeits of an entire year's games! The penalties resulted from the NCAA ruling of "lack of institutional control" following a 4 year investigation of improper benefits to Heisman Trophy winner Reggie Bush, and basketball player O.J. Mayo, who played only 1 year in the Trojan's basketball program. "I'm absolutely shocked and disappointed in the findings of the NCAA." said former USC coach Pete Carroll. Carroll, now head coach for the Seattle Seahawks, went on to say, "I never thought it would come to this." USC will lose 30 football scholarships over 3 years and vacate 14 wins in which Bush played. USC banned itself from playing in any post-season tournaments and vacated wins in which Mayo played but did not receive any additional NCAA sanctions. Former USC coach Tim Floyd, current head basketball coach at the University of Texas El-Paso, was accused of giving cash to a middleman who helped USC get Mayo. Bush also returned his Heisman trophy to the Heisman Trust, which indicated, after considering giving it to former University of Texas star Vince Young, that it would vacate the award to Bush and treat the situation as though the trophy had never been awarded.

### *HIGH SCHOOL TO COLLEGE TRANSITION*

Providence College athletic director Bob Driscoll said "It's my feeling that [Joseph Young] needs to fulfill his commitment …" The former Parade All-America and Gatorade Texas Boys Basketball Player of the year for 2009-10 from Houston's Yates High School, signed a letter of intent to attend Providence, and then asked for a release. The college denied the request and when the National Letter of Intent Policy and Review Committed denied his appeal, Young, son of former University of Houston player Michael Young, was left with the choice to either attend Providence or sit out a year before he could attend another Division 1 basketball program. Young said "I'm all right, God won't push me in the wrong way. This will only make me stronger." Following the denial of his appeal, Young elected to attend the University of Houston but per NCAA rules will have to sit out a year before being eligible to play for the Cougars.

### *WORLD CUP MUTINY*

The French soccer federation suspended 4 players following a boycott by France's World Cup team of a training session in South Africa. Nicolas Anelka was expelled from the team during Frances' 2-0 loss to Mexico after he insulted coach Raymond Domenech. 23 players boycotted a team training session after the expulsion leading to the suspension of 4 players by the French Football Federation, including former captain Patrice Evra, Franck Ribery, and Jeremy Toulalan, and Nicolas Anelka. French President Nicolas Sarkozy, following what was called an "embarrassing first-round exit" after the loss to Mexico, criticized the mutiny.

### *NO 1ST AMENDMENT RIGHTS*

The National Basketball Association fined Rudy Fernandez of the Portland Trail Blazers $25,000 after he publicly asked for a trade. NBA rules prohibit players from "public statements that are 'detrimental' to the league." Fernandez' agent made known publicly the player's preference not to report to the Blazers in an effort to allow him to play in Europe, leading to the fine by the NBA.

### *APPEAL DENIED*

National Football League commissioner Roger Goodell did not reduce Houston Texans linebacker Brian Cushing. The league commissioner upheld Cushing's 4 game suspension stemming from a positive drug test for hCG. The substance is on the league's banned substance list because it can be used as a masking agent for steroids. "It was never like we expected anything different." Texas coach Gary Kubiak said. "We understand the ruling and what we're dealing with. I think it was more of an educational process on the part of [owner] Bob McNair doing everything he could to educate us on Brian's situation and try to make sure it never happens again. When you've got a great player like that, you can't lose him." McNair requested Goodell to review additional medical information the team presented on behalf of Cushing. Following a review by medical experts not associated with the NFL, the commissioner determined that there was no basis for changing the decision to suspend Cushing for the first 4 games of the regular season.

Your comments or suggestions may be submitted on the Section's website or to your editor at srjaimelaw@clear.net

# TOO MUCH COMPETITION:

## THE SUPREME COURT SACKS THE NFL'S SINGLE-ENTITY DEFENSE 9-0 IN *AMERICAN NEEDLE, INC. V. NATIONAL FOOTBALL LEAGUE*

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## INTRODUCTION

A couple months removed from the New Orleans Saints first Super Bowl Championship on February 7, 2010, the National Football League ("NFL") once again found itself in the headlines. Only this time, the headlines did not represent what the NFL was doing on the field, but rather, the NFL's off-the-field conduct was at issue. While many people standing on the sidelines may view the NFL as a single entity,[1] the way the NFL and its thirty-two teams have recently been viewed legally is quite different.[2] The legal view of the NFL is much more than kickoffs, sacks, and touchdowns. The legal view consists of contracts, conspiracy, and trade restraints.[3]

In *American Needle, Inc. v. National Football League*, the Supreme Court was forced to view the NFL in a legal sense when deciding the NFL's recent off-the-field issue involving an antitrust dispute.[4] The dispute arose when American Needle, a manufacturer and seller of trademarked apparel, accused the NFL of conspiring under Section One of the Sherman Act.[5] Because of these accusations, the Supreme Court was left to resolve the issue of whether or not the NFL was even capable of conspiring under Section One of the Sherman Act.[6] In order for the Supreme Court to hold that the NFL was even capable of violating Section One of the Sherman Act, the NFL had to be viewed as thirty-two separate entities rather than a "single entity."[7] In order to hold the NFL as a single entity, the Court had to decide there was "economic unity" amongst the thirty-two teams.[8] In order to hold that the NFL was thirty-two separate entities, the Court had to decide if the NFL's conduct was a concerted action that unreasonably put a restraint on trade.[9]

This Note argues that courts must look past the competition that the NFL teams demonstrate on the playing field when determining single-entity status. Part I introduces the NFL and the antitrust issues facing it. Part II examines Section One of the Sherman Act and the "rule of reason" analysis developed by the Supreme Court. Further, Part III discusses relevant case law used by the Supreme Court in its opinion. Part IV discusses the "nonstatutory labor exemption" afforded to the NFL in disputes involving labor. Part V reviews various circuit court decisions involving sports leagues and antitrust law, while Part VI details the district and circuit court opinions. Finally, Part VII focuses on the Supreme Court reasoning in *American Needle*, specifically addressing the "competition" and "unity" between the NFL teams. The Note concludes in Part VIII by stating that the Supreme Court focused too much of its inquiry on the competition between the NFL teams. A closer look at how the NFL teams depend on each other for financial success would have yielded a different result.

## I. THE NFL

As an unincorporated and non-profit association, the NFL was established in 1920.[10] Over the past ninety years, the NFL has grown into thirty-two separately owned franchises that all share the common NFL logo.[11] While the teams may share this common logo, each team differentiates from one another by having its own "names, colors, and marks."[12] Because of these distinct characteristics, for the first forty-three years of the NFL's existence, each team was responsible for licensing its own intellectual property.[13] Because the teams were situated in various cities across the United States, the NFL sought to further enhance its intellectual property licensing opportunities by creating the National Football League Properties ("NFLP") in 1963.[14] The NFLP was formed to "develop, license, and market" the intellectual property for each of the NFL's thirty-two teams.[15]

From 1963 to 2000, American Needle was one of many manufacturers granted a license by the NFLP to produce and distribute NFL-team apparel such as hats and jerseys.[16] However, the NFLP deviated from its intellectual-property license practices in 2000.[17] In December 2000, the NFLP and Reebok International ("Reebok") came to a ten-year agreement in which Reebok would be the sole manufacturer and seller of NFL-trademarked headgear for each of the thirty-two NFL teams.[18] Because of the NFLP's new agreement with Reebok, it failed to renew its licensing agreement with American Needle.[19] The failure to renew the agreement prompted American Needle's lawsuit against the NFL in 2007 in the Northern District of Illinois.[20] In that lawsuit, American Needle alleged that the NFLP's agreement with Reebok for exclusive licenses was in violation of both Section One and Section Two of the Sherman Act.[21]

The NFL's response to American Needle's lawsuit focused on the Supreme Court's decision in *Copperweld Corporation v. Independence Tube Company*.[22] The NFL's stance has always been that it and its thirty-two teams act as a single entity when marketing and licensing intellectual property.[23] The district court agreed with the NFL's reasoning and granted summary judgment for the NFL.[24] Following the district court's ruling, American Needle quickly appealed the decision to the United States Court of Appeals for the Seventh Circuit and ultimately to the United States Supreme Court.[25]

## II. APPLICABLE LAW

### *A. The Sherman Act*

The Sherman Act, originally passed in 1890, states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[26] The underlying theory of the Sherman Act centers on the notion that the best price levels among business entities come through free competition.[27] A mere violation of the Sherman Act is just a start of the court's inquiry. Since the Sherman Act's origination, the Supreme Court has added another step to its analysis of antitrust cases by developing its own "rule of reason."[28]

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### *B. The "Rule of Reason"*

The Supreme Court first introduced the "rule of reason" analysis in 1918 in *Board of Trade of Chicago v. United States*.[29] In that case, the Board of Trade of the City of Chicago was accused of restraining trade by adopting a "call" rule that prohibited the purchasing or offering of grain between closing and opening periods.[30] Given the unique situation of Chicago's grain market at the time, the Court determined that "consider[ing] the facts peculiar to the business to which the restraint is applied" is an important determination that must be made.[31] When making this determination, the Court determined that several factors should be considered: the before and after condition once the restraint is implemented, the type of restraint imposed, and the effect the restraint has on the market.[32] The Court reasoned that these factors would help in deciding the true intent of the party engaging in restraining conduct.[33] Based on this analysis, the Court concluded that the proper test in determining whether a violation occurs under the Sherman Act is "whether the restraint imposed is such as merely regulates . . . competition or whether it is such as may suppress or even destroy competition."[34]

Along with the "rule of reason" analysis, the Supreme Court has included two elements that the plaintiff must prove in order to show that Section One of the Sherman Act has been violated.[35] These two elements, discussed in *Texaco, Inc. v. Dagher*, include the existence of a Section One violation and a demonstration by the plaintiff that the defendant's conduct was "unreasonable and anticompetitive."[36] The plaintiff can satisfy this burden by showing that actual anticompetitive effects exist.[37] If the plaintiff is successful in satisfying these elements, the defendant has a chance to show "procompetitive justifications for the restraint."[38] To rebut the defendant's argument, the plaintiff must show that the "restraint is not reasonably necessary to achieve the stated objective."[39] Once the defendant has had the opportunity to show the "procompetitive justifications," the Court implements a balancing approach to decide whether or not the "anticompetitive effects" outweigh the "procompetitive justifications."[40]

### *C. The "Rule of Reason" Analysis: "Per Se" and "Quick Look"*

The Supreme Court's "rule of reason" analysis is subject to two exceptions: the "per se rule" and the "quick-look rule."[41] The per se rule only applies to contracts that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[42] While the per se rule is popular amongst plaintiffs, the rule only applies in limited circumstances such as contracts entered into that fix prices[43] because of their "pernicious effect on competition."[44] Furthermore, courts are hesitant "to adopt per se rules . . . where the economic impact of certain practices is not immediately obvious."[45]

On the other hand, the quick-look rule is necessary in cases where a "more careful" look is appropriate.[46] The quick-look rule is an "intermediate standard" that applies in cases where the per se rule would be unjust.[47] The quick-look rule is used when someone with a basic knowledge of economics can make the determination that the anticompetitive arrangements will have a negative effect on consumers and markets.[48] Unlike the per se rule, competitive harm is presumed under the quick-look rule.[49] Therefore, it is up to the defendant to provide "some competitive justification" for the restraining activity.[50] The court must apply more than a quick look when the anticompetitive arrangement in question could possibly have a "procompetitive effect" or "no effect at all" on the market.[51]

When deciding which analysis to adopt, the Supreme Court has not offered a "bright-line" rule.[52] Because there is no bright-line rule, courts are left with adhering to the "sliding scale of reasonableness."[53] Therefore, the court is to apply a reasonableness standard on a case-by-case basis.[54] Nevertheless, no matter which standard the court adopts, the goal of the analysis is to determine what effect the defendant's actions have on the competition.[55]

## III. APPLICABLE CASE LAW

### *A. The Copperweld Analysis*

As briefly mentioned earlier, the major issue facing the Supreme Court in *American Needle* centered on the Court's holding in *Copperweld*.[56] In that case, the Supreme Court decided the issue of whether a parent and a wholly owned subsidiary company were capable of conspiring and violating Section One of the Sherman Act.[57] The Court held that a parent and wholly owned subsidiary company share a "complete unity of interest."[58] The Court discussed that the parent and subsidiary companies should be viewed as a single entity because they all have common objectives.[59] When achieving these common objectives, the Court pointed out that a subsidiary company acts in the best interest of the parent company and vice versa.[60] Because of this relationship, the Court stated that when the parent and subsidiary come to agreements concerning a specific course of action, then there has been no conspiring of "economic resources" that weren't already working together.[61] Thus, the Court concluded when the parent and subsidiary company act in this fashion there is no violation of Section One of the Sherman Act.[62]

### *B. The Application of Copperweld*

An illustration of the *Copperweld* analysis is seen in *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*[63] In *City of Mt. Pleasant*, the Eighth Circuit discussed the idea of whether a group of three related corporations, which made up a rural electric cooperative, violated Section One of the Sherman Act.[64] In that case, each electric company was a wholly owned and operated subsidiary of the parent electric cooperative.[65] Despite the fact that each subsidiary set its own rates and separately managed its cash flow, the court held that the electric cooperative was in fact a single entity.[66] The court attributed its decision to the "goals and interests" of the single entity rather than the ownership structure.[67]

Another illustration of the *Copperweld* analysis is seen in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*[68] In that case, the Supreme Court was faced with a similar scenario as seen in *City of Mt. Pleasant*. Three agricultural cooperatives owned by the same group of farmers were accused of violating Section One of the Sherman Act.[69] The Court held that the three cooperatives constituted one organization even though the structures of the cooperatives were divided entities.[70] The Court's holding gives support to the notion that "substance, not form should determine whether a separately incorporated entity is capable of conspiring under [Section One of the Sherman Act]."[71]

## IV. THE "NONSTATUTORY LABOR EXEMPTION"

The Supreme Court has never definitively decided the question as to whether professional sports leagues are categorized as single entities for antitrust purposes. Nevertheless, in *Brown v. Pro Football, Inc.,* the Supreme Court flirted with the possibility that professional sports leagues should be classified as single entities.[72] In that case, the Court addressed the single-entity issue when a NFL

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player challenged the NFL bargaining policies concerning a labor dispute.[73] The twenty-eight teams that comprised the NFL at the time and the National Football League Players Association ("NFLPA") proposed an arrangement where "practice squad" players would be paid $1,000 a week for their efforts.[74] The Court properly held that federal labor law, not antitrust law, controls situations such as collective bargaining.[75]

Additionally, the Court in *Brown* explained that the NFL and other entities were subject to immunity from antitrust liability based upon a "nonstatutory labor exemption."[76] The exemption was described to favor "free and private collective bargaining."[77] The Court recognized the fact that being safeguarded from antitrust sanctions is the only way to "allow meaningful collective bargaining to take place."[78] Nevertheless, the Court explained that the exemption requires that bargaining for such things as wages, hours, and working conditions must be done in good faith.[79]

In addition to the "nonstatutory labor exemption," the *Brown* Court briefly touched on the single-entity issue concerning antitrust law. When reviewing the issue, the Court stated that teams in a professional sports league "are not completely independent economic competitors" and that they "depend on upon a degree of cooperation for economic survival."[80] Likewise, in other decisions, the Supreme Court has argued that sports teams alone could not survive on their own without the league and that NFL teams "rarely compete in the market place."[81]

## V. ANTITRUST LAW: A REVIEW OF CIRCUIT COURT DECISIONS

### *A. The Seventh Circuit*

While the Supreme Court has never decided the single-entity antitrust issue concerning professional sports leagues, some circuit courts have addressed it.[82] For example, in the Seventh Circuit, the court was faced with the issue of whether or not an agreement with the National Basketball Association ("NBA") and a national broadcasting network constituted impermissible trade.[83] The court made the important point that antitrust law "encourages[ ] cooperation inside a business organization . . . to facilitate competition between that organization and other producers."[84] Highlighting cooperation by the teams, the court suggested that the NBA, when acting in the broadcast market, was more properly categorized as a single entity rather than a group of separate entities.[85] Nevertheless, the final decision as to whether the NBA should be classified as a single entity was never actually determined.[86] The case settled before a decision on remand was ever made.[87]

### *B. The Second Circuit*

In the Second Circuit, the court offered a strong argument against the NFL's single-entity status.[88] In that case, the North American Soccer League ("NASL") accused the NFL of violating Section One of the Sherman Act.[89] The NFL was prohibiting owners of NASL teams from "cross-ownership" of NFL teams.[90] The court firmly stated that "each member [NFL team] is a separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other members."[91] Thus, the court concluded that the "NFL teams are separate economic entities engaged in a joint venture."[92] Ultimately, the court pointed out that holding the NFL as a single entity would wrongly guard it against violations of Section One of the Sherman Act:

To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.[93]

### *C. The First Circuit*

Nevertheless, in the First Circuit, the court in *Sullivan v. National Football League* was forced to decide a nonlabor-NFL policy.[94] In that case, the owner of the New England Patriots, one of the NFL's thirty-two teams, attempted to sell shares of the team publicly.[95] However, the owner was denied the opportunity to do so because the NFL's constitution and policy disallowed such a sale.[96] Thus, the owner sued, alleging a violation of Section One of the Sherman Act.[97] The NFL argued that there was a "well established" rule that "a professional sports league's restrictions on who may join the league or acquire an interest in a member club do not give rise to a claim under antitrust laws."[98] The court rejected the NFL's single-entity argument, as well as the Supreme Court's reasoning in *Copperweld.*[99] The court held that the teams compete with each other "for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia."[100] Therefore, the court held that the NFL should not be treated as a single entity.[101]

## VI. THE LOWER COURT DECISIONS

### *A. The District Court Decision*

As discussed previously, the dispute between American Needle and the NFL originated in the United States District Court in the Northern District of Illinois.[102] American Needle, the petitioner, brought suit because of the NFL's failure to renew its licensing agreement for NFL apparel with American Needle.[103] American Needle also argued that the NFL failed to extend licenses to any other manufacturer when it came to an exclusive agreement with Reebok.[104] American Needle contended that, once the agreement with Reebok was in place, the NFL was engaging in illegal conspiracy in restraint of trade in violation of Section One of the Sherman Act.[105]

The issue facing the court was whether or not each of the thirty-two NFL teams can legally come to an agreement of assigning one manufacturer to produce its intellectual property.[106] The district court promptly disagreed with American Needle's argument stating, that "[t]he owner or licensor of intellectual property can grant a license to one or many."[107] The court noted that the decision was contingent on whether or not the NFL is in fact a single entity.[108] From there, the court cited to *Dagher* by stating that the NFL's operations are "so integrated . . . that they should be deemed to be a single entity rather than [a] joint venture[ ] cooperating for a common purpose."[109]

The court relied on Seventh Circuit precedent in *Chicago Professional Sports Limited Partnership v. National Basketball Association* ("*Bulls II*") to bolster its holding.[110] The district court compared *Bulls II*, which dealt with the NBA's broadcast agreement, to American Needle's argument.[111] The court affirmatively stated that *Bulls II* is "no different in principle from the question how the clubs divide revenue from merchandise bearing their logos and trademarks."[112] The court noted that the NFL's decision to come to the agreement with Reebok was actually a good business decision that did not stray from recent business decisions made by the league.[113] In granting summary judgment in the NFL's favor, the district court concluded that "[t]he economic reality is that the separate ownerships had no economic significance in and of itself, and American Needle

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does not suggest that it ever dealt with any of the teams as independent organizations."[114]

### *B. The Circuit Court Decision*

After its failure to succeed in the district court, American Needle promptly appealed its case to the United States Court of Appeals for the Seventh Circuit.[115] On appeal, American Needle contended that it was improper to grant summary judgment to the NFL because American Needle did not have ample time for discovery.[116] Furthermore, American Needle argued that the evidence it needed was "in the possession of the defendants."[117] For those reasons, the circuit court addressed both the discovery and the summary judgment issues separately.[118]

The circuit court's analysis of the discovery issue was short winded. American Needle based its argument on the fact that the district court incorrectly limited its discovery request.[119] Nevertheless, the circuit court pointed to the district court's explanation that further discovery was not needed.[120] Furthermore, the circuit court discussed that for American Needle to surpass summary judgment, it needed to provide "specific evidence which [it] might have obtained from [the NFL defendants] that could create a genuine issue" against the NFL's single-entity defense.[121] The circuit court noted that American Needle's failure to provide evidence barred it from succeeding on the discovery issue on appeal.[122]

On the other hand, the circuit court offered a much more in-depth analysis of American Needle's summary judgment issue. On appeal, American Needle argued that the district court failed to properly apply *Copperweld* when finding that the NFL was a single entity.[123] The circuit court cited to *Brown* and *Bulls II* in its discussion that the characteristics of leagues, such as the NFL, make the issue of deciding whether antitrust scrutiny applies rather difficult.[124] With those cases in mind, the circuit court addressed the notion that the NFL "*could* be a single entity."[125] In fact, the circuit court reasoned with *Bulls II* in stating that the single-entity question should be looked at "one league at time," in addition to "one facet of a league at a time."[126]

The circuit court was not persuaded with American Needle's argument against the NFL. American Needle asserted that the district court incorrectly held that the NFL was a single entity simply because the NFL teams "act" as a single entity when licensing their intellectual property.[127] American Needle argued that the district court's proper inquiry should have been "whether the NFL teams' agreement to license their intellectual property collectively deprived the market of sources of economic power that control the intellectual property."[128] Despite that fact, the circuit court stated that the district court's decision to grant summary judgment in the NFL's favor was appropriate because the "NFL teams collectively license their intellectual property to promote NFL football."[129] Thus, the circuit court ultimately held that the NFL was in fact a single entity for antitrust purposes, sheltering the league from antitrust scrutiny.[130]

## VII. REVIEWING THE NFL'S SINGLE-ENTITY DEFENSE

### *A. Applying the Sherman Act and Copperweld*

The primary purpose of the Sherman Act "is to promote consumer welfare."[131] The central focus of Section One of the Sherman Act is to promote free competition.[132] Based on these notions, the Supreme Court has consistently held that "concerted action under § 1 [of the Sherman Act] does not turn simply on whether the parties are legally distinct entites."[133] Rather, the Court determines whether a violation of Section One of the Sherman Act occurs by taking into "consideration [ ] how the parties involved in the alleged anticompetitive conduct actually operate."[134] Based on this reasoning, the Court has "repeatedly found instances in which members of a legally single entity violated § 1 [of the Sherman Act] when the entity was controlled by a group of competitors and served in essence, as a vehicle for ongoing concerted activity."[135]

Nevertheless, courts from all over the country have wrestled with the issue of what it takes for a corporation to act as a single entity for antitrust purposes. As mentioned earlier, the Supreme Court last discussed the parameters of Section One of the Sherman Act over sixteen years ago in *Copperweld*.[136] Following the Court's ruling in *Copperweld*, courts have not been able to consistently interpret the boundaries of the Sherman Act. Some courts focus on whether or not the corporation's act in question destroys competition.[137] Other courts focus on the interaction between the parent corporation and its subsidiaries.[138] Nevertheless, one thing is common amongst all courts –what constitutes a violation of Section One of the Sherman Act is not clear.

An application of Section One of the Sherman Act to the NFL's case involved a unique discussion. In *American Needle*, the NFL did not dispute the fact that its thirty-two teams compete on the playing field.[139] In fact, the NFL agreed that "in some ways" the teams compete off the field.[140] Despite the competition, the NFL felt as though its business practices constituted that of a single entity; therefore, the league should not be subjected to antitrust scrutiny.[141] The NFL's argument was based on the fact that Section One of the Sherman Act regulates conspiracy-like conduct by competitors.[142] Further, the NFL relied on precedent set forth in *Copperweld* to defend its claim that parent companies and wholly owned subsidiaries, such as the NFL and its thirty-two teams, are not subject to Section One of the Sherman Act.[143]

The NFL's concern as to whether it was subjected Section One of the Sherman Act makes business sense. If the NFL were to face scrutiny under the Sherman Act, the agreements between the NFL and other entities would face examination under antitrust law.[144] The examination would include, but not be limited to, how the agreements would affect prices consumers would have to pay.[145] On the other hand, if it were to be found to be immune from Section One of the Sherman Act, the NFL would not have to worry about antitrust law peering over its shoulder when it made decisions that could affect consumers.[146]

Despite being unanimously ruled against, the NFL exhibited many qualities of a single entity to the Supreme Court. The NFL contended that each of its thirty-two teams is responsible for a "single product."[147] The product, NFL football, is in competition with other entertainment providers as well as other sports leagues.[148] In addition, the circuit court "assert[ed] [the fact] that a single football team could produce a football game is less of a legal argument than it is a Zen Riddle: Who wins when a football team plays itself?"[149] Furthermore, each of the thirty-two teams has *shared* costs and revenues from its intellectual property for nearly fifty years.[150] Therefore, as far as the NFL is concerned, the "goal[] and interest[]" of each of the thirty-two NFL teams are the same – produce NFL football.[151]

Despite the contentions made by the NFL, the Supreme Court cited to its decision in *Copperweld* to counter the NFL's single-entity argument. The Court pointed out that "substance, not form, should determine whether a[n] … entity is capable of conspiring under § 1 [of the Sherman Act]."[152] The Court further explained that the issue is not whether the NFL is a "legally single entity" but rather whether

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the NFL "joins together separate decisionmakers [sic]."[153] Based on this inquiry, the Court continued its discussion of the NFL's single-entity argument:

The NFL teams do not possess either the unitary decisionmaking [sic] quality or the single aggregation of economic power characteristic of independent action. Each of the teams is substantial, independently owned, and independently managed business. '[T]heir general corporate actions are guided or determined' by 'separate consciousnesses,' and '[t]heir objectives are' not 'common.'[154]

The Supreme Court further addressed the NFL's arguments by relying on *Copperweld*. Using the Indianapolis Colts and New Orleans Saints, both NFL teams, as examples, the Court noted that the two teams are competitors in the business of supplying trademarked headwear.[155] Because of this, the Court noted that the intellectual property licenses of each team were going against the "common interests of the whole" league.[156] Thus, the Court concluded that these actions were made by each team to better itself rather than the whole league.[157] Seeking to better the individual team rather than the whole league, the Court contended, is "directly relevant" to the notion that the NFL is not a single entity.[158]

### *B. Applying the "Rule of Reason" Analysis*

As discussed earlier, a plaintiff must overcome the "rule of reason" analysis to succeed in proving a defendant violated Section One of the Sherman Act.[159] In order for the plaintiff to do this, it is first responsible for the first part of the analysis – showing that significant anticompetitive effects exist.[160] In addition, these anticompetitive effects must outweigh the defendant's business justifications for the action.[161] While this may not seem like a difficult burden, a significant portion of plaintiff's cases are dismissed because of their inability to show anticompetitive effects exist.[162]

The second part of the "rule of reason" analysis gives the defendant a chance to rebut the plaintiff's claim. After the plaintiff is afforded the opportunity to prove these effects exist, the defendant is then given the opportunity to show that there is a legitimate procompetitive justification.[163] If the defendant is successful, the plaintiff is then given a chance to show that the defendant can satisfy its business needs by less restrictive ways.[164] However, less than one percent of cases are dismissed by the plaintiff demonstrating that the defendant can take alternative actions.[165]

Some scholars were surprised the Supreme Court did not wrestle with the issues seen in recent jurisprudence regarding the "rule of reason" analysis.[166] The likely analysis of the NFL's case under *Dagher* could have allowed for a different outcome than applying the reasoning used in *Copperweld*.[167] By applying *Dagher* to *American Needle*, the analysis would first start with American Needle establishing that procompetitive effects exist. By doing this, American Needle would have to establish that the NFL's exclusive licensing agreement with Reebok outweighed any business justification that the NFL could bring forward. Furthermore, the NFL would have been given the chance to rebut American Needle's argument by showing its agreement with Reebok does not have anticompetitive effects on the market.

If the NFL's case was examined under the "rule of reason" analysis, the NFL would be able to provide strong evidence against a Section One attack by American Needle. The NFL's anticompetitive effects argument would be centered on the fact that its bargaining power for licensing intellectual property is greater when each of the thirty-two teams unite.[168] An example of this is seen in the NFL's recent case. The NFLP acted on behalf of the thirty-two NFL teams to sort through the bids of manufacturers of headwear.[169] By allowing the NFLP to act in such a fashion, the thirty-two teams were most likely able to benefit by having the bargaining power to attract competitive bids.[170] If the NFL did not have the NFLP to act on its behalf, its bargaining power could have been affected.[171]

### *C. Other Issues Examined by the Court*

If the issue of Section One coverage isn't difficult enough, the corporate framework of the NFL poses unique challenges for courts. Several courts have held that sports leagues, which have a similar business structure as the NFL, do not act as a single entity when operating in certain facets of business.[172] Conversely, several courts have held that sports leagues, including the NFL, should be classified as single entities.[173] In *American Needle*, the Supreme Court addressed the reasoning used in both of these instances.

As previously discussed in *Brown*, the "nonstatutory labor exemption" cannot be used by the NFL in the present case. The facts of that case involved a labor dispute that is governed by federal labor law.[174] Unfortunately for the NFL, the "nonstatutory labor exemption" does not apply to disputes involving antitrust law.[175] While the NFL knew *Brown* would not carry the day in the present case, the NFL hoped the Supreme Court would create a similar exemption from antitrust scrutiny.

While the "nonstatutory labor exemption" does not apply in the present case, the Supreme Court in *Brown* did offer a bit of reasoning that could help the NFL's single-entity defense. As stated previously, the Court in *Brown* reasoned that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival."[176] Additionally, the Seventh Circuit Court of Appeals used the Supreme Court's language in *Brown* when siding with the NFL.[177] Despite the circuit court's use of *Brown* when siding with the NFL's argument, the Supreme Court found the reasoning in *Brown* to be "unpersuasive."[178] Rather, the Court held that the "justification for cooperation is not relevant to whether that cooperation is concerted or independent action."[179]

In further discussion, the Supreme Court cited to other sports-related antitrust cases in its opinion. Unfortunately for the NFL, none of the cited cases were to its benefit. The Court bolstered its argument against the NFL by highlighting the teams' financial independency from the league as another reason to shut down the NFL's single-entity defense.[180] The Court noted that the "financial performance of" one "team," in particular, did not affect the financial performance of another team.[181]

### *D. The Competition Inquiry*

The trend in the Supreme Court's reasoning seems to center on the notion that the thirty-two NFL teams act as competitors.[182] While some may feel this reasoning is flawed, court decisions have acknowledged that the competition between teams is an integral part of the inquiry.[183] Simply put, the thirty-two teams in the NFL depend on each other for financial success.[184] As stated earlier, there cannot be an NFL game without the existence of two NFL teams. The financial success of one NFL team depends on the success of another.[185] Similar to the NFL, others sports leagues such as the NBA, Major League Baseball, and the National Hockey League are all "unique" because their product can only be produced when the teams in each respective league are working together.[186]

The primary competition that takes place between the NFL and other sports leagues is on the football field or on the basketball

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court. In *Los Angeles Memorial Coliseum Commission v. National Football League*, Judge Williams wrote a strong dissent that supports the competition argument.[187] In that case, Judge Williams noted that "[v]irtually every court to consider this question had concluded that N.F.L. member clubs do not compete with each other in the economic sense."[188] By focusing on competition, the Supreme Court in *American Needle* failed to take into account the fact that the structure of the NFL and its teams are "intertwined."[189] The Court should not look at the conduct of how the individual teams operate. Rather, the Court should focus its antitrust analysis on the structure of the league.[190] A closer look by the Court would have revealed the NFL is more like a single entity working together than separate entities competing with each other.

The Supreme Court was reluctant to acknowledge the fact that the thirty-two NFL teams actually have a "complete unity of interest."[191] By doing this, the Court seemingly glossed over an important fact about the league. A substantial part of the revenues generated by the sale of the teams' intellectual property by the NFLP have "either been given to charity or [have been] shared equally among the teams."[192] The equal distribution of revenues earned from the intellectual property, such as the jerseys and caps from the present case, further exhibits the NFL's defense that it acts as a single entity. This example of revenue sharing brings the NFL's single-entity argument full circle – the teams are *working together* rather than competing with each other when dealing their intellectual property.

## VIII. CONCLUSION

While the Supreme Court's holding does not change antitrust law,[193] some believe the Supreme Court's ruling may affect the challenges made by other sports leagues in the future.[194] Specifically, the ruling "preserves an opportunity" for plaintiffs to challenge other sports leagues' conduct under Section One of the Sherman Act.[195] Because of this, sports leagues will most likely be closely scrutinized when engaging in questionable anticompetitive practices.[196]

For that reason, some believe that the ruling is a "sweeping defeat for the league" because of the potential affect the ruling could have on "all commercial deals."[197] Commercial deals, including league-apparel deals as well as television contracts, would be subject to the "rule of reason" analysis.[198] Nevertheless, the NFL is confident it will be able to withstand "rule of reason" scrutiny in the future.[199]

Despite the fact the Supreme Court unanimously ruled in American Needle's favor, the Court's decision in *American Needle* does not mean all is lost for the NFL. The decision simply means that the case will be remanded to the circuit court for a final decision on the merits. The final decision should be based on the NFL's ability to withstand "rule of reason" scrutiny. Because of that, many believe that the NFL will prevail in the end.[200] Regardless of how the circuit court decides the case, the mere fact that the teams in sports leagues compete with each other either on the football field or on the basketball court should not weigh heavily when excluding them from the single-entity defense. Courts must, on a case-by-case basis, pay close attention to the league's operations that surround the alleged-antitrust violation in question before making a single-entity determination.

1 *See* Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007) [hereinafter *New Orleans*], *aff'd* Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008) [hereinafter *NFL*], *rev'd*, Am. Needle, Inc. v. Nat'l Football League, No. 08-661, 2010 WL 2025207, at *3 (May 24, 2010) [hereinafter *Am. Needle*].

2 *See Am. Needle*, 2010 WL 2025207, at *12.

3 *See* 15 U.S.C.A. § 1 (West 2004). Section One of the Sherman Act is defined as the following:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, it any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*Id*.

4 *Am. Needle,* 2010 WL 2025207, at *3.

5 § 1 (focusing on the "conspiracy" and "restraint of trade" language).

6 *Am. Needle*, 2010 WL 2025207, at *5 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984)).

7 *Id.* "As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a 'contract, combination ..., or conspiracy' as defined by § 1 of the Sherman Act." *Id.*

8 *See, e.g.,* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147-48 (9th Cir. 2003) (stating that "[w] here there is substantial common ownership, a fiduciary obligation to act for another entity's economic benefit or an agreement to divide profits and losses, individual firms function as an economic unit and are generally treated as a single entity").

9 *See* § 1.

10 *See Am. Needle,* 2010 WL 2025207, at *3; *see also* M. Scott LeBlanc, *American Needle, Inc. v. NFL: Professional Sports Leagues and "Single-Entity" Antitrust Exemption*, 5 Duke J. Const. L. & Pub. Pol'y Sidebar 148, 149 (2010) (citing Brief for the Petitioner at i, *Am. Needle*, 2010 WL 2025207, at *3).

11 *See, e.g.,* LeBlanc, *supra* note 10, at 149 (citing Brief for the Petitioner, *supra* note 10, at i).

12 *Am. Needle,* 2010 WL 2025207, at *3 (mentioning the New Orleans Saints and Indianapolis Colts, the teams that played in the 2010 Superbowl, as two teams that "are well known to sports fans").

13 *See id.* (stating that "the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys").

14 *See, e.g., id.*

15 *See, e.g., id.*

16 *See id.* at *4; *see also New Orleans*, 496 F. Supp. 2d at 942 (stating that the NFLP granted licenses to American Needle for over 20 years).

17 *See Am. Needle,* 2010 WL 2025207, at *4; *see also* LeBlanc, *supra* note 10, at 150 (noting that "declining merchandise sales in the late 1990s" caused "the NFL's thirty-two member teams [to] collectively decided to change their intellectual property licensing practices in the hopes of increasing profits").

18 *See Am. Needle,* 2010 WL 2025207, at *4; *see also* LeBlanc, *supra* note 10, at 150.

19 *See Am. Needle,* 2010 WL 2025207, at *4.

20 *See, e.g., New Orleans*, 496 F. Supp. 2d at 942.

21 *See id.*; *see also* 15 U.S.C.A. §§ 1-2 (West 2004). Section Two of the Sherman Act is defined as follows: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. § 2.

22 467 U.S. 752 (1984); *see also Am. Needle,* 2010 WL 2025207, at *5.

23 *See New Orleans*, 496 F. Supp. 2d at 944, *aff'd NFL*, 538 F.3d at 738, *rev'd Am. Needle*, 2010 WL 2025207, at *4; *see also* LeBlanc, *supra* note 10, at 150 (citing the Brief for the Petitioner, *supra* note 10, at i).

24 *See, e.g., New Orleans*, 496 F. Supp. 2d at 944 (concluding that the facts make it clear that the NFL and its thirty-two teams are "a single entity in licensing their intellectual property").

25 *See, e.g., Am. Needle,* 2010 WL 2025207, at *3.

26 § 1.

27 *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978). "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain-quality, service, safety, and durability [ ] and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Id.*

28 Black's Law Dictionary 1149 (9th ed. 2004) (defining the rule of reason as "[t]he judicial doctrine holding that a trade practice violates the Sherman Act only if the practice is an unreasonable restraint of trade, based on the totality of economic circumstances").

29 246 U.S. 231 (1918).

30 *See id.* at 236-37 (discussing "grain," which includes wheat, corn, oats, rye, barley, and rice).

31 *Id.* at 236-38 (stating that Chicago was one of the leading grain markets in the world at the time, and a significant portion of commercial grain trading occurred in Chicago, Ill.).

32 *Id.* at 238 (explaining that the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts" that must be considered to determine if a violation of the Sherman Act occurred).

33 *See id.*

34 *Id.; see also* LeBlanc, *supra* note 10, at 151.

35 *See* James T. McKeown, *2008 Antitrust Developments in Professional Sports: To the Single Entity and Beyond*, 19 Marq. Sports L. Rev. 363, 365 (2009) (stating that the type of proof needed varies by the defendant's conduct).

36 547 U.S. 1, 5 (discussing that the "rule of reason" is presumptively applied in violations of Section One of the Sherman Act); *see also* McKeown, *supra* note 35, at 365 (stating that the plaintiff's demonstration must show "actual adverse effects on competition" or "proof of facts from which adverse effects can be inferred").

37 *See* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993).

38 *See* McKeown, *supra* note 35, at 365.

39 *See Brown Univ.,* 5 F.3d at 668.

40 McKeown, *supra* note 35, at 365.

41 *Id.* at 365-66 (citing State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982))).

42 Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)); *see also* McKeown, *supra* note 35, at 366 (calling the per se rule the "automatic rule of illegality").

43 *See* McKeown, *supra* note 35, at 366 (adding "bid rigging" and "horizontal customer allocations" as other circumstances in which the per se rule would apply) (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

44 *See N. Pac. Ry. Co.*, 356 U.S. at 5. The Court added the following: The principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable-an inquiry so often wholly fruitless when undertaken. *Id.*

45 *State Oil Co.*, 522 U.S. at 10 (citing Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 477, 458-59 (1986)).

46 *See* McKeown, *supra* note 35, at 366 (citing Cal. Dental Ass'n v. Fed. Trade Comm'n , 526 U.S. 756, 770 (1990)).

47 *See, e.g.,* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (discussing that the quick-look rule "applies in cases where *per se* condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint").

48 *See* McKeown, *supra* note 35, at 366 (citing *Cal. Dental Ass'n*, 526 U.S. at 770).

49 *See Brown Univ.,* 5 F.3d at 669.

50 *See id.* (quoting Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992) [hereinafter *Bulls II*]. "If the defendant offers sound pro-competitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis." *Id.*

51 *See* McKeown, *supra* note 35, at 366 (quoting *Cal. Dental Ass'n*, 526 U.S. at 770-71) (holding that the "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily b ascertained")).

52 *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984) (noting that "[p]er se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct") (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16, n. 25 (1984)).

53 *See Cal. Dental Ass'n*, 526 U.S. at 779.

54 *See id.*

55 *See id.* at 780-81. When determining what effect the defendant's actions have on competition, the Court added the following: [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry met for the case, looking at 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. *Id.*

56 *See generally* 467 U.S. 752 (1984) (discussing an antitrust suit brought by one tubing company against another tubing company and its subsidiary).

57 *Id.* at 766; Nathaniel Grow, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense*, 105 Mich. L. Rev. 183, 186 (2006); LeBlanc, *supra* note 10, at 152; McKeown, *supra* note 35, at 367.

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58 *Copperweld*, 467 U.S. at 771 (stating that parent and wholly owned subsidiary companies "objectives are common, not disparate" and that "their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one").
59 *Id.* (comparing a parent and subsidiary company to a "multiple team of horses drawing a vehicle under the control of a single driver").
60 *Id.* (adding that a parent and subsidiary company "always have a 'unity of purpose or common design'") (quoting Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)).
61 *Id.* (adding that "[i]f a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny").
62 *See id.*
63 838 F.2d 268 (8th Cir. 1968).
64 *See id.*
65 *See id.*
66 *See id.*
67 *See* Grow, *supra* note 57, at 190 (citing Heike Sullivan, *Fraser v. Major League Soccer: The MLS's Single Entity Structure is a "Sham*," 73 Temp. L. Rev. 865, 866 (2000) (arguing that a single entity inquiry is fact intensive and that the court must consider the entities' common goals and interests)).
68 370 U.S. 19 (1962).
69 *Id.* at 24-25. In that case, the respondents brought suit based on the following theory: [T]hat Sunkist and Exchange Orange controlled the supply of by-product oranges available in the California-Arizona area to independent processors; that they combined and conspired with Exchange Lemon, TreeSweet, and Silzle to restrain and to monopolize interstate trade and commerce in 1951 in the processing and sale of citrus fruit juices, particularly canned orange juice; that they in fact monopolized such trade and commerce; and that the purpose or effect thereof was the elimination of Winckler as a competitor in the sale of such juices. *Id.*
70 *Id.* at 29. "[T]he 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions . . . ." *Id.*
71 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 773 (1984).
72 518 U.S. 231 (1996) (discussing a suit brought by NFL players against the NFL for price fixing salaries for developmental team players).
73 *See id.*
74 *Id.* at 234.
75 *Id.* "This Court has previously found in the labor laws an implicit antitrust exemption that applies where needed to make the collective-bargaining process work." *Id.*
76 *Id.* at 235-36 (citing Connell Constr. Co. v. Plumbers, 421 U.S. 616, 622 (1975) (discussing building trades union); Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (discussing retailers of fresh meat); Mine Workers v. Pennington, 381 U.S. 657 (1965) (discussing union negotiations amongst mine workers)).
77 *See id.* at 236 (citing 29 U.S.C. § 151 (1947) (discussing labor policies)); *see also* Teamsters v. Oliver, 358 U.S. 283, 295 (1959) (reiterating the fact that federal labor law controls situations such as collective bargaining and turning down the notion that states have the power to control these agreements).
78 *Brown,* 518 U.S. at 237 (citing *Connell Constr. Co.*, 421 U.S. at 622) (emphasizing that if collective bargaining were held to be in violation of antitrust laws then federal labor law's "goals" could "never" be achieved)).
79 *See id.* at 236 (citing 29 U.S.C. §§ 158(a)5, 158(d) (1974)); Nat'l Labor Relations Bd. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).
80 *Brown,* 518 U.S. at 238 (pointing out that "[i]n the present context, however, that circumstance makes the league more like a single bargaining employer" but doesn't mean the league is a "single bargaining employer" in every context); *see also Bulls II*, 95 F.3d at 593; *see also* Grow, *supra* note 57, at 189.
81 *See, e.g.,* Nat'l Football League v. N. Am. Soccer League, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari).
82 *See Bulls II*, 95 F.3d at 593; *see also* Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002); Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994); Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249 (2d Cir. 1982); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976).
83 *See Bulls II*, 95 F.3d at 597.
84 *Id.* at 598.
85 *Id.* at 600. "Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability of sports teams to set wages for players." *Id.*
86 *See* McKeown, *supra* note 35, at 369.
87 *See id.*
88 *See* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249 (2d Cir. 1982).
89 *Id.*
90 *See id.* at 1250 (explaining that the NFL was not allowing owners of the NASL to own a NASL team and a NFL team concurrently).
91 *Id.* at 1252. "Each [NFL team] also derives separate revenues from certain lesser sources, which are not shared with other members [NFL teams], including revenues from local TV and radio, parking and concessions. A member's gate receipts from its home games varies from those of other members . . . ." *Id.*
92 *Id.*
93 *Id.* at 1257.
94 34 F.3d 1091 (1st Cir. 1994).
95 *See id.* at 1096.
96 *See id.* at 1095. The court discussed the pertinent part of the NFL's constitution and policy, which included the following: Under Article 3.5 of the NFL's constitution and by-laws, three-quarters of the NFL club owners must approve all transfers of ownership interests in an NFL team, other than transfers within a family. In conjunction with this rule is an uncodified policy against the sale of ownership interests in an NFL club to the public through offerings of publicly traded stock. The members, however, retain full authority to approve any given transfer by a three-quarters vote according to Article 3.5. *Id.*
97 *See id.* at 1098.
98 *Id.* (citing Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 783 F.2d 1347 (9th Cir. 1986) (arguing that there are no cases that "stand for the broad proposition that no NFL ownership can injure competition")).
99 *See id.* (explaining that the NFL did not cite to any case which considered the "particular relevant market" or a "league policy against ownership").
100 *Id.; see also* Grow, *supra* note 57, at 196.
101 *See Sullivan*, 34 F.3d at 1098.
102 *See New Orleans*, 496 F. Supp. 2d at 941.
103 *See id.* at 942. "It [American Needle] does not claim that the NFL and its 32 teams previously acted improperly by delegating to NFL Properties [NFLP] the authority to grant licenses. That was permissible, it contends, so long as the licenses were spread around a number of competitors." *Id.*
104 *Id.*
105 *Id.*
106 *Id.* at 942-43.
107 *Id.* (citing Cook, Inc. v. Boston Scientific Corp., 333 F.3d 737, 740-41 (7th Cir. 2003)).
108 *See id.* (concluding that the NFL and its thirty-two teams "clearly are" a single entity).
109 *Id.* (citing Texaco, Inc. v. Dagher, 547 U.S. 1, 6 (2006)).
110 *Bulls II*, 95 F.3d at 593.
111 *See id.*
112 *New Orleans,* 496 F. Supp. 2d at 943 (citing *Bulls II*, 95 F.3d at 597).
113 *See id.* When coming to the conclusion that the NFL made a good business decision, the court noted the following: There is no sudden joining of independent sources of economic power previously pursuing separate interests. Why the NFL should opt for that structure [referring to the NFLP] is obvious. To require that 32 teams each take total responsibility for the protection and marketing of its own logos and trademarks in a nationwide market would cause each to be at a competitive disadvantage with other leagues integrated marketing. *Id.*
114 *Id.* at 944 (citing City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc., 838 F.2d 268, 275 (8th Cir. 1988)).
115 *See NFL,* 538 F.3d at 736.
116 *Id.* at 739. The district court denied American Needle's motion for a continuance before it granted summary judgment. *Id.* at 740.
117 *Id.* (explaining that American Needle was wrong when accusing the district court of abusing its discretion involving the discovery matters).
118 *See id.* at 740-44.
119 *See id.* at 740.
120 *See id.* "[T]he court clearly explained that further discovery was unnecessary because 'the facts that materially [bore] upon the [court's] decision[ ] [were] undisputed,' and led 'to the conclusion that the NFL and teams act as a single entity in licensing their intellectual property.'" *Id.*
121 *Id.* (citing Davis v. G.N. Mortgage Corp., 396 F.3d 869, 885 (7th Cir. 2005); United States v. All Assets & Equip. of W. Side Bldg. Corp., 58 F.3d 1181, 1190-91 (7th Cir. 1995) (affirming district court's denial of defendants' request for additional discovery because request "lacked specificity concerning what information [the defendants] hoped to uncover and how it would refute [the claims brought against them]")).
122 *See id.* at 741 (explaining that American Needle believed "further discovery was necessary because 'the determination of the single entity question [sic] requires a fact intensive inquiry [sic]'").
123 *See id.* (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)).
124 *See id.* (citing Brown v. Pro Football, Inc., 518 U.S. 231, 234 (1996); *Bulls II*, 95 F.3d at 593).
125 *Id.* at 742 (citing *Bulls II*, 95 F.3d at 598). The court further stated that "because of the many and conflicting characteristics that professional sports leagues generally exhibit, we have expressed skepticism that *Copperweld* could provide the definitive single-entity determination for all sports leagues alike." *Id.* (citing *Bulls II*, 95 F.3d at 599-600).
126 *Id.* (citing *Bulls II*, 95 F.3d at 600).
127 *Id.; see also New Orleans*, 496 F. Supp. 2d at 941.
128 *NFL,* 538 F.3d at 742.
129 *Id.* at 744.
130 *See id.*
131 *See* Bruce Johnsen & Moin A. Yahyt, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. Pa. J. Const. L. 403, 408 (2004).
132 *See* 15 U.S.C.A. § 1 (West 2004).
133 *Am. Needle*, 2010 WL 2025207, at *6.
134 *See id.*
135 *Id.*
136 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
137 *See, e.g.,* Bd. of Trade of Chicago v. United States, 246 U.S. 231 (1918).
138 *See, e.g., Copperweld*, 467 U.S. at 752.
139 *See* Michael Cann, *What the Supreme Court's Antitrust Ruling Means to the NFL*, Sports Illustrated, May 24, 2010, http://sportsillustrated.cnn.com/2010/writers/michael_mccann/05/24/nfl.antitrust/index.html.
140 *See id.*
141 *See id.*
142 *See id.*
143 *See id.*
144 *See id.*
145 *See id.*
146 *See id.* (discussing the immunity and applicability of Section One of the Sherman Act).
147 *See* LeBlanc, *supra* note 10, at 156 (citing Brief for Respondents at 22, *Am. Needle*, 2010 WL 2025207, at *3).
148 *See id.*
149 *NFL,* 538 F.3d at 742 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101 (1984)).
150 *See* LeBlanc, *supra* note 10, at 156.
151 *See* City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268 (1968).
152 *Am. Needle,* 2010 WL 2025207, at * 8.
153 *Id.*
154 *Id.* at *9 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984)); *see also* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1252 (2d Cir. 1982).
155 *Am. Needle,* 2010 WL2025207, at *9.
156 *Id.*
157 *Id.*
158 *Id.* (reasoning that "teams are acting as 'separate economic actors pursuing separate economic interests,' and each team therefore is a potential 'independent cente[r] of decisionmaking [sic]'") (quoting *Copperweld*, 467 U.S. at 770).
159 *See* Kristi Dosh, *American Needle v. NFL: Looking Forward*, Forbes, May 26, 2010, http://blogs.forbes.com/sportsmoney/2010/05/american-needle-vs-nfl-looking-forward .
160 *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century,* 16 Geo. Mason L. Rev. 827 (2009).
161 *See* Dosh, *supra* note 159.
162 *See* Carrier, *supra* note 160, at 828 (stating that 97% of cases are dismissed because the plaintiff failed to show significant anticompetitive effects existed).
163 *See id.* at 827.
164 *See id.*
165 *See id.*
166 Phone interview with a partner at Covington & Burling, LLP, and Author, a student at The Thomas M. Cooley Law School (June 11, 2010, 2:00 EST) (on file with author).
167 *See id.*
168 *See* Dosh, *supra* note 159.
169 *See id.*
170 *See id.*
171 *See id.* (stating that each team wouldn't have an equal opportunity to benefit if it did not have the NFLP to act on its behalf).
172 *See* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994) (involving a dispute about franchise ownership); *see* Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1387-90 (9th Cir. 1984) (involving a dispute about franchise location); *see* McNeil v. Nat'l Football League, 790 F. Supp. 871, 878-80 (D. Minn. 1992) (involving a labor dispute).
173 *See New Orleans*, 496 F. Supp. 2d at 941; *see also Bulls II*, 95 F.3d at 593.
174 *See* Brown v. Pro Football, Inc., 518 U.S. 231, 234 (1996).
175 *See id.*
176 *Id.* at 248.
177 *See NFL*, 538 F.3d at 741.
178 *Am. Needle*, 2010 WL 2025207, at *10.
179 *Id.* at *11.
180 *See id.* at *9 (citing N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1252 (2d Cir. 1982)).
181 *N. Am. Soccer League,* 670 F.2d at 1252 (discussing that the "financial performance of each team … does not … rise and fall with that of the others").
182 *See Am. Needle,* 2010 WL 2025207, at *9.
183 *See* Grow, *supra* note 57, at 193; Shawn Treadwell, *An Examination of the Nonstatutory Labor Exemption From the Antitrust Laws, In the Context of Professional Sports,* 23 Fordham Urban L. J. 955, 962 (1996).
184 Grow, *supra* note 57, at 193 (citing Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1402 & n.1 (9th Cir. 1984) (Williams, J., concurring in part and dissenting in part)).
185 *See id.* at 194 (citing *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1405 (Williams, J., concurring in part and dissenting in part) (arguing that the value of a sports franchise is directly connected to the success of the larger league)).
186 *See id.* at 191-92 (stating that a "combination of NBA teams produces 'NBA Basketball,' a combination of teams produces 'NFL Football,' a combination of MLB teams produces 'Major League Baseball,' and a combination of NHL teams produce 'NHL Hockey'").
187 *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1405 (Williams, J., concurring in part and dissenting in part).
188 *Id.; see also* Grow, *supra* note 57, at 192 (citing Treadwell, *supra* note 183, at 962).
189 *See* Grow, *supra* note 57, at 194 (arguing that "no distinction exists between the league structure and its member teams") (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 774 (1984)).
190 *See id.*
191 *See Am. Needle*, 2010 WL2025207, at *8 (citing *Copperweld*, 467 U.S. at 771).
192 *See id.* (adding that "[m]ost, but not all[ ]" of the revenues are shared or given to charity).
193 Phone interview with a partner at Covington & Burling, LLP, and Author, a student at The Thomas M. Cooley Law School (June 11, 2010, 2:00 EST) (on file with author).
194 *See* Marc Edelman, *Ruling May Have Impact in Other Areas of Sports Business,* Street and Smith's Sports Bus. J., May 31, 2010, at 20.
195 *See id.*
196 *See id.*
197 *See, e.g.,* Adam Liptak & Ken Belson, *N.F.L. Fails in Its Request for Antitrust Immunity*, N.Y. Times, May 25, 2010, at B3.
198 *See, e.g., id.*
199 *See, e.g., id.* "We [the NFL] remain confident we will ultimately prevail because the league decision about how best to promote the N.F.L. was reasonable, pro-competitive, and entirely lawful." *Id.* (quoting Greg Aiello, a spokesman for the NFL).
200 Phone interview with a partner at Covington & Burling, LLP, and Author, a student at The Thomas M. Cooley Law School (June 11, 2010, 2:00 EST) (on file with author) (adding that the ruling seemed to be somewhat of a going away gesture for Justice Stevens's last decision because he spent years practicing antitrust law).

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## Thursday

7.25 hours including 1 hour ethics

7:45 **Registration and Continental Breakfast**

8:15 **Welcoming Remarks**
***Course Director***
Mike Tolleson, *Austin*
Mike Tolleson & Associates

8:30 **Recent Court Cases**
*1 hr (.25 ethics)*
Stan Soocher, Esq., *Denver, CO*
Editor-in-Chief, "Entertainment Law & Finance" and
Associate Professor, Music & Entertainment Industry Studies
University of Colorado Denver

9:30 **State of the Texas Film and Music Industry** *.5 hr*
Casey Monahan, *Austin*
Texas Music Office

Bob Hudgins, *Austin*
Texas Film Commission

10:00 **Practicing Law and Wellness: Modern Strategies for Lawyers Dealing With Anxiety, Addiction and Depression** *.5 hr ethics*
Speaker to be Announced

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10:30 **Break**

10:45 **Navigating the DMCA Safe Harbors: Lessons from *Viacom v. Google* and Other Cases** *.75 hr*
Buck McKinney, *Austin*
Attorney at Law

Corynne McSherry, *San Francisco, CA*
Electronic Frontier Foundation

11:30 **Digital Media: Technological Innovation v. the Copyright Law** *.5 hr*
Allen Bargfrede, Esq., *Boston, MA*
Assistant Professor,
Berklee College of Music
Author, "Music Law in the Digital Age"

12:00 **Break - Lunch Served**

12:15 **Texas Star Award Presentation**

12:30 **Lunch Presentation: Entertainment Law in Texas: How We Got Here - Where We're Going** *.5 hr*
Mike Tolleson, *Austin*
Mike Tolleson & Associates

1:00 **Break**

1:15 **Sound Exchange: Collecting Performance Royalties for Sound Recordings - Did You Get Yours?** *.5 hr*
John Simson, *Washington, DC*
Executive Director
Sound Exchange

1:45 **Protecting an Artist's Legacy Through Estate Planning, Probate and Post-Death Administration of an Artist's Rights**
*.75 hr (.25 ethics)*
Tamera H. Bennett, *Lewisville*
Bennett Law Office

Ken Pajak, *Austin*
The Bannerot Law Firm

2:30 **U.S. Performing Rights Organizations: Inside the PROs - What They Do & How They Do It** *.5 hr*
Steven Winogradsky, *Studio City, CA*
Winogradsky/Sobel

3:00 **Break**

3:15 **U.S. Copyright Office: Registration Issues for Music and Film Attorneys** *.5 hr*
Marybeth Peters, *Washington, DC*
U.S. Copyright Office

3:45 **Share or Share-Alike: Creative Commons v. Copyright** *.5 hr*
Erin Rodgers, *Houston*
Law Office of Al Staehely
Texas Accountants and Lawyers for the Arts

4:15 **Exploitation of Rights in Europe: How are They Different, How Do You Get Paid ?** *.75 hr*
Robin Bynoe, *London, UK*
Charles Russell

5:00 **Adjourn**

## Friday

6.75 hours including 1 hour ethics

8:00 **Continental Breakfast**

8:20 **Announcements**

8:30 **Representing Musicians: Review of Selected Issues Encountered in Negotiating Management, Financing, Producer and Recording Agreements**
*1 hr*
***Moderator***
Mike Tolleson, *Austin*
Mike Tolleson & Associates

Seth Lichtenstein, *Beverly Hills, CA*
Goldring, Hertz & Lichtenstein

Al Staehely, *Houston*
Law Office of Al Staehely

Joseph Stallone, *Austin*
Oaks, Hartline & Daly

9:30 **Be Careful What You Tweet: Social Networking Legal Issues** *.75 hr (.5 ethics)*
Tamera H. Bennett, *Lewisville*
Bennett Law Office

10:15 **Break**

10:30 **Ethics: Who's Your Lawyer? Multi-Party Representation and Conflict Waivers** *.5 hr ethics*
John P. 'Jack' Sahl, *Richfield, OH*
Professor of Law
University of Akron

11:00 **Indie Label Distribution Agreements: The Key Deal Points** *.75 hr*
Edward Z. Fair, *Austin*
Law Offices of Ed Fair

Seth Lichtenstein, *Beverly Hills, CA*
Goldring, Hertz & Lichtenstein

11:45 **RIAA - Signs, Seals and Delivery** *.5 hr*
Carlos Linares, *Washington, DC*
Recording Industry Association of America

12:15 **Lunch on Your Own**

1:30 **Navigating Music Rights with the HFA** *.5 hr*
Michael Simon, *New York, NY*
Senior Vice President of Business Affairs, General Counsel and Chief Strategic Officer
Harry Fox Agency

2:00 **Music Clearance and Licensing for Low Budget Films** *.5 hr*
Steven Winogradsky, *Studio City, CA*
Winogradsky/Sobel

2:30 **Is it Fair Use? Assessing Licensing Issues in Film and Audiovisual Works** *.5 hr*
Deena B. Kalai, *Austin*
Deena Kalai, PLLC

3:00 **Break**

3:15 **Film Distribution for the Independent Producer: Strategies and Negotiations** *.5 hr*
Sally Helppie, *Dallas*
Tipton Jones
President, Advocate Pictures, LLC

3:45 **Securing Your Band and Label Name: Application Prosecution Review by U.S. Trademark Office Examiner** *.5 hr*
Michael D. Baird, *Alexandria, VA*
Managing Attorney
U.S. Trademark Office

4:15 **Right of Publicity In Texas and Beyond or "Why Can't I Use the President to Sell Jackets"** *.75 hr*
Keith D. Jaasma, *Houston*
Patterson & Sheridan

5:00 **Adjourn**

**ABOUT THE COVER ARTIST**

**Bill Narum** (1947-2009) exemplified the fusion of art, technology, and music, providing graphics, videos, and websites for many performers and venues including ZZ TOP, Bill Monroe, Captain Beefheart, Ravi Shankar, Humble Pie, Doug Sahm, Nanci Griffith, Stevie Ray Vaughan, the Armadillo World Headquarters, the Continental Club and Threadgills Restaurant. He was also a founder and President of the South Austin Museum of Popular Culture.

# 2010 TEXAS STAR AWARD RECIPIENT

**MIKE TOLLESON** has been the Director of the Entertainment Law Institute since its inception in 1990 and was a cofounder and initial Chair of the Entertainment and Sports Law Section of the State Bar in 1989.

A graduate of the SMU Dedman School of Law, he has worked for over forty years as an entertainment attorney, concert producer, film producer and officer in various industry organizations. The overriding goal of his work has been to develop the film and music industry in Texas, allowing homegrown talent to remain and flourish in his native state.

He was a cofounder of the legendary Austin concert venue, Armadillo World Headquarters (1970-1980); cofounder of the Austin public access channel (ACTV); and co-producer of the first Willie Nelson 4th of July Picnic in 1973. In 1973, as a consultant to KLRU-TV, he brought Willie Nelson and KLRU together for the pilot episode and was the talent advisor for the first season of Austin City Limits, now the longest running music program on television.

President of the state-wide Texas Music Association from 1983-1985, he was appointed in 1985 by Governor Mark White to the newly formed Texas Music Commission. He established the Texas Stand at the International Music Market (MIDEM) in Cannes, France, 1985, and has served as a Governor of the Texas Chapter of the Recording Academy.

His clients consist of individuals and companies from all aspects of the entertainment industry.

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# CAN THE FEDS INVESTIGATE CYCLING TEAM DOPING ALLEGATIONS AS FRAUD?

By Betty Chang

*Betty Chang is a partner of Dennett & Chang LLP in Austin, Texas. Dennett & Chang provides services in all aspects of intellectual property law, including patents, trademarks and entertainment & sports. Ms. Chang can be reached at changbetty@sbcglobal.net.*

On May 25, 2010, the New York Times reported that Federal authorities are considering the expansion of their investigation of the former U.S. Postal Service Cycling Team and its members for doping, to include fraud and conspiracy.

Specifically, the Times reported their sources as saying that, "the authorities want to know whether money from the United States Postal Service, the main sponsor of Armstrong's team from 1996 to 2004, was used to buy performance enhancing drugs...."[1]

Based on the Fed's history of treating doping allegations as criminal investigations,[2] this article assumes that the investigations being considered are criminal investigations.

Even if the Cycling Team did commit fraud against the USPS, that fraud would not be a crime; so the Feds have no authority to investigate.

The Federal Bureau of Investigations is the investigative service of the Federal Government and the U.S. Postal Investigation Service investigates crimes against the U.S. Postal Service. So, any Federal investigation would likely be conducted by the FBI or the Postal Investigation Service. The FBI's mission is "to protect and defend the United States against terrorist and foreign intelligence threats and to enforce the criminal laws of the United States; ,[3] and the Postal Investigation Service's mission is "to support and protect the U.S. Postal Service and ... ; enforce the laws that defend the nation's mail system from illegal or dangerous use; and ensure public trust in the mail." [4]

Both of these services are federal crime enforcement agencies; and federal crimes are offenses committed against American society in general. The FBI's fraud jurisdiction includes healthcare fraud, mortgage fraud, securities fraud and disaster recovery fraud. Postal Inspectors investigate mail fraud, postage fraud, identity theft, and re-shipping scams.[5]

So, the Feds may investigate whether the Cycling Team defrauded the USPS if the alleged fraud is a (1) federal crime which (2) harms the American society in general.

## I. FEDERAL CRIMINAL FRAUD STATUTES

Federal Fraud Statutes include a general prohibition against false statements made to the federal government (like falsification of the truck drivers' logs required by the Department of Transportation [6]), and a specific prohibition against fraud in particular government contracts (like misbranding parts provided to the U.S. Navy.[7])

Although both of these prohibitions seem to apply to the considered investigation, the Postal Service statute states that no Federal law dealing with public or Federal contracts applies to the USPS[8] andthe federal criminal statutes only apply if they "deal" with the Postal Service.[9] Because, the contract fraud statute makes no reference to the Postal Service,10 the Feds cannot investigate the alleged fraud on the basis of the contract between the Cycling Team and the USPS.

If the alleged fraud is a federal crime, the Feds may have jurisdiction under the general fraud provision."[11]

Federal fraud statutes target fraud committed against society in general. In the examples above, falsified truck driver logs threaten traffic safety, and misbranded ship parts can affect the operation of Navy ships. Both of these examples relate to Federal agencies in their service to the American society, i.e., regulating interstate travel and maintaining fleets for national defense.

## II. CRIMES INFLICTED AGAINST FEDERAL AGENCIES IN THEIR SERVICE TO SOCIETY OR AGAINST THE U.S. MAIL, THAT HARMS AMERICAN SOCIETY IN GENERAL.

The U.S. Constitution authorized Congress to establish the Postal Service, [12] so the USPS appears to be a federal agency. Additional support for this position are that the USPS has rights of sovereign immunity[13] and eminent domain 1.4 (which are rights reserved only to the government), the priority of the

*Continued on Page 15*

*Continued from Page 14*

United States in debt collection,[15] and the Supreme Court has held that, "[the USPS] is not a separate ... person from the United States but is part of the Government." [16]

In that Supreme Court case, the plaintiff claimed that the USPS violated anti trust laws in terminating the plaintiffs mail sack supply contract. The Court held that the USPS is immune from anti trust liability because it is not a separate "anti trust person" from the U.S.; since the U.S. is immune from anti trust liability, so is the Postal Service. [17]

Mail sacks are essential to the regular mail delivery services for which the USPS was created, and the USPS enjoys a statutory monopoly to provide that service."' When the USPS conducts other businesses, it is not protected by sovereign immunity.[19] Sovereign immunity is a key characteristic of a government agency; so this limitation shows Congressional intent for the USPS to be treated like a private enterprise when it conducts business other than regular mail delivery.

Also like a private enterprise, the USPS determines and keeps its own system of accounts; it buys and sells equipment, supplies and buildings for its operations; and, it can sue and be sued by others.[20]

Consistent with the legislation that deprives the USPS of sovereign immunity outside of providing regular mail service,[21] Federal Courts have held that, the ability "to sue and be sued" generally waives sovereign immunity and subjects the USPS to judicial processes like a "private enterprise under similar circumstances."[22] The sponsorship of the Cycling Team was not related to regular mail delivery, so allegations of fraud arising from that relationship must be treated as if it arose in USPS's capacity of a private enterprise.

Having determined that the U.S. Postal Service Cycling Team sponsorship contract is not subject to the Federal contract fraud statute and USPS's engagement with the Cycling Team was conducted as a private enterprise, the only remaining issue to consider is whether, if the Cycling Team inflicted fraud against USPS, that fraud could have harmed society in general.

Like private businesses, the USPS generates revenues through the sale of products and services (e.g., postage stamps and certified mail receipts). The Federal Government buys from the USPS specific services like mail in election ballots for U.S. citizens living abroad, and rural mail service. Regardless of whether the Government buys these services from USPS because of its monopoly or otherwise, the Government seems inclined to purchase these services from someone, whether or not the USPS.[23] In this respect, the USPS is a private enterprise that sells goods and services to both the Federal Government and the public in general. Like any other business that sells to both the Government and the public, if it suffers fraud losses from a business relationship, that loss is not generally deemed a harm inflicted on the American society . Even if the Cycling Team had inflicted fraud against the Postal

Service, it would not be analogous to either the safety threat underlying falsified truck driver logs or the effectiveness of Navy ships, in that no harm would have incurred to American society in general.

Because Federal law generally exempts the U.S. Postal Service from Federal statutes relating to Federal and public contracts, and imposes on the Postal Service the status of a private business in its dealings with the Cycling Team, the Feds lack jurisdiction to investigate the alleged fraud as a criminal offense. Without a right to investigate the underlying crime, the Feds have no basis for investigating a conspiracy to commit that crime.

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[1] Michael S. Schmidt and Julie Macur, *Cycling Doping Inquiry May Broaden*, May 25, 2010, New York Times, http://www.nytimes.com/2010/05/26/sports/cycling/26cycling.html?hp

[2] See, New York Times, *Jeff Novitzky*, Times Topics, updated May 19, 2010, New York Times, http://topics.nytimes.com/top/reference/timestopics/people/n/jeff novitzky/index.html?inline=nyt per

[3] http://www.fbi.gov

[4] https://Postalinspectors.uspis.gov/

[5] *Id.*

[6] *United States v. McCord*, 143 F.3d 1095 (8th Cir. 1998); 18 U.S.C. § 1001

[7] *United States v. Brooks*, 111 F.3d 365 (4th Cir. 1997); 18 U.S.C. § 1031

[8] 39 U.S.C. § 410(a)

[9] 39 U.S.C. § 410(b)(2)

[10] 18 U.S.C. § 1031

[11] 18 U.S.C. § 1001

[12] U.S. Const., art. 1, § 8, cl. 7

[13] Subject to the limitations of 39 U.S.C. § 401; and see Boehme v. United States Postal Service, 343 F.3d 1260 (10th Cir. 2003)

[14] 39 U.S.C. § 401 (9)

[15] *Id.*

[16] *United States Postal Service v. Flamingo Industries* (USA) Ltd., 540 U.S. 736 (2004)

[17] *USPS v. Flamingo, supra.*

[18] 18 U.S.C. § 1696

[19] 39 U.S.C. § 409(e)(1)

[20] 39 U.S.C. § 401

[21] 39 U.S.C. § 409(e)(1)

[22] *Boehme v. USPS, supra*, internal cites omitted

[23] The existence of a provision for carriage of mails outside of the mails (39 U.S.C. § 601) is the Government's acknowledgement that entities other than USPS can perform such operations.

## SUBMIT YOUR ARTICLES

The editors of the *Texas Entertainment and Sports Law Journal ("Journal")* are soliciting articles on a sports or entertainment law topic for publication in the TESLAW Journal.

All submitted articles will be considered for publication in the *Journal*. Although all submitted articles may not be published, we may choose to publish more than one article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All articles should be submitted to the editor and conform to the following general guidelines. Articles submitted for publication in the Spring 2010 issue of the journal must be received no later than January 1, 2010.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½" x 11" paper and submitted in triplicate with a diskette indicating its format.

If you have any questions concerning the *Journal*, please email Sylvester R, Jaime, Editor, Texas Entertainment & Sports Law Journal, at srjaimelaw@clear.net.

## NOTICE:

Art-friendly journal seeking budding artist to display artwork on cover! If you would like to see your (or your client's, mother's, spouse's, friend's, etc.) artwork on the cover of our journal, please submit a JPEG or EPS file (no less than 300 dpi) along with a PDF of the artwork to Sylvester Jaime at *srjaimelaw@comcast.net.*

Articles appearing in the Journal are selected for content and subject matter. Readers should assure themselves that the material contained in the articles is current and applicable to their needs. Neither the Section nor the Journal Staff warrant the material to be accurate or current. Readers should verify statements and information before relying on them. If you become aware of inaccuracies, new legislation, or changes in the law as used, please contact the Journal Editor. The material appearing in the Journal is not a substitute for competent independent legal advice.

## *At the last Annual Meeting . . .*

*Incoming Chair Don Valdez thanking outgoing Chair D'Leslie Davis for her service and contributions.*

*D'Leslie Davis, Mike Tolleson and other Section Council members discussing business issues at annual meeting.*

# SAVE THE DATE

## OCTOBER 7-8, 2010

## *THE 20TH ANNUAL ENTERTAINMENT LAW INSTITUTE*

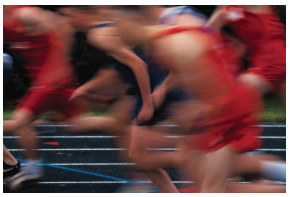
**Radisson Hotel & Suites • Austin, Texas**

**This is the same weekend as the**
**AUSTIN CITY LIMITS MUSIC FESTIVAL**
**which starts on Friday.**

# BEING A SPORTS STAR IS NOT ALL GLAMOUR AND GLITZ

Guns, a knife and a bulletproof vest were found in the vehicle of Robert O'Ryan. O'Ryan was accused in a Los Angeles courtroom of stalking 18 year old Olympic gymnast Shawn Johnson. O'Ryan pleaded not guilty by reason of insanity to stalking and burglary charges after breaking onto a studio lot to meet Johnson while she was a contestant on Dancing With the Stars.

### *GENDER IN QUESTION FOR SOUTH AFRICAN STAR*



World champion runner Caster Semenya is at the center of a gender investigation by the International Association of Athletics Federation, track and field's governing body. The IAAF ordered gender-verification tests after the world 800-meter champion's "dramatic improvement in times and muscular build." After winning the 2009 world championship in Berlin, and despite reports from South Africa that she has been cleared to return to competition, Semenya has not competed since the world championships due to the IAAF's order requesting medical officials to verify her gender.

### *FLYING BAT LEADS TO PERSONAL INJURY*

Tyler Colvin a rookie with the Chicago Cubs suffered a punctured chest wounds after slivers from a shattered bat hit him. Colvin was hospitalized and is expected to miss the rest of the baseball season. Cubs manager Mike Quade commenting on the Welington Castillo's maple bat said, "These bats, I'm amazed it doesn't happen more." Colvin was struck when trying to score from third on a ball hit by Castillo. A Cubs trainer stated that Colvin was "… hit in the upper left chest, allowing air into his chest well and potentially into his lungs."

### *SCANDAL LEADS TO BACKGROUND CHECKS*

USA Swimming approved new athlete-protection measures. At its annual convention, USA Swimming made it mandatory for members to report any credible allegations of sexual abuse. All non-athlete members must pass a criminal-background check and anyone who interacts with swimmers, including local club owners and chaperones, are required to join USA Swimming. The screenings are required every 2 years for coaches and will be updated on a "real-time" basis so any infractions are included promptly in the groups' database.

### *LOS ANGELES DODGERS DIVORCE ACTION*

Despite being an attorney and MIT MBA graduate, Jamie McCourt claims under cross-examination by Houston attorney Steve Susman that she did not read the marital property agreement she signed that gave ownership of the Los Angeles Dodgers to her husband Frank McCourt. Calling her testimony "As fictional as Harry Potter …" Susman representing Mr. McCourt, cross examined Mrs. McCourt about the marital property agreement she signed in 2004. Mrs. McCourt's lawyer Dennis Wasser, in response to a question about how Mrs. McCourt could sign the document without reading it, said, "These people are wealthy individuals. They have documents thrust in front of them all the time. Jaime didn't read the document. Frank didn't read the document." Despite signing the document, Mrs. McCourt is claiming the Dodgers are community property entitling her to a 50-50 ownership of the team. "I trusted Larry [Silverstein – drafter of the marital agreement]," testified Mrs. McCourt. "I trusted Frank. It was not unusual for me and Frank to sign documents without reading them if we trusted the person who asked us to sign." The marital agreement also gave her sole ownership of the couple's houses. Susman was able to get Mrs. McCourt to repeatedly say that she "didn't understand sections of the documents." She also stated that she trusted Silverman and never thought he would allow her to sign something that waived her rights to part ownership in the Dodgers.

# UNTIMELY OBITS:


***Reggie Garrett***, a quarterback for West Orange Stark High School in Orange, Texas, collapsed after throwing a touchdown pass and later died. His family said that Garrett had a history of seizures.

High school junior offensive lineman ***Kody Turner*** collapsed in practice and died. The Chickasha, Oklahoma high school football game was canceled after the student's death.

Jefferson County, Kentucky Public Schools settled a lawsuit over the death of ***Max Gilpin***. The 15-year old football player collapsed during practice and died 3 days later. The defendants agreed to pay $1.75 million to settle the suit.

College wrestler ***Jesus Cruz***, 20 years old and captain of the team, collapsed during a tournament and died. The Rio Hondo College athlete was on the mat when he collapsed. Mount San Antonio College in Walnut Creek, California canceled the remainder of the tournament following Cruz's collapse.

★ ★ ★ ★ ★ ★ ★ ★ ★ ★

## COURT CASES OF NOTE

***The Western Athletic Conference*** filed suit against the University of Nevada and Fresno State University. The WAC wants the schools to stay in the league during the 2011-12 season, pay damages and a $5 million dollar break-up fee for leaving the league. The teams are heading for the Mountain West Conference and prefer to start play after the 2011 football season. The WAC filed the lawsuit in Jefferson County District Court in Colorado. "The damages the WAC could incur if Fresno State and Nevada left early are very, very significant," said WAC commissioner Karl Benson. "That's what has driven this: to protect the assets of the WAC as a corporate entity."

***The Tennessee Titans*** filed a lawsuit against University of Southern California and its coach Lane Kiffin for "maliciously" luring away assistant running backs coach Kennedy Pola. Tennessee Football, Inc. filed the lawsuit in Davidson County Chancery Court accusing the university and the coach of violating Pola's contract. The Titans claim that Pola was required to obtain the team's permission to discuss the job. Team coach Jeff Fisher stated, "Kiffin neglected to make the customary courtesy phone call to let him and the NFL team know he was interested in hiring Pola." The Titan's also claim that Pola's contract required him to obtain written permission from the team president and general counsel because "verbal consent is inadequate." The suit alleges that because Pola was hired away one week before training camp the team's planning was disrupted, causing "potential loss of confidence by players," the loss of salary and benefits paid to Pola along with "future damages."

***The Dallas Cowboys*** indoor practice facility collapsed and ex-Cowboy Jamar Hunt claimed the collapse caused "career-ending injury." The tight end free agent, was one of 27 players taking part in a rookie mini-camp when the facility collapsed. Hunt claims that he suffered "serious, disabling and permanent injuries." The National Institute of Standards and Technology concluded that the facility fell in winds of 55 mph to 65 mph, despite engineering standards requiring the facility to withstand wind speeds of 90 mph. Hunt's attorney, Michael Guajardo, said Hunt suffered career ending injuries when a steel support landed on him. The Cowboys cut Hunt and he has not been able to sign with another team because he can't be cleared capable of plying without surgery, which will brand him as "a damaged commodity" said Guajardo.

## NOTICE

The next TESLAW council meeting will be on October 7th at the Radisson Hotel, 111 East First Street, in Austin at 5:30 p.m., immediately following the Entertainment Law Institute. You are cordially invited to attend, and we also hope you take advantage of the excellent CLE program offered at ELI.

For future planning purposes, we will also have a meeting in March, 2011, during SXSW (date to be announced) and another scheduled meeting during the State Bar Convention in San Antonio next June."

# RECENT SPORTS AND ENTERTAINMENT LAW PUBLICATIONS

Compiled by Monica Ortale, Faculty Services & Reference Librarian
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# ENTERTAINMENT & SPORTS LAW SECTION
# of the STATE BAR of TEXAS

## MEMBERSHIP APPLICATION

The Entertainment & Sports Law Section of the State Bar of Texas was formed in 1989 and currently has nearly 600 members. The Section is directed at lawyers who devote a portion of their practice to entertainment and/or sports law and seeks to educate its members on recent developments in entertainment and sports law. Membership in the Section is also available to non-lawyers who have an interest in entertainment and sports law.

*The Entertainment & Sports Law Journal,* published two times a year by the Section, contains articles and information of professional and academic interest relating to entertainment, sports, intellectual property, art and other related areas. The Section also conducts seminars of general interest to its members. Membership in the Section is from June 1 to May 31.

To join the Entertainment & Sports Law Section, complete the information below and forward it with a check in the amount of $30.00, made payable to the Entertainment & Sports Law Section, ATTN: TESLAW Treasurer, P.O. Box 12487, Capitol Station, Austin, Texas 78711. You can also go to www.texasbar.com, click on "Sections and Committees", click on "Sections", click on "Join a Section Online" - It's as easy as 1, 2, 3. If these methods do not work for you, please call the State Bar Sections Department at 1-800-204-222 ext. 1420 to register by phone or fax.

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