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Casenotes

MULTIPLE CHARACTERIZATIONS FOR THE SINGLE ENTITY ARGUMENT?: THE SEVENTH CIRCUIT THROWS AN AIRBALL IN CHICAGO PROFESSIONAL SPORTS LIMITED PARTNERSHIP v. NATIONAL BASKETBALL ASSOCIATION

I. INTRODUCTION

Much to the purist sports fan's chagrin, sports in today's society revolves around money. Owners are faced with the difficult task of finding increasing sources of revenue to offset what they perceive as the alarming trend of escalating players' salaries. Broadcasting rights to sporting events is one revenue source that has grown by leaps and bounds over the past two decades.

1. See Erik Brady & Debbie Howlett, Who's Paying for Ballpark Binge? You Are, SEATTLE TIMES, Sept. 22, 1996, at D5. Before the year 2000, 45 new stadiums and arenas will be built, costing over nine billion dollars. See id. Owners frequently move teams to other cities to cash in on a better financial offer. See id. The St. Louis Rams (formerly the Los Angeles Rams), Oakland Raiders (who moved from Oakland to Los Angeles, back to Oakland), Baltimore Ravens (formerly the Cleveland Browns) and Tennessee Oilers (formerly the Houston Oilers) all have moved in the last two seasons. See id. In addition, the Seattle Seahawks are threatening to move to Los Angeles. See id. The concept of loyalty to fans has evaporated in the rush to build new stadiums with high-priced luxury boxes. See Robert Draper, Spoils Sports, TEX. MONTHLY, Jan. 1, 1996, at 110. One estimate has 38 owners, from each of the four major professional sports, playing the stadium blackmail game, where loyalty to a city means little and a team typically belongs to the city with the highest bid. See id.

2. See Mark Montieth, New Arena Means Suite Success for Revenue-Searching Pacers, INDIANAPOLIS STAR, Aug. 18, 1996, at B1. Indiana Pacers president Donnie Walsh recently received a letter from a season ticket holder telling him he had to re-sign Pacers' star guard Reggie Miller. See id. Walsh wondered if the fan would be willing to pay three times his season ticket price, because Miller's salary will most likely triple as well. See id. This is an example of the crisis that faces all National Basketball Association (NBA) teams right now. See id. Salaries are increasing dramatically, but the fans can only shoulder so much of the burden before they stop buying tickets. See id.

The anticipated size of Miller's raise has become the status quo. Escalating players' salaries have become a sports-wide epidemic, evidenced by the fact that the average professional baseball player's salary rose from $600,000 to over $1,000,000 in just two years. See David M. Van Glish, The Future of Sports Broadcasting and Pay-Per-View: An Antitrust Analysis, 1 SPORTS L. J. 79, 82 (1994).

3. The broadcast rights to the summer Olympic Games sold for $25 million in 1976, compared to the $456 million that NBC paid for the 1996 Games. See Money and the Olympics: 'Amateurs' Mostly a Myth, USA TODAY, July 27, 1996, at A14. In addition, the broadcast rights to baseball cost $1.7 billion over the next five years, the NBA's four year deal is worth $1.1 billion, the National Football League has a four-year deal worth $4 billion, and the American Broadcasting Company (ABC)
The importance of broadcasting rights cannot be overstated. The money paid for these rights can fuel the growth of a fledgling sport or league. From a broadcaster's view, the ownership of broadcasting rights can increase exposure and even help to define a network. The magnitude of broadcasting rights is also evidenced by the bidding wars that often accompany their acquisition, in addition to the divisive effects they can have on the sports themselves.

The National Basketball Association (NBA), which sells the broadcasting rights to its games, would ordinarily be subject to antitrust laws in the formation of such contracts. This is not the case in professional sports broadcasting, however, because Congress has tailored a specific exception to the antitrust laws, known as the

will broadcast college football's championship game for the next seven years for over $500 million. See Thomas Bonk, Olympic TV Is a Cash Register, L.A. TIMES, July 26, 1996, at C1.

4. See Chris Sheridan, As NBA Turns 50, Stern Focuses on the Future, ROCKY MOUNTAIN NEWS, Oct. 27, 1996, at C15. Interest in watching NBA games has increased substantially since 1979. See id. In that year, NBA games could not generate enough ratings to be broadcast in prime time and the NBA Finals were shown via tape delay. See id. Now games are viewed in 170 countries in 44 languages. See id. In addition, the league has over 100 different television deals. See id.

Major League Soccer (MLS) demonstrated the importance of broadcast rights in a rather unusual way. See Stefan Fatsis, Major League Soccer Does Well in U.S. Debut, WALL ST. J. EUROPE, Oct. 21, 1996, at 13. The league is paying the Entire Sports Network (ESPN) and ABC to broadcast its games through 1998, at which point the league hopes that a steady ratings increase will produce a big payoff. See id. After the 1998 season, the league commissioner believes that broadcasting rights will be the biggest stream of revenue. See id.

5. See Matthew Rose, New Sports Highlights Service Heats up Off-Field Competition, WALL ST. J. EUROPE, Oct. 7, 1996, at 8. Sports News Television (SNTV) is attempting to negotiate broadcast rights to enable it to become the world's first "exclusive niche marketer" of sports highlights. Id. The station's plan was unsuccessful during the 1996 Summer Olympics, however, because television news crews not associated with the $900 million broadcast rights agreement were not allowed to transmit highlights until up to a day after the event was finished. See id. See also Larry Lebowitz, Dolphins Join WQAM in Three-Team Package; All-Sports Station Pays $35 Million for Five Years, SUN-SENTINEL (Ft. Lauderdale, Fla.), Oct. 30, 1996 (low-rated AM station purchases radio rights for Miami Dolphins, Florida Marlins and Florida Panthers in bid to establish itself as "market's radio sports leader").

6. See Stefan Fatsis & Elizabeth Jensen, ABC Sets Deal for Football Championship, WALL ST. J., July 24, 1996, at A3. Fox spent $395 million to purchase rights for NFL games from longtime broadcaster CBS. See id. Moreover, ABC initially offered $399 million for college football's big four bowl games, but was forced to increase its bid to $500 million. See id.

7. See Robes Patton, Labor Snag Delays Riley's Free-Agent Shopping Spree, SUN-SENTINEL (Ft. Lauderdale, Fla.), July 10, 1996, at C1. The NBA free-agent signing period was briefly delayed following the imposition of a lockout which lasted only eight minutes. See id. The disruption was due to a dispute over how to share the profits from the television contract between the NBA, the National Broadcasting Company (NBC) and Turner Network Television (TNT). See id.

8. For a discussion of how the antitrust laws apply to sports in general and basketball specifically, see infra notes 39-44 and accompanying text.
Sports Broadcasting Act (SBA).9 The SBA was designed to permit leagues to sell broadcasting rights without the scrutiny that similar contracts in other settings receive.10 In addition, if the NBA is a single entity, it cannot violate section 1 of the Sherman Antitrust Act and is free to negotiate restrictions in television contracts.11

The United States Court of Appeals for the Seventh Circuit addressed the issue of broadcast rights in the context of the Sports Broadcasting Act and the Sherman Antitrust Act in Chicago Professional Sports Limited Partnership v. National Basketball Ass’n (NBA II-A).12 In NBA II-A, the Seventh Circuit concluded that when acting in the broadcast market, the NBA was closer to a single entity than a joint venture.13 The court went on to speculate that a professional sports league may be a single entity for some purposes and a joint venture for others.14

This Note focuses on the Seventh Circuit’s single entity analysis. Section II describes the facts that gave rise to NBA II-A.15 Section III discusses the Sherman Antitrust Act and the circumstances leading to the adoption of the Sports Broadcasting Act as an exception to the Sherman Antitrust Act.16 The Seventh Circuit’s analysis and disposition of the issues are covered in detail in Section IV.17 Section V analyzes the reasoning behind the Seventh Circuit’s deci-

10. For a discussion of the Sports Broadcasting Act, see infra notes 112-19 and accompanying text.
12. 95 F.3d 593 (7th Cir. 1996).
13. See id. at 600. A joint venture can violate Section 1 of the Sherman Act while a single entity cannot because a Section 1 violation requires a plurality of actors, which a single entity obviously lacks. See Michael L. Denger et al., Vertical Price, Customer and Territorial Limitations, 890 PLI/Corp. 505, 507 (1995). For a more in-depth discussion of the importance of the single entity issue, see infra notes 77-111 and accompanying text.
14. See NBA II-A, 95 F.3d at 600. The court acknowledged that while the NBA might be a single entity for the purpose of selling broadcast rights, it might also be a joint venture in the recruitment of players. See id.
15. For a discussion of the facts in NBA II-A, see infra notes 20-33 and accompanying text.
16. For a discussion of the background of the Sports Broadcasting Act and the Sherman Act, see infra notes 34-119 and accompanying text.
17. For a discussion of the court’s analysis and holding in NBA II-A, see infra notes 120-91 and accompanying text.
In conclusion, Section VI explores the impact of **NBA II-A** on future suits against professional sports leagues.19

II. FACTS

The NBA limits the number of NBA games that may be broadcast over "superstations," which are independent, over-the-air television stations that broadcast in their local markets and are also available on other cable systems across the country.20 The NBA's rules, including those applicable to broadcast limitations, are voted on by the NBA's Board of Governors, which consists of one representative from each team.21 Prior to the 1990-91 season, each team was permitted to televise up to twenty-five games on a superstation, but a new rule was adopted for the 1990-91 season which reduced that number to twenty.22 Chicago Professional Sports Limited Partnership (Bulls), the entity that owns the NBA's Chicago Bulls, claimed that the reduction violated antitrust law and sought an injunction to allow them to continue to sell the rights to twenty-five games.23 After a five day trial, the district court granted the Bulls and WGN the injunction, which prevented the NBA from enforcing

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18. For an analysis of the court's reasoning, see infra notes 192-212 and accompanying text.

19. For a discussion of the impact of **NBA II-A**, see infra notes 213-17 and accompanying text.


21. See NBA I, 754 F. Supp. at 1338. NBA teams pool and market some of their television rights. See id. at 1340. At the time this case initially went to trial, each team received $6.8 million dollars in shared revenue from the national television contract. See id. In addition, each team may broadcast half (41) of its regular season games on any non-superstation, over-the-air television station within its home territory. See id. at 1344. The team keeps all the revenue from such broadcasts. See id. With very few limits, a team may broadcast any number of games on local cable stations within 75 miles of the team's home city. See id. The team also retains all of this revenue. See id.

22. See id. at 1338, 1344. The reduction cost the Chicago Bulls approximately $640,000, based on the $128,000 a game that WGN paid in 1989-90, the first year of its contract with the Bulls. See id. at 1348.

23. See id. at 1338-39. WGN Continental Broadcasting Co. (WGN), the superstation to which the Bulls licensed its 25 games, also joined the suit. See id. at 1338.
the new restriction on superstation broadcasts. The injunction was upheld by the Seventh Circuit.

Despite the twenty-five game limit specified in the injunction, the NBA allowed the Bulls to broadcast thirty games on WGN for the 1991-92, 1992-93, and 1993-94 seasons. The NBA allowed only twenty-five games, the number mandated by the injunction, for the 1994-95 season.

In 1993, the NBA restructured its contracts in an attempt to take advantage of some of the suggestions in the Seventh Circuit's 1992 opinion (NBA I-A). The league transferred all broadcast rights to the National Broadcast Company (NBC) in a contract that

24. See id. at 1339.
25. See Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n (NBA I-A), 961 F.2d 667, 677 (7th Cir. 1992). The court noted that the NBA had not offered an adequate reason to overrule the district court. See id. at 677. The court did, however, acknowledge that the NBA might have been hampered by the speed of the litigation. See id. at 676. The court said "this case went to decision like greased lightning. Seven weeks from complaint to trial is unheard of in antitrust litigation . . . . If litigation ought not resemble a marathon, neither is the 100-yard dash a good model." Id.
27. See id.
28. See Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n (NBA II-A), 95 F.3d 593, 595 (7th Cir. 1996). The suggestions of the Seventh Circuit included:
1. Establish that the league is a "single entity" so that whatever it does is unreviewable . . . .
2. Transfer all team copyrights to the NBA.
3. Invoke the protection of the SBA by transferring all telecast rights of NBA games whether national or local to the NBA and then put a cap on the number of national telecasts of NBA games in the contracts with NBC and Turner.
4. Demonstrate that a limitation on the distribution of Bull's games on WGN "expands output, serves the interests of consumers and should be applauded rather than condemned." (citation omitted). To do this, the court suggested that the NBA might try to establish that keeping popular games off superstations helped weaker teams attract support of their local audiences and increase their gate receipts, which is a principal source of team revenues, while at the same time attracting larger audiences, an expansion of output.
5. Attempt to establish that the elimination of all Bulls' games on WGN will cause WGN and the Bulls to suffer no "antitrust injury," i.e., loss that comes "from acts that reduce output or raise prices to consumers." (citation omitted).
6. Have the league impose a superstation fee or tax which would produce income for the teams since it would be shared equally and would eliminate any "free-riding" by the Bulls and WGN.
NBA II, 874 F. Supp. at 847.
The district court noted these suggestions with disapproval, stating that they "effectively eliminated the very real possibility of a negotiated settlement of the case." Id.
also permitted eighty-five games to be broadcast on superstations. Since the NBA licensed seventy of these games to the Turner superstations (Turner Broadcasting System (TBS) and Turner Network Television (TNT)), WGN would only be allowed to broadcast fifteen games. The Bulls chose to ignore the fifteen game limitation and instead sold thirty games to WGN. Following a nine-week trial, the district court modified the injunction, increasing the number of superstation games to thirty. Both sides appealed.

III. BACKGROUND
A. Sherman Act
1. History of the Sherman Act and Its Applicability to Professional Sports Leagues

In 1889, Senator Sherman introduced the Sherman Bill, which he declared was a “bill to declare unlawful, trusts and combinations in restraint of trade and production.” This bill was never passed, however, and a more comprehensive version, written by Senator George F. Hoar of Massachusetts, was substituted with Senator Sherman’s approval. Congress passed the Sherman Act in 1890 as a response to an increasing trend of mergers. With its major

29. See NBA II-A, 95 F.3d at 595. Under this contract, each team had the right to broadcast all 82 games, 41 over the air and 41 on cable. See id. For an explanation of the television broadcast rules, see supra note 21.

30. See NBA II-A, 95 F.3d at 595.

31. See id. The Bulls took the position that the 30 games were authorized in the NBC contract as over-the-air broadcasts, in addition to being authorized by the injunction. See id. The Bulls did make one concession: no Bulls game would be broadcast on WGN the same time as a game on a Turner superstation. See id. at 595-96.

32. See Chicago Prof’l Sports Ltd. Partnership v. National Basketball Ass’n (NBA II-A), 95 F.3d 593, 595 (7th Cir. 1996). The court chose thirty games, because for three seasons the NBA voluntarily allowed the Bulls to broadcast that many. See NBA II, 874 F. Supp. at 869. The court noted that this agreement did not have a negative impact on the league; rather, the evidence indicated the agreement may have had a positive impact. See id. Therefore, the court concluded that a reduction below thirty games would be unreasonable. See id.

33. See NBA II-A, 95 F.3d at 595. The Bulls wanted to broadcast 41 games on WGN, while the NBA insisted that a lower number of games (15 or 20) was consistent with antitrust laws. See id.

34. ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW 2 (Greenwood Press 1980) (quoting 51 CONG. REc. 96 (1889)).

35. See id. Both houses passed Senator Hoar’s version without amendment, but it was entitled the Sherman Act due to Senator Sherman’s leading role in the proposal of such a law. See id.

provisions in Section One and Two, the principal purpose of the Sherman Act is to promote competition.

Initially, courts did not apply antitrust laws to professional sports because they believed that professional sports teams and leagues were not engaged in interstate commerce. The Supreme Court expressed this view in 1922, holding that baseball games were "purely state affairs," despite the fact that interstate travel was involved. While this characterization of professional sports may have been passed "against a background of rampant cartelization and monopolization of the American economy." See id. at 729.

Senator Sherman reflected his view that economic power was synonymous with political domination when he said:

If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.


37. Section One provides in pertinent part:

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 hereby declared to be 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....


Section Two provides in pertinent part, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire ... to monopolize ... shall be deemed guilty of a felony ...." 15 U.S.C. § 2 (1988).

38. See Don Shacknai, Sports Broadcasting and the Antitrust Laws: Stay Tuned for Baseball After the Bulls Romp in Court, 1 Sports L. 1, 4 (1994). The Supreme Court, in summarizing the purpose of the act, stated:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.


39. See Michael Jay Kaplan, Application of Federal Antitrust Laws to Professional Sports, 18 A.L.R. Fed. 489, 495 (1974) (noting that baseball had "relatively slight" impact on interstate commerce and that game was "in a real sense, a local exhibition").

40. Federal Base Ball Club of Baltimore v. National League of Prof’l Baseball Clubs, 259 U.S. 200, 208-09 (1922). The Court viewed the constant travelling as incidental to commerce. See id. at 209. By way of analogy, the Court reasoned that
have been appropriate in the early twenties, the landscape of professional sports dramatically changed over the following three decades.41 In 1953, the Supreme Court upheld the 1922 decision, declaring that Congress “had no intention of including the business of baseball within the scope of the federal antitrust laws.”42 In reaching this decision, the Court noted that baseball had developed for thirty years under the assumption that antitrust laws did not apply to it.43 This exemption from the antitrust laws is unique to baseball, since antitrust laws do apply to other sports such as boxing, football and basketball.44

2. The Rule of Reason and Per Se Illegality

Taken literally, all contracts would violate the Sherman Act,45 but the Supreme Court has interpreted the language to prohibit only those agreements which unreasonably restrain trade.46 Ordinarily the “Rule of Reason” is the analytical tool courts use to determine if an agreement unreasonably restrains trade, but in limited circumstances, a rule of per se illegality applies.47 Under the rule of per se illegality, some agreements are considered so harmful to

a law firm does not participate in interstate commerce simply because one of its lawyers goes to another state to argue a case. See id.

41. See generally, Kaplan, supra note 39, at 495 (contrasting relative simplicity of baseball in 1920s with sophistication of 1950s).
43. See id. at 357. In addition, the Court indicated that Congress’ silence on the matter in the aftermath of the ruling constituted acquiescence. See id. The Court did not rule out the possibility that there were “evils” in baseball that should be rectified by the Sherman Act, but did express a preference for a legislative, rather than a judicial, solution. Id.
44. See Kaplan, supra note 39, at 495-96 (citing Flood v. Kuhn, 407 U.S. 258, 282-83 (1972)). The Court, in Flood, presumed that in addition to boxing, football and basketball, antitrust laws also applied to hockey and golf. Flood, 407 U.S. at 283.

In 1971, the Court recognized that the antitrust laws applied to basketball. Haywood v. National Basketball Ass’n, 401 U.S. 1204, 1205 (1971). In Haywood, a player contested the NBA rule which prohibited drafting any player until four years after his high school graduation. See id. at 1204. The Supreme Court, recognizing that the NBA was subject to the antitrust laws, characterized the rule as a group boycott in violation of the Sherman Act and reinstated the District Court’s injunction which allowed Haywood to play. See id. at 1205-07.

45. See Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918). The Court recognized that “every agreement concerning trade, every regulation of trade, restrains.” Id.
46. See Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
47. See Michael D. Blechman, Relationship Among Competitors, 941 PLI/Corp. 7, 12 (1996) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)). For a discussion of the per se rule and its decreasing role in antitrust analysis, see infra notes 52-65 and accompanying text. For further discussion of the Rule of Reason, see infra notes 66-68 and accompanying text.
competition that they are deemed illegal without an inquiry. The Supreme Court has applied per se illegality to tying arrangements, division of markets and group boycotts.

Until the late 1960s, the per se approach dominated the antitrust landscape. The high watermark was the Supreme Court's decision in *United States v. Arnold, Schwinn & Co.*, in which the Court applied the per se rule to non-price vertical restrictions imposed by a supplier on its distributors.

48. See Blechman, *supra* note 47, at 12. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming value are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." See *id.* (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

49. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 8 (1958). The tying arrangement in this case was a "preferential routing" clause in sales contracts and leases. See *id.* at 3. Between 1864 and 1870, Congress granted Northern Pacific 40 million acres of land. See *id.* at 2-3. When Northern Pacific sold or leased this land, they included a "preferential routing" clause in the contracts. See *id.* at 3. This clause forced the grantee or lessee to ship all commodities manufactured or produced on the land via Northern Pacific when the rates were equal to competing carriers. See *id.*

50. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 244 (1899). The agreement in *Addyston* specified that six defendants would not compete in 36 states and territories. See *id.* at 213.

51. See *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 467-68 (1941). Members of the Fashion Originators' Guild (Guild) cooperated in a boycott by refusing to sell to retailers who also sold garments that copied designs of Guild members. See *id.* at 461. Over 12,000 retailers signed agreements to participate in the boycott, though more than half were essentially coerced out of the fear that Guild members would not sell to them if they did not cooperate. See *id.* at 461-62.

52. See Thomas Piraino, *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1755 (1994). The main reason for the early dominance of the per se rule was its simplicity. See *id.* at 1756. The rule served as a deterrent to anticompetitive conduct because businesses were aware that certain types of activity should be avoided. See *id.* When the rule failed to deter, this simplicity saved judicial resources due to shorter, less expensive trials. See *id.*

Despite its dominance, the per se rule was subjected to some heavy criticism. See *id.* Opponents viewed its simplicity as rigidity. See *id.* The rule's blanket prohibition of certain conduct, without examining its economic impact, deterred both beneficial and harmful practices. See *id.* Some antitrust commentators were troubled by such a rule that banned a restraint, even if that restraint actually promoted economic efficiency. See *id.* at 1756-57.


55. See Piraino, *supra* note 52, at 1756. The Court rejected Schwinn's attempt to sell bicycles to a distributor subject to territorial limitations upon resale. See
A decade later, the per se approach began to lose favor, as evidenced by the Supreme Court's reversal of *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania, Inc.* The Court decided that non-price vertical restrictions should be evaluated under the Rule of Reason. The Court acknowledged that, while the provision restricted intrabrand competition among sellers of Sylvania televisions, it promoted interbrand competition as a whole. In changing to the Rule of Reason analysis, the Court stated that "[d]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." 

Since *GTE Sylvania*, the per se approach has suffered a steady erosion in favor of the Rule of Reason. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court indicated a willingness to apply the Rule of Reason to a price-fixing agreement. The Court determined that a fixed common price for the licensing of musical compositions was not a per se violation of Section 1. In *Schwinn*, 388 U.S. at 379. The Court found such an agreement to be clearly destructive to competition and therefore per se invalid. See *id*. According to the Court, the restriction was unreasonable since the manufacturer no longer retains dominion over the product or risk of loss once the product is sold to a distributor. See *id*.


57. See *GTE Sylvania*, 433 U.S. at 57-58. The disputed restriction was a contractual requirement that forced distributors to sell Sylvania televisions only from authorized locations. See *id* at 38.

58. See *id* at 54-55. Such restrictions allow manufacturers to "achieve certain efficiencies in the distribution of . . . products." *Id* at 54.

59. *Id* at 58-59. The Court cited three important factors in abandoning the per se rule for vertical restrictions. See *id* at 57-58. First, there is widespread use of various forms of vertical restrictions in the United States economy. See *id* at 57. Second, the weight of scholarly and judicial authority indicated that such restrictions served an economic purpose. See *id* at 57-58. Finally, there was no showing that Sylvania's agreements would have a "pernicious effect on competition." *Id* at 58.

60. See Piraino, *supra* note 52, at 1757-58. For a discussion of the advantages and drawbacks of the per se rule, see *supra* note 52.


62. See Piraino, *supra* note 52, at 1758. According to the Court, the rigid per se analysis should be ignored in favor of examining whether the restraint "appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast*, 441 U.S. at 19-20.

63. See *id* at 24-25. In *Broadcast*, Columbia Broadcasting System, Inc. (CBS) sued the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), claiming that blanket licenses constituted illegal price fixing. See *id* at 4.

ASCAP is organized as a clearing house for copyright holders. See *id* at 5. Each of its 22,000 members grants it nonexclusive rights to license their works. See *id*. ASCAP then issues licenses and pays its members royalties according to a schedule that takes several factors into consideration. See *id*. BMI, which represents 10,000 publishing companies and 20,000 authors and composers, functions in a
upholding the restriction under the Rule of Reason, the Court determined that the common license permitted more efficient marketing of compositions. The Court has also applied the Rule of Reason to other cases which previously warranted a per se analysis.

Most courts examine competitive restraints under Section 1 using the Rule of Reason. When using the Rule of Reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." The four primary factors that courts typically focus on are: effect on intrabrand competition, effect on interbrand competition, market share and the business objectives of the supplier.

The "quick look" approach is another analytical tool which has developed in recent years as an intermediate standard between per

very similar way. See id. Almost all domestic copyrighted compositions are stored by ASCAP, which has three million, and BMI, which has one million. See id.

Each organization uses blanket licenses, which CBS alleged to be price fixing. See id. A blanket license gives the licensee the right to perform "any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term." Id. The fee for a blanket license is a percentage of total revenues or a flat fee and does not depend on the amount or type of music used. See id.

64. See id. at 20. The Court acknowledged that the blanket license was a creature of necessity. See id. With thousands of users and copyright holders and millions of compositions, the blanket license was the only way to permit "unplanned, rapid, and indemnified access" to compositions, while at the same time protecting the copyright holder. Id. The blanket license avoided the prohibitive cost of individual transactions and monitoring. See id. In addition, the Court recognized that an individualized fee for a blanket license would result in the need for a complicated fee schedule and would also produce reporting problems. See id.


66. See id.

67. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977). Justice Brandeis elaborated on some of the relevant considerations: [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

68. See Barbara A. Reeves et al., Vertical Restrictions, 915 PLI/Corp. 9, 34 (1996). The business objectives of the supplier are relevant to determine whether there are legitimate justifications for the restraint. See id. The threshold question is usually the existence of market power. See id.
se illegality and the full Rule of Reason analysis. While the quick look approach originated in one of Chief Justice Burger's dissenting opinions, National Collegiate Athletic Association (NCAA) v. Board of Regents is commonly cited to demonstrate its analysis. Under this approach, there is an initial presumption that the restraint impairs competition. The court then takes a quick look at the justifications for the restraint. If the court is satisfied after this quick look that the justifications are legitimate, a full Rule of Reason analysis is conducted. The quick look approach permitted the Supreme Court to take a longer look at the conduct in NCAA, which it would normally have condemned under the per se approach. After the Court determined that the justifications warranted further consideration, the Court examined the facts of the case and found the agreement to be anti-competitive.

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71. See Yancey, supra note 69, at 678, 681. Chief Justice Burger first advocated the quick look approach in his dissent from United States v. Topco Assocs., Inc., 405 U.S. 596, 613 (1972) (Burger, C.J., dissenting). See Yancey, supra note 69, at 678. In Topco, Chief Justice Burger did not think it was appropriate to condemn an "agreement among several small grocery chains to join in a cooperative endeavor" under a per se rule. Topco, 405 U.S. at 613 (Burger, C.J., dissenting). Burger thought the Court should not formulate "per se rules with no justification other than the enhancement of predictability and the reduction of judicial investigation." Id. at 622.

72. See Yancey, supra note 69, at 679. The quick look approach actually has two variations. See id. With both approaches there is an initial presumption that the restraint impairs competition. See id.

73. See id. The first variation of the quick look approach functions as a burden shifting device. See id. The initial presumption shifts the burden to the defendant to demonstrate procompetitive benefits sufficient to justify the presumed anticompetitive effects. See id. In the second variation, the court's quick look is based on the arguments alone. See id.

74. See id. at 679-80. The court must not only be satisfied that the justifications are legitimate, but they must also be capable of proof. See id. at 680.

75. See NCAA, 468 U.S. at 100. In NCAA, the Board of Regents of the University of Oklahoma challenged a NCAA television plan in which all teams received the same fee for a televised game. See id. at 98. The fee did not increase with viewing audience, the number of markets in which the game is broadcast, or the caliber of teams. See id.

The Court acknowledged that this type of horizontal price fixing was usually condemned using the per se rule. See id. at 100. According to the Court, "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." Id. at 101.

76. See Yancey, supra note 69, at 681 (citing NCAA, 468 U.S. at 104-13).
3. Single Entities

To establish a violation under Section 1 of the Sherman Act, a plaintiff must prove not only that the restraint is unreasonable, but also that there was a plurality of actors involved, acting "in a concerted manner to impose the restraint."\(^\text{77}\) Section 1 does not prohibit anti-competitive action by a single entity.\(^\text{78}\) Section 2 of the Sherman Act applies to action by a single entity, which is only unlawful if it "threatens actual monopolization."\(^\text{79}\) Thus, a single firm is not in violation of Section 1, even if it appears to unreasonably restrain trade.\(^\text{80}\)

In *Copperweld Corp. v. Independence Tube Corp.*,\(^\text{81}\) the Supreme Court rejected, in part, the intra-enterprise conspiracy doctrine.\(^\text{82}\) The Court held that a parent and its wholly owned subsidiary had to be viewed as a single firm because they had a "complete unity of interest."\(^\text{83}\) The Court limited its holding to a parent and wholly owned subsidiary, so it is unclear whether this analysis applies to affiliated corporations that the parent does not wholly own.\(^\text{84}\) Those who argue that a league is a single entity believe that the Court's rationale in *Copperweld* should be extended to professional sports leagues.\(^\text{85}\)

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78. See id.
80. See id.
82. See Thomas W. McNamara, *Defining a Single Entity for Purposes of Section 1 of the Sherman Act Post Copperweld: A Suggested Approach*, 22 SAN DIEGO L. REV. 1245, 1247. The Supreme Court, in what is termed the "intra-enterprise conspiracy doctrine," had traditionally treated parent companies and their subsidiaries as separate entities. See id. at 1246.
83. *Copperweld*, 467 U.S. at 771. In *Copperweld*, Lear Siegler, Inc. (Lear) operated Regal Tube Co. (Regal) as an unincorporated division. See id. at 756. David Grohne served as president of this division, which manufactured structural steel tubing. See id. at 755-56. Copperweld Corp. (Copperweld) acquired Regal from Lear in 1972. See id. at 756. As part of the transaction, Lear and its subsidiaries were not allowed to compete with Regal in the United States for five years. See id. Grohne, who took a position with Lear prior to the sale of Regal, established his own steel tubing company, Independence Tubing Corp. (Independence) while he was still working for Lear. See id. Independence entered into a contract with Yoder Co. to construct a tubing mill. See id. Copperweld and Regal sent Yoder a threatening letter, which resulted in Yoder repudiating its contract. See id. at 757. In addition, Copperweld attempted to discourage banks and real estate firms from doing business with Independence. See id.
84. See McNamara, supra note 82, at 1247.
Circuits are split as to whether a professional sports league is a single entity that is subject only to Section 2 of the Sherman Act, or a joint venture that must be analyzed under Section 1's Rule of Reason. The majority of courts that have considered this issue have characterized professional sports leagues as joint ventures. Although other sources support the single entity position, only one circuit has followed it.

The Second Circuit was the first circuit to analyze a professional sports league and conclude that it was a joint venture. In *North American Soccer League v. NFL*, the North American Soccer League (NASL) challenged an NFL provision which prohibited NFL team owners from owning other major professional sports league teams. In characterizing the NFL as an "unincorporated joint venture consisting of 28 individually owned separate professional football teams, each operated through a distinct corporation or partnership," the court focused on the teams' independent economic interests. The court concluded that the cross-ownership supporters of the single entity theory argue that while the teams are separately owned, the teams share a "unity of interest" due to the desire to promote league competition and to preserve the economic well being of every team. See id. at 952-53.


87. See *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *Los Angeles Mem'l Coliseum Comm'n v. National Football League (NFL)*, 726 F.2d 1381 (9th Cir. 1984); *North Am. Soccer League (NASL) v. NFL*, 670 F.2d 1249 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).


89. See *North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982). The Circuit Court for the District of Columbia reached a similar conclusion three years earlier. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978). The court stated "[t]he clubs operate basically as a joint venture." *Id.* The court did not, however, go into an extensive analysis to reach this conclusion; instead, it only cited a couple of cases and articles as support for its proposition. See id. at 1179 n.19.

90. 670 F.2d 1249 (2d Cir. 1982).

91. See *NASL, 670 F.2d at 1250.* This "cross-ownership ban" began as an unwritten policy of the NFL commissioner in the 1950's. See id. at 1254. This policy was reduced to writing in 1967. See id. Finally, in 1978, the NFL owners attempted to amend the NFL by-laws to force NFL owners to divest their soccer holdings. See id.

92. *Id.* at 1251-52. The court noted that teams do not share expenses, capital expenditures or profits. See *id.* In addition, each team has independent sources of revenue, including local TV and radio revenues, parking and concessions. See *id.*
ban substantially restrained competition, thus violating the Rule of Reason. 93

In *Los Angeles Memorial Coliseum Commission v. NFL*, 94 the Ninth Circuit emphasized the independent nature of each team in its determination that the NFL was a joint venture. 95 The Los Angeles Memorial Coliseum Commission challenged a rule which required three-quarters of the teams to approve a team’s move into another team’s home territory. 96 Initially, the court rejected the NFL’s argument that the teams must cooperate in order to produce NFL football. 97 In rejecting the NFL’s single entity defense, the court emphasized that each team has independent management policies in addition to the off-field competition for players, coaches and management personnel. 98

Similarly, the First Circuit focused on off-field competition between teams. 99 In *Sullivan v. NFL*, 100 the owner of the New England Patriots, William Sullivan, sued the NFL, claiming that an NFL ban on the sale of publicly traded stock violated the Sherman Act. 101

The court also acknowledged that the cross-ownership ban was proposed largely to protect the Philadelphia Eagles and Minnesota Vikings, who were suffering financially due to the increased prominence of the NASL Philadelphia Atoms and Minnesota Kicks. See id. at 1254. The Philadelphia Atoms were leading the NASL in attendance, while the Eagles lost money from 1969-74 and from 1976-77. See id. Minnesota Vikings owner, Max Winter, said that the Kicks were “drawing very well” and hurting his team in terms of media exposure and fan participation. Id. For these reasons the court concluded that the “NFL teams are separate economic entities engaged in a joint venture.” Id. at 1252.

93. See id. at 1261. The court remanded the case so that the district court could enter a permanent injunction against the cross-ownership ban. See id. at 1262.

94. 726 F.2d 1381 (9th Cir. 1984).
95. See id. at 1390.
96. See id. at 1385. The challenged provision was Rule 4.3 of Article IV of the NFL Constitution. See id. at 1384. The Oakland Raiders’ lease with the Oakland Coliseum had expired in 1978. See id. at 1385. The Raiders, and managing general partner Al Davis, approached the Los Angeles Coliseum concerning a potential move to Los Angeles. See id. Upon reaching an agreement to move, Davis announced the plans at a NFL meeting. See id. The NFL teams voted against the plan 22-0, with five teams abstaining. See id.
97. See id. at 1389. The court noted that “[t]he necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act.” Id.
98. See id. In addition, teams that are close to each other compete for fan support, local television and radio revenue and media space. See id.
100. 34 F.3d 1091 (1st Cir. 1994).
101. See id. at 1094. Article 3.5 of the NFL Constitution requires three-quarters of team owners to approve any transfer of team ownership interests, except transfers within a family. See id. In addition to this provision, the NFL has an uncodified policy against a sale to the public in the form of publicly traded stock.
The court rejected the NFL’s argument that *Copperweld Corp. v. Independence Tube Corp.*\(^{102}\) establishes the NFL as a single entity.\(^{103}\) According to the court, the degree of off-field competition between teams indicated that the NFL was not a single entity.\(^{104}\)

While no circuit has held a traditional sports league to be a single entity, the Fourth Circuit found a professional sports association to be a single entity in *Seabury Management, Inc. v. Professional Golfers’ Ass’n.*\(^{105}\) The district court concluded that the Professional Golfers’ Association (PGA) and its Middle Atlantic Section (MAPGA) were a single entity under *Copperweld.*\(^{106}\) The Fourth Circuit affirmed the district court’s findings in an unreported opinion.\(^{107}\)

Despite the lack of precedential support, there is additional persuasive authority that supports the single entity view of a professional sports league. Chief Justice Rehnquist, dissenting from the denial of certiorari in *NFL v. NASL,*\(^{108}\) believed that competition between teams off the field was “rare,” and aside from the competition between two teams in one city,\(^{109}\) the league competes as a

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\(^{103}\) See *Sullivan,* 34 F.3d at 1099. According to the court, in *Copperweld,* although the subsidiary was a legally distinct entity, it had the same interests. See *id.* The court distinguished the case at hand, noting that NFL teams compete in several ways off the field, indicating that the teams have different interests, unlike the subsidiary in *Copperweld.* See *id.*

\(^{104}\) See *id.* The court stated that it was “well established” that NFL teams compete off the field for fan support, players, coaches, ticket sales, local broadcast revenues and the sale of team merchandise. *Id.* at 1098.


\(^{106}\) See *Seabury,* 878 F. Supp. at 777. The district court determined that the PGA and MAPGA functioned as a single economic unit. See *id.* In reaching this conclusion, the court noted that even though each PGA Section had its own revenues, by-laws, elected officers and programs designed to only benefit the Section, the Sections’ actions must receive final approval from the PGA. See *id.* at 778. In addition, the court found it “significant” that each Section was “governed by the PGA Constitution, by policies adopted either at PGA annual meetings or by the PGA Board of Directors, and by other pertinent policy documents, such as trademark licensing agreements.” *Id.* at 777.

\(^{107}\) See *Seabury,* Nos. 94-1814, 94-1688, 1995 WL 241379, at *3.


\(^{109}\) New York has two professional football teams, the Giants and Jets, while Los Angeles was home to the Rams and Raiders at the time this case was decided.
“unit against other forms of entertainment.” In addition, the Supreme Court has hinted, in dicta, at support for the single entity construction.

B. Sports Broadcasting Act

In 1961, Congress enacted the Sports Broadcasting Act (SBA) as a statutory exemption to the antitrust laws. Congress passed the SBA to counteract the effects of United States v. NFL, which invalidated a contract between the NFL and the Columbia Broadcasting System (CBS). The SBA permits a league to negotiate a single television contract on behalf of its teams without the scrutiny of the antitrust laws. In addition to overruling United States v. NFL, Congress intended to protect small-market teams that lacked

Both teams have subsequently left Los Angeles, for St. Louis and Oakland respectively.

110. Id. at 1077 (Rehnquist, C.J., dissenting).

111. See Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2126 (1996). The Court acknowledged that teams in a professional sports league depend on some cooperation for economic survival. See id. Reflecting on this fact, the Court said “that circumstance makes the league more like a single bargaining employer . . . .” Id. The Court said no more on this issue, because it was irrelevant to the case before them. See id.


The antitrust laws . . . shall not apply to any joint agreement by or among persons engaged in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.


Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such Section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

Id. § 1292 (1988).


114. See NFL, 196 F. Supp. at 447. The invalidated contract would have dramatically altered the previous arrangement in the NFL. See id. at 446. Prior to the 1961 contract, each team sold its own television rights. See id. The new agreement provided that all teams in the league would pool their television rights, giving the league Commissioner authority to sell the package of television rights. See id. at 447. The court interpreted this contract as eliminating competition among the teams regarding the sale of television rights and struck down the contract. See id.

sufficient bargaining power to negotiate favorable television contracts.116

After its passage in 1961, the SBA went virtually unchallenged until the late-1980s.117 The few cases that did arise under this Act involved "tangential" issues, including the formation of rival sports teams or leagues, blackout provisions and related exemptions from antitrust law.118 The lawsuit filed in 1990 by the Chicago Bulls is considered the first significant challenge to the Act.119

IV. NARRATIVE ANALYSIS

A. Majority Opinion

In Chicago Professional Sports Ltd. Partnership v. National Basketball Association (NBA II-A),120 the Seventh Circuit addressed two principal issues. First, the court considered whether the SBA, an exemption from antitrust law, applied to the NBC-NBA television contract.121 Second, the court considered whether the NBA is a single entity, exempt from Section 1 of the Sherman Act, or a joint venture subject to Section 1 liability.122 The Seventh Circuit concluded that the NBA may be characterized as a single entity for some purposes and a joint venture for others.123

1. The Sports Broadcasting Act

The Seventh Circuit first considered whether the Sports Broadcasting Act exception to the antitrust laws applied.124 The court noted that the NBA's initial contract failed to satisfy Section 1 because the Act only applied to "transfers" of broadcast rights.125 The court found that the 1993 contract, written with that distinction in mind, met the conditions of Section 1.126

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116. See id.
117. See Goodman, supra note 20, at 485.
118. See id.
119. See id.
120. 95 F.3d 593 (7th Cir. 1996).
121. See id. at 596.
122. See id. at 596-600. For the pertinent text of Section 1, see supra note 37.
123. See NBA II-A, 95 F.3d at 600.
124. See id. at 596.
125. See id.
126. See id. In the new contract, the league took title of the copyright interests from the games and transferred all broadcast rights to NBC. See id. The NBA then received some of the broadcasting rights back, subject to contractual restrictions. See id.
Although Section 1 had been satisfied, the court determined that Section 2 had not been satisfied, and therefore the antitrust laws applied.\textsuperscript{127} By attempting to restrict telecasts to the teams' home markets, the NBA-NBC contract violated Section 2, which in turn made Section 1 inapplicable.\textsuperscript{128} The court pointed out that because the Sports Broadcasting Act is a special-interest exception to the antitrust laws it receives a "beady-eyed reading."\textsuperscript{129} The court acknowledged that the NBA had "understandable and proper" business reasons for writing the contract the way it did, but the Sports Broadcasting Act exception did not apply, so antitrust laws were in effect.\textsuperscript{130}

2. Sherman Act

The Seventh Circuit identified three issues that its 1992 decision left unresolved.\textsuperscript{131} The NBA did not appeal whether there was an antitrust injury, so the court did not discuss this issue.\textsuperscript{132} The other two issues concerned the NBA's status as a single entity and its ability to collect a fee for games broadcast on superstations.\textsuperscript{133}

a. Waiver

As an initial matter, the court ruled against the Bulls' assertion that the single entity argument was forfeited because of its omission from the first appeal.\textsuperscript{134} The court rejected this argument because

127. See NBA II-A, 95 F.3d at 596.
128. See id.
129. Id. The court stated that the league had "to jump through every hoop; partial compliance doesn't do the trick." Id.
130. Id. The court noted that the Sports Broadcasting Act would have applied if the league had assumed licensing and then sold the rights to Bulls games to a local Chicago station, instead of WGN. See id. In addition, the Act itself offered other options. See id. According to the court, the league chose not to pursue these options for tax reasons and because there is greater responsibility as a licensor, as opposed to a regulator. See id.
131. See id.
132. See NBA II-A, 95 F.3d at 596. The court hinted that the NBA would have lost this issue anyway, noting parenthetically that the Bulls and WGN suffer injury in fact. See id.
133. See id. In its initial appearance before the Seventh Circuit, the NBA did not raise the single entity argument, however, on remand the NBA did argue that it was a single entity, and should therefore be able to collect a fee like other licensors of entertainment products. See id. In addition, the league's Board of Governors adopted a rule requiring a fee for games licensed to superstations. See id. This fee would be based on the fee that the two Turner stations pay for games licensed directly from the league. See id.
134. See id.
of the ramifications it would have on other complex cases. In addition, the court noted that its prior decision had stated that the issue would be available later in the litigation.

b. Fees

The court next turned to the issue of a fee for games broadcast on superstations. After briefly describing the district court's decision to cut the proposed NBA fee, the court held that the district court had improperly cut the fee. In examining the fee, the court focused on output, which it said was the "core question" in antitrust. Acknowledging that a high price is not necessarily indicative of a violation of the Sherman Act, the court concluded that the NBA fee would not reduce output. Because there were no antitrust issues relating to the fee, the court was obliged to respect the NBA's decision.

135. See id. at 596-97. The court remarked on how quickly the case had progressed, noting that the case initially went to trial and decision in seven weeks. See id. The court was concerned that, by denying the NBA the chance to pursue the single-entity issue, defendants in other complex cases would "drag their heels" to make sure that all possible issues had been covered. Id. at 597. The court concluded that this result would not benefit anyone. See id.

136. See id. After first noting that parts of the NBA's brief "verged" on arguing the NBA is a single entity, the court concluded that "it would be imprudent to decide the question after such cursory dialog. Perhaps the parties will join issue more fully in the proceedings still to come in the district court." NBA I-A, 961 F.2d at 673.

137. See NBA II-A, 95 F.3d at 597.

138. See id. The court held that the fee was invalid because it was excessive. See id. The NBA calculated the fee by starting with the fee that it charged the Turner stations, $450,000 per game. See id. Then the NBA reduced the fee to reflect the fewer cable stations that carry WGN. See id. The judge, however, started with advertising revenues WGN generated from retransmission on cable and cut that figure in half so that the Bulls could keep "their share" of the revenues. Id. As a result of this recalculation, the fee was cut from $138,000 to $39,400. See id.

The court analogized the district court's opinion to that of an agency with the power to regulate rates. See id. The court ruled that this was improper, stating that "antitrust laws do not deputize district judges as one-man regulatory agencies." Id.

139. Id.

140. See id. The court pointed out that even though the Bulls complain that the fee is excessive and unfair, they still want to broadcast 30 games, or more if they are allowed. See id. The court also noted that WGN receives other benefits which compensate for the high fee: "(i) the presence of Bulls games may increase the number of cable systems that carry the station, augmenting its revenues 'round the clock; (ii) WGN slots into Bulls games ads for its other programming; and (iii) many viewers will keep WGN on after the game and watch whatever comes next." Id.

141. See NBA II-A, 95 F.3d at 597. The court analogized decisions of a league's internal governance to the decisions of a corporation's board of directors. See id.
c. Single Entity Argument

The court began its analysis of the single entity issue by examining the NBA's arguments. The NBA argued that, although it consists of twenty-nine teams and the national organization, it creates a single product, NBA Basketball. This product competes with other basketball leagues, sports and forms of entertainment. Separate ownership provides a powerful interest to field better teams, which increases competition in the league. According to the NBA, antitrust law encourages cooperation within an organization to increase its competitiveness with other organizations and products.

Next, the court considered the district court's decision that Section 1 of the Sherman Act prohibits almost all cooperation between separately incorporated firms. The district court concluded that the only cooperation allowed, according to Copperweld Corp. v. Independence Tube Corp., was when there is a "complete unity of interest." The appellate court conceded that this phrase appeared in Copperweld, but dismissed its application to antitrust law as "silly." The court noted that a single firm may have many competing interests, but that does not mean that its actions must be justified under the Rule of Reason.

The court characterized Copperweld as distinguishing between unilateral and concerted actions, and concluded the parent-subsidi-
ary relationship belongs on the unilateral side. Concentrated action is found when conduct “deprives the marketplace of the independent centers of decision making that competition assumes” without the efficiencies associated with firm integration. Some entities, such as mergers, joint ventures and various vertical agreements, are somewhere in between these two extremes and should be assessed under the Rule of Reason. Using this framework, the court concluded that the NBA could be considered a single firm.

The court then attempted to classify the NBA as either a joint venture or a single-entity, acknowledging that it had characteristics of both. First, the court distinguished the NBA from the National Collegiate Athletic Association (NCAA), an organization which the Supreme Court has characterized as a joint venture. The NBA has no existence apart from sports: only the NBA can make “NBA Basketball” games, and only the NBA can “make” teams. According to the court, each of these characteristics makes the NBA appear like a single firm. In addition, from the perspective of fans and advertisers, “NBA Basketball” is one product originating from a single source. Yet, a college basketball player, who seeks to sell his skills, perceives NBA teams as distinct. Finally, the court noted that the Supreme Court had a difficult time fitting the National Football League into one of the two categories.

153. See NBA II-A, 95 F.3d at 598.
154. Id. (quoting Copperweld, 467 U.S. at 769).
155. See id.
156. See id. at 598-99. Based on the preceding analysis of Copperweld, the court concluded that the district court’s legal standard was wrong and its judgment flawed. See id.
157. See NBA II-A, 95 F.3d at 599. A single-entity is analyzed under Section 2 of the Sherman Act, while a joint venture must undergo the Rule of Reason analysis of Section 1. See id.
158. See id.
159. See id. Since the start of this litigation, two teams were added, the Toronto Raptors and Vancouver Grizzlies. See id. The teams consisted of players from the existing teams and additional draft picks. See id.
160. See id.
161. See id. This is true even though teams such as the Chicago Bulls and Seattle Supersonics are “highly distinguishable.” Id. In the same way, General Motors is a single firm, although the Corvette and Chevrolet are very different cars. See id.
162. See NBA II-A, 95 F.3d at 599. In addition, the difficulty in transferring skills in basketball to another sport makes the “league look like a group of firms acting as a monopoly.” Id.
The court next examined the way other circuits have treated various sports leagues. First, the court noted that its role was one of deferential appellate review, and therefore it could not choose one interpretation over the other since that was the duty of the district court. While most courts have preferred the joint venture characterization of sports leagues, both the Professional Golf Association (PGA) and an electric cooperative were found to be single firms, even though they were less integrated than the NBA. In addition, the court cited a "strong dissent" from the denial of certiorari by Justice Rehnquist who argued that the North American Soccer League was a single firm.

After considering the parties' arguments and judicial precedent, the court concluded that Copperweld does not impose one "right" characterization. The court determined that, due to the diversity of sports, the analysis should be undertaken "one league at a time." The court went further, however, and suggested that the analysis could occur "one facet of a league at a time." As a result, the court explicitly left open the possibility that the NBA was a single firm when licensing broadcasting rights and a joint venture required if the league is to survive. See Brown, 116 S. Ct. at 2126. Although not confronted with the single entity issue, the Court did say that the NFL seemed more like a single bargaining employer. See id.

For a discussion of the judicial treatment of professional sports leagues, see supra notes 87-111 and accompanying text.

The NBA had urged the court to reach a decision, following six years of litigation on the subject. See id.

See id. (citing Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994); North Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982); Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978)).


In Mt. Pleasant, the rural electric cooperative consisted of three levels. See id. at 271. The 43 local distribution cooperatives are owned by the members who receive the electricity. See id. These 43 cooperatives own the six generation-and-transmission cooperatives (G & Ts) which sell and transport wholesale electricity. See id. The six G & Ts own Associated Electric Cooperative, which owns almost all of the electrical generating capacity and all the larger power lines. See id. The court found this arrangement to be a single entity because the relationship was entirely interdependent, not independent. See id. at 277.

See NBA II-A, 95 F.3d at 599 (citing NFL v. North Am. Soccer League, 459 U.S. 1074, 1077 (1982)).
when limiting the competition for players who have few other market options.\textsuperscript{172}

The court concluded that the NBA's superstation rules cannot be condemned without a full Rule of Reason inquiry because the NBA is sufficiently integrated.\textsuperscript{173} The court noted that it had upheld the district court's original injunction due to the district court's characterization of the NBA as a cartel.\textsuperscript{174} After the NBA's latest arguments, the court concluded that the NBA's actions in the broadcast market were closer to those of a single firm than a group of independent firms.\textsuperscript{175} As a result, the court stated that the Bulls must establish that the NBA has exercised power in a relevant market that has injured consumers.\textsuperscript{176}

In addition, the court briefly discussed market power, which it noted was an "indispensable ingredient" of every claim under the Rule of Reason analysis.\textsuperscript{177} The NBA argued that it lacks market power because there is no time slot in which the NBA dominates and because the season overlaps all the other professional and college sports.\textsuperscript{178} The court noted that if the NBA assembled a homogeneous audience for advertisers it still might have market power, even if it was a small portion of air-time.\textsuperscript{179} Although both parties had devoted significant portions of time to this issue at trial, the judge deemed the issue irrelevant and refused to make findings of fact on the subject.\textsuperscript{180} The court ended its discussion by noting that market power is only irrelevant if the NBA is a single firm under \textit{Copperweld Corp. v. Independence Tube Corp.},\textsuperscript{181} but suggested that due to the difficulty of characterization, it might be better to analyze the case under the Rule of Reason since market power would be the

\textsuperscript{172} See \textit{id.}

\textsuperscript{173} See \textit{NBA II-A}, 95 F.3d at 600.

\textsuperscript{174} See \textit{id.}

\textsuperscript{175} See \textit{id.}

\textsuperscript{176} See \textit{id.}

\textsuperscript{177} See \textit{id.}

\textsuperscript{178} See \textit{NBA II-A}, 95 F.3d at 600.

\textsuperscript{179} See \textit{id.} at 601.

\textsuperscript{180} See \textit{id.}

\textsuperscript{181} 467 U.S. 752 (1984).
starting point. The Seventh Circuit vacated the decision of the district court and remanded for further proceedings.

B. Concurring Opinion

In his concurrence, Judge Cudahy agreed with the majority's opinion that the "quick look" doctrine did not apply to this case, but disagreed with the majority on two significant issues. First, Judge Cudahy contended that the district court was correct when it examined the NBA's fee for WGN broadcasts of Bulls games. He also believed that the court should not have even reached the single entity argument, due to its omission from the prior appeal.

In conclusion, Judge Cudahy offered some thoughts on the analysis of the single entity argument. His analysis of the subject focused on the independent economic interests of the individual teams. He ended his discussion of the single entity issue by criti-

182. See NBA II-A, 95 F.3d at 601.
183. See id. The court stated that the Bulls and WGN would be bound by the league's limitations on superstation telecasts until further proceedings were conducted. See id.

Complicating the remand slightly is the fact that the presiding judge died before the Seventh Circuit decided this latest appeal. See id. The court suggested that the parties might agree that an assessment of credibility is unnecessary, which would allow the new judge to base his decision on the transcript, exhibits, stipulations and argument. See id.

184. See id. Judge Cudahy thought the "quick look" approach should have a narrow application. See id. He noted that it originated in the analysis of the NCAA, which is much less integrated than the NBA. See id. (citing National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984)). According to Judge Cudahy, the NBA fits in between loose alliances, where anticompetitive agreements are obvious, and fully integrated entities, which merit far less attention. See id. For this reason he thought a full Rule of Reason analysis was necessary. See id. at 601-02.

185. See id. at 602. Judge Cudahy was not satisfied with the majority's conclusion that output would not be affected. See id. He thought that cost and output were related issues in this case. See id. He pointed out that the district court found as a fact that "[the NBA's proposed fee] may well at some future date decrease output and distribution of Bulls games on WGN . . . ." Id. Judge Cudahy noted that it was difficult to tell if output is reduced because the output is limited to thirty games, instead of what the market can bear. See id. Judge Cudahy would have remanded the fee issue as well, because he was not sure if the size of the district court's adjustment was justified by antitrust considerations alone. See id.

186. See id. Judge Cudahy took issue with the majority's decision to entertain the single entity argument despite its omission from the previous appeal. See id. According to Judge Cudahy, the exception announced by the court was without precedent. See id. He did not understand why defendants in complex cases should receive preferential treatment. See id. In his opinion, Judge Cudahy felt that the issue could not be reached at all, despite dicta in the earlier opinion to the contrary. See id.

187. See NBA II-A, 95 F.3d at 602-06.
188. See id. at 603.
cizing two points in the majority’s analysis. First, Judge Cudahy did not believe it was a good idea to “divorce” the issues of single entity and ownership. Second, he disagreed with the majority’s discussion of independent interests.

V. CRITICAL ANALYSIS

In NBA II-A, the Seventh Circuit avoided deciding if the NBA is a single entity or joint venture. To reach this indecisive result, the Seventh Circuit first had to ignore the principles of waiver and allow the NBA to raise an argument it had failed to raise in the first appeal. In concluding that the NBA may be a single entity for some purposes and a joint venture for others, the Seventh Circuit has made a disturbing break from several other circuits that have considered the issue.

To reach the single entity argument, the Seventh Circuit concluded that its omission by the NBA in its previous appeal was excused. The court believed that public policy dictated this result.

189. See id. at 605-06.
190. See id. at 605. This separation, according to Judge Cudahy, leads to “messy and inconsistent application of antitrust law.” Id.
191. See id. (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984)). Judge Cudahy emphasized that the holding in Copperweld focused on the relationship of a parent corporation and its wholly-owned subsidiary. See id. Judge Cudahy disagreed with the majority’s example of competing interests in a firm. See id. at 606. He believed Copperweld focused on the economic interests of decisionmakers, noting that employees usually do not fit this description. See id.

In Judge Cudahy’s opinion, there was a “strong” argument that the NBA was a joint venture because the teams are individually owned and revenue is not shared in a fixed proportion. Id. These factors allow each team to have independent economic interests. See id.

192. See NBA II-A, 95 F.3d at 599. The court remanded the case for a third time. See id. Although the court appreciated the parties’ desire for a decision after six years of litigation, the court could not say that the NBA was a single entity or joint venture as a matter of law. See id. In reaching this conclusion, the court cited several conflicting authorities on the issue as evidence that more than one characterization is possible. See id. at 599-600. For a discussion of the conflicting views on the status of professional sports leagues, see supra notes 87-111 and accompanying text.

193. See id. The court allowed the NBA to raise the single entity argument, despite the league’s failure to raise the issue during the first appeal before the Seventh Circuit. See id. at 596-97. According to the court, any other result would have far reaching consequences for complex litigation. See id. at 597. For a discussion and criticism of the court’s decision to ignore the rule of waiver, see infra notes 195-98 and accompanying text.

194. See id. at 600.
195. See id. at 596-97. The court noted that the case was tried and decided in a short amount of time, seven weeks. See id. at 596. This was made possible by “judicial willingness to entertain in subsequent rounds of the case arguments that could not be fully developed in such short compass.” Id. at 597.
because to rule otherwise would slow down litigation in complex cases because defendants would be very careful to raise every argument. This result is curious, because it is contrary to the usual rules applicable to waiver of issues on appeal. In addition, it is difficult to understand why the NBA, with its many lawyers, should be given special treatment that a much smaller litigant would not receive.

Next, the Seventh Circuit chose to "straddle the fence" when it decided that the NBA could be a joint venture in some aspects and at the same time a single entity in other aspects. This analysis contradicts that of the First, Second, Fourth, Ninth and District of Columbia Circuits, which have all classified professional sports

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196. See id. at 597. The court was concerned that without such an exception, defendants in complex cases would "drag their heels in order to ensure that nothing was overlooked, a step that would benefit no one." Id. Interestingly enough, the court cites Schering Corp. v. Illinois Antibiotics Co., 89 F.3d 357 (7th Cir. 1996), in conjunction with its decision to hear the previously omitted single entity argument. See id. In Schering, however, Judge Posner stated the following rule: "We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the district court's decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver." Schering, 89 F.3d 357, 358 (7th Cir. 1996) (emphasis added). This case is simply inapplicable, however, because the NBA, having lost initially in district court, was the appellant before the Seventh Circuit. See NBA I-A, 961 F.2d 667 (7th Cir. 1992). With this exception unavailable, the NBA must fall within the general rule, also enunciated by Judge Posner: "A ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case." Schering, 89 F.3d at 358.

197. See NBA II-A, 95 F.3d at 602 (Cudahy, J., concurring). See, e.g., Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir. 1994) (failing to develop argument or cite legal authority waives issue). The Seventh Circuit failed to follow its own precedent. The court acknowledged that the NBA had failed to develop its argument by stating:

Parts of the NBA's brief verge on the argument that a sports league is a single entity as a matter of law. . . . But the NBA did not contend in the district court that the NBA is a single entity . . . . It does no more than allude to the possibility here. Whether a sports league is a single entity for antitrust purposes has significance far beyond this case, and it would be imprudent to decide the question after such cursory dialog.

NBA I-A, 961 F.2d 667, 672-73 (7th Cir. 1992). Having said this, the court ignored the rules of waiver, saying "[p]erhaps the parties will join issue more fully in the proceedings still to come in the district court." Id. at 673.

198. See NBA II-A, 95 F.3d at 602. The NBA had at least 21 attorneys working on this appeal. See id. at 594-95.

199. See id. at 600. The court concluded that the NBA is closer to a single entity when it acts in the broadcast market but may be a joint venture when it restricts competition for players. See id. By way of analogy, the court pointed out that just because McDonald's franchises can coordinate the release of a new hamburger, it doesn't automatically follow that the franchises can set uniform wages for certain types of employees. See id. Likewise, the ability of teams to agree on a television contract does not mean they can set wages for players. See id.
leagues as either joint ventures or single entities. Each of these circuits was confronted with a professional sports league that had characteristics very similar to the NBA. Unlike these circuits, however, the Seventh Circuit suggested that the single entity analysis could be performed several times on an individual sports league, by examining each facet of the league.

Both the First and Ninth Circuits focused on the significant off-field competition between teams in concluding that the NFL was a joint venture. The First Circuit noted that NFL teams have diverse interests, as evidenced by competition for fan support, players, coaches, ticket sales, local broadcast revenues and the sale of team merchandise. The Ninth Circuit also focused on each of these factors, in addition to the independence of each team's management.

The NBA shares almost all of the characteristics of a joint venture that the First and Ninth Circuits deemed important in determining that the NFL was a joint venture. The district court found that in addition to head-to-head competition in some geographic areas, “[a]ll the teams compete for media attention, for coaching staffs and front office personnel and, with some restraints, for players.” In addition, each NBA team keeps ninety-four percent of the gate receipts for regular season home games. NBA teams may also keep 100% of local television revenues. These

supra notes 77-111 and accompanying text. 201. For a discussion of these characteristics, see infra notes 203-09 and accompanying text.

See NBA II-A, 95 F.3d at 600.

See Sullivan v. NFL, 34 F.3d 1091, 1098-99 (1st Cir. 1994); Los Angeles Mem'l Coliseum Comm'n, 726 F.2d 1381, 1390 (9th Cir. 1984).

See Sullivan, 34 F.3d at 1098. For the facts and holding of Sullivan, see supra notes 99-104 and accompanying text.

See LA Coliseum, 726 F.2d at 1390. For a discussion of LA Coliseum, see supra notes 94-98 and accompanying text.

The NBA teams do not compete for merchandise sales. See NBA I, 754 F. Supp. 1336, 1340 (N.D. Ill. 1991). The teams split proceeds from team merchandise evenly. See id. In 1990, the Bulls sold more merchandise than any other team, yet they still received 1/27th of the total revenues. See id.

Id. at 1341. The head to head competition occurs in the New York region where the New York Knicks and New Jersey Nets compete and also in the city of Los Angeles where the Los Angeles Clippers and Los Angeles Lakers play. See id.

The NBA collects only six percent of the gate receipts. See id. Interestingly, NFL teams split their gate receipts 60-40 between home and away teams. See id.

Id. at 1344. At the time of the first trial, NBA rules permitted teams to televise "up to half (41) of its regular season games, home or away, over any com-
examples of off-field competition are almost identical to the factors the First and Ninth Circuits encountered.

The Seventh Circuit reached the single entity issue by selectively following precedence and judicial procedure. The court determined that it must remand the issue, again, because more than one characterization was possible. But the Seventh Circuit did not stop there. Instead of simply remanding the case, the court, in dicta, chose to leave open the possibility that each facet of a league must be examined under a Rule of Reason analysis. The court offered no justification for such a position. Nowhere in its opinion does the Seventh Circuit cite differences between the NFL and NBA which justify a different approach from that taken by other circuits. A far cry from offering lower courts an innovative legal analysis, this decision merely complicates an already difficult issue.

VI. IMPACT

The result the Seventh Circuit reached in NBA I-A will only increase litigation in all complex fields. The court carved out a new exception to the rules of waiver, which would allow a defendant to raise new issues in subsequent appeals, as long as the case is sufficiently complex. Such an exception, unique to the Seventh Circuit, could make it a haven for litigating difficult cases, because the risks associated with omitting an issue are no longer present.

More specifically, litigation in the antitrust field will increase as well. A finding that a league is a single entity or joint venture will not close the issue, because another facet of a league may be vulnerable to attack. This result could be particularly harmful to the NBA itself, because even if it were to win on remand, it would merely close the issue of broadcast rights. The court’s dicta could commercial over-the-air television station other than a superstation located in its ‘home territory.’”

210. For a discussion of the court’s treatment of waiver, see supra notes 195-98 and accompanying text.

211. See NBA II-A, 95 F.3d at 599. This is the third time that the Seventh Circuit has remanded the case. The court justified this remand by saying “[w]e are not authorized to announce and apply our own favored characterization unless the law admits of only one choice.”

212. See NBA II-A, 95 F.3d at 600.

213. See NBA II-A, 95 F.3d at 597. For a discussion of the court’s handling of the waiver issue, see supra notes 195-98 and accompanying text.
courage a college player to challenge the single entity status in relation to the recruitment of players.\textsuperscript{214}

The single entity issue is having a dramatic impact on the formation of new professional sports leagues. New leagues are being created as single entities, specifically to avoid the application of antitrust laws.\textsuperscript{215} Unfortunately, even such precautions cannot protect a league from litigation, frivolous or otherwise. After Major League Soccer’s first year of operation, ten players have filed suit, alleging that the league’s player restraints violate the antitrust laws.\textsuperscript{216}

The split in the circuits, the impact on new leagues and the amount of money at stake in professional sports all make this issue ripe for a Supreme Court decision.\textsuperscript{217} The split in the circuits that existed prior to this case is now even more alarming, due to the possibility of multiple characterizations for the same league. Until the Supreme Court steps in, litigation will proliferate and attorneys will be forced to contrive new structures to withstand antitrust challenges. The situation in the Seventh Circuit is more distressing than most. The NBA, or any other professional sports league, may find itself in court several different times, on several different issues, attempting to convince a court that a league is a single entity.

\textit{Timothy R. Deckert}

\textsuperscript{214} See \textit{NBA II-A}, 95 F.3d at 600.
\textsuperscript{215} See Stefan Fatsis, \textit{Futbol Invades the U.S.}, \textit{WALL ST. J.}, Apr. 5, 1996, at B9. The newest men’s professional soccer league, Major League Soccer (MLS), is collectively owned by six investors, who each paid five million dollars to operate, but not own, a club. \textit{See id.} MLS hopes that this single entity structure will allow it to restrict player salaries while avoiding antitrust litigation. \textit{See id.} Similarly, the new women’s professional team, the American Basketball League (ABL), is organized as a single entity, with the league owning all the clubs. \textit{See Donna Carter, League Boss Refuses to Fear the WNBA, \textit{DENRO Post}, Jan. 27, 1997, at C9.} This structure will shield the ABL from antitrust liability, while keeping salaries low to prevent the league from folding from escalating salaries. \textit{See id.}


\textsuperscript{217} The Chicago Bulls and NBA will not reach the Supreme Court, due to a settlement late last year. \textit{See Chicago Bulls, NBA Reach Pact on Televising Games}, \textit{WALL Sr. J.}, Dec. 13, 1996, at B6. Under the terms of the settlement, the Bulls are allowed to televise 15 games a year nationally on WGN. \textit{See id.} The Bulls will not pay a fee for these games, but will share the advertising revenue with the league. \textit{See id.} In addition, the Bulls may broadcast an unlimited amount of games over WGN in the Chicago area. \textit{See id.}