

NOTE

THERE'S NO "I" IN "LEAGUE": PROFESSIONAL SPORTS LEAGUES AND THE SINGLE ENTITY DEFENSE

*Nathaniel Grow**

TABLE OF CONTENTS

INTRODUCTION	184
I. PROFESSIONAL SPORTS LEAGUES ARE SINGLE ENTITIES IN MATTERS INVOLVING LEAGUE-WIDE, NONLABOR POLICIES ...	188
A. <i>Current Judicial Framework for Single Entity Analysis</i>	189
B. <i>Professional Sports Leagues Are Single Entities in Nonlabor Disputes</i>	191
1. <i>A Unity of Interest Exists among All Franchises in a Professional Sports League</i>	191
2. <i>The Economic Realities of Professional Sports Leagues Dictate That Leagues Should Be Considered Single Entities</i>	194
C. <i>The Sullivan Court Misapplied Copperweld</i>	196
1. <i>Sullivan Incorrectly Focused on Organizational Form, Rather Than Economic Reality</i>	197
2. <i>Sullivan Mistakenly Relied on Pre-Copperweld Precedent</i>	199
II. PROFESSIONAL SPORTS LEAGUES ARE NOT SINGLE ENTITIES FOR PURPOSES OF LABOR DISPUTES.....	201
A. <i>The Current Judicial Framework for Balancing Antitrust and Labor Law</i>	202
B. <i>Sports Leagues Are Not Single Entities in Labor Disputes</i>	205
1. <i>A Unity of Interest Does Not Exist in the Labor Market</i>	206
2. <i>The Economic Realities of Professional Sports Leagues Make Single Entity Status for Labor Disputes Improper</i>	207
CONCLUSION	208

* J.D. 2005. I would like to thank Jenelle Beavers, Yaman Shukairy, Timothy Wyse, and Jeremy Suhr for their contributions and criticism. Additionally, I would like to thank my parents, Michael and Catherine Grow, for their unwavering love and support.

INTRODUCTION

In 1925, baseball great Ty Cobb said, “The great trouble with baseball today is that most of its players are in the game for the money that’s in it—not for the love of it, the excitement of it, [or] the thrill of it.”¹

Eighty-one years later, many fans would label Cobb a visionary for having foreseen the major role that money would play not only in Major League Baseball, but in all of professional sports. With high salaries, ticket prices, and profits, professional sports are no longer just a game, but a big business worth billions of dollars.² Accordingly, as the financial interests of professional sports have become primary, leagues have been forced to deal with many of our nation’s business regulations.

Like many other sectors of the national economy, professional sports have faced antitrust scrutiny—but arguably no other sector has faced a more haphazard application.³ While every professional league has received some degree of antitrust inquiry,⁴ courts have treated antitrust challenges to the five major professional sports differently.⁵ The Supreme Court gave Major League Baseball, the first professional sport to face an antitrust inquiry, an antitrust exemption in 1922.⁶ The Court’s treatment of baseball has proven to be an anomaly, however, as the Court has subsequently been unwilling to extend similar protection to other sports.⁷

Lacking an exemption, the other major professional sports leagues have faced repeated antitrust challenges. For instance, in recent years leagues

1. Eric D. Scheible, Note, *No Runs. No Hits. One Error: Eliminating Major League Baseball’s Antitrust Exemption Will Not Save the Game*, 73 U. DET. MERCY L. REV. 73, 73 (1995).

2. See JAMES QUIRK & RODNEY D. FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS* 3 (1992).

3. See Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc.*, 1 U. PA. J. LAB. & EMP. L. 297, 310 (1998) (“Although baseball has enjoyed some degree of exemption from Sherman Act liability, courts have not provided a similar luxury to other forms of entertainment or even to other sports.”).

4. See Edward Mathias, Comment, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 203 n.3 (1999) (discussing several major cases).

5. For the purposes of this Note, the five major professional sports are Major League Baseball (“MLB”), the National Basketball Association (“NBA”), the National Football League (“NFL”), the National Hockey League (“NHL”), and Major League Soccer (“MLS”).

6. See *Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922). The Supreme Court has reaffirmed baseball’s antitrust exemption twice. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953); see also Nathaniel Grow, “A Derelict in the Stream of Law”: Baseball’s Antitrust Exemption 39 (June 2002) (unpublished B.S. thesis, Ohio University) (on file with the Ohio University Honors Tutorial College) (concluding that the Court exempted baseball from antitrust law based on a finding that it was a sport, rather than a business).

7. See *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204 (1971); *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957); *United States v. Int’l Boxing Club of N.Y.*, 348 U.S. 236 (1954). The First Circuit has also denied the MLS single entity status. *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002), *cert. denied*, 537 U.S. 885 (2002).

have faced challenges to restrictions on television broadcasts⁸ and the unilateral implementation of league-wide labor polices.⁹

Perhaps the most popular defense strategy employed by professional sports leagues has been the "single entity defense."¹⁰ Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy[] in restraint of trade."¹¹ Because a "combination . . . or conspiracy" requires multiple parties, courts have held that a single entity cannot be held liable under section 1.¹² Thus, single entities can only be liable under section 2 of the Sherman Act, which prohibits monopolization of an industry by a single legal entity.¹³ This distinction between section 1 and section 2 is significant; leagues benefit from avoiding section 1 liability because section 2 claims are relatively rare¹⁴ and comparatively easy to defend.¹⁵

Initially, sports leagues were successful in their use of the single entity defense. In *San Francisco Seals v. National Hockey League*,¹⁶ the U.S. District Court for the Central District of California held that the NHL was a single entity.¹⁷ The court held that league franchises were not economic competitors and therefore were "all members of a single unit."¹⁸ Subsequent courts quickly rejected the *San Francisco Seals* court's logic, however, and ruled that leagues were not single entities.¹⁹ In these decisions, courts either

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

9. Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976); McNeil v. Nat'l Football League, 790 F. Supp. 871 (D. Minn. 1992).

10. See Clifford Mendelsohn, Fraser v. Major League Soccer: *A New Window of Opportunity for the Single-Entity Defense in Professional Sports*, 10 SPORTS LAW. J. 69, 73-74 (2003) (reporting that sports leagues have used the single entity defense for decades).

11. Section 1 states in full:

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 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, 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.

Sherman Act, 15 U.S.C.A. § 1 (West 1997 & Supp. 2006).

12. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988).

13. 15 U.S.C. § 2 (2000); *Copperweld*, 467 U.S. at 767.

14. See Karen Jordan, Note, *Forming a Single Entity: A Recipe for Success for New Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC. 235, 237 (2001) ("[R]are are claims under § 2 of the Sherman Act. The few existing § 2 claims have involved upstart leagues suing established leagues for monopolizing a professional sport." (citation omitted)).

15. See Mathias, *supra* note 4, at 219-20 (arguing that section 2 claims are harder to prove).

16. 379 F. Supp. 966 (C.D. Cal. 1974).

17. *Id.* at 968.

18. *Id.* at 969-70.

19. See *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (finding that NFL teams were sufficiently independent and competitive to preclude the single entity defense in a challenge to an NFL rule preventing teams from moving into another franchise's home territory); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982)

quickly dismissed the single entity defense²⁰ or implicitly rejected it by applying section 1 of the Sherman Act.²¹

Just when the issue seemed settled, however, the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*²² gave new life to the single entity defense. The Court held that collusion was impossible between a company and its wholly owned subsidiary,²³ reasoning that while collusion is generally bad, concerted activity between a parent company and its subsidiary does not deprive the market of independent sources of decision-making.²⁴ *Copperweld* advanced a "unity of interest" test, holding that parties are a single entity when their objectives are common and their "actions are guided or determined not by two separate corporate consciousnesses, but one."²⁵ While on its face the decision would only appear to apply to companies and their wholly owned subsidiaries, lower courts have interpreted *Copperweld* broadly. For instance, the Eighth Circuit has applied *Copperweld* to an electric cooperative, holding that the cooperative was a single entity despite the fact that it consisted of three separately owned corporations.²⁶ Meanwhile, the Supreme Court has remained silent as to how far the logic of *Copperweld* should extend.²⁷

Copperweld bolsters the leagues' single entity argument. Professional sports leagues are unique in that combination is essential to creating the ultimate product, even though each franchise in a league is independently owned.²⁸ One, two, or even a handful of teams cannot produce the ultimate

(refusing to allow the single entity defense in a suit objecting to the NFL's rule preventing league owners from owning franchises in other sports leagues); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (affirming lower court's finding that the NFL draft was a group boycott under the rule of reason and rejecting the league's single entity defense); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (holding that the single entity defense was unavailable to the NFL in a challenge by players to a rule requiring any franchise signing a free agent to compensate the player's former team).

20. *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1389; *N. Am. Soccer League*, 670 F.2d at 1252.

21. *Smith*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey*, 543 F.2d 606 (8th Cir. 1976).

22. 467 U.S. 752 (1984).

23. *Id.* at 771. *Copperweld* rejected the intra-enterprise conspiracy doctrine, which historically held that "a parent and its wholly owned subsidiary were capable of conspiring in violation of section 1" of the Sherman Act. Mendelsohn, *supra* note 10, at 78 (citation omitted).

24. *Copperweld*, 467 U.S. at 771.

25. *Id.*

26. *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988); *see also Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (extending the single entity defense to the NBA).

27. *See Fraser v. Major League Soccer*, 284 F.2d 47, 56 (1st Cir. 2002) (noting that the Supreme Court has not subsequently explained *Copperweld*).

28. Franklin M. Fisher, Christopher Maxwell, & Evan Sue Schouten, *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 MARQ. SPORTS L.J. 1, 5 (1999) (finding that the product a sports league produces cannot be produced by a single team); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). The MLS represents an exception to this general rule, with owners initially having an interest in multiple franchises. However, the MLS is quickly moving to a one-team-per-owner organization. Grahame L. Jones, *MLS Looks Way Down the Field*, L.A. TIMES, Mar. 29, 2006, at D8.

league product: championship athletic competition.²⁹ Leagues argue that while teams may compete on the field, they have a unity of economic interest off the field with all teams depending on the financial success of the entire league.³⁰ Thus, the question is whether to view a professional sports league as a collection of McDonald's franchises (a number of independently owned, interconnected entities with a common interest) or as collusion among McDonald's, Wendy's, and Burger King.³¹

In the twenty-two years since *Copperweld*, attempts by sports leagues to advance the single entity defense have received a mixed response from the circuit courts. The Seventh Circuit, in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*,³² ruled that, at least in certain circumstances, the NBA should be considered a single entity.³³ The court held that in order to determine whether a unity of interest exists, courts should analyze a sports league on a case-by-case basis, one facet at a time.³⁴ The Seventh Circuit rule is the minority, however; despite *Copperweld*, the other circuits examining the question have continued to rule that sports leagues are not single entities.³⁵ The First³⁶ and Eighth³⁷ Circuits have both ruled against sports leagues on the single entity question. Additionally, because the Second,³⁸ Ninth,³⁹ and D.C.⁴⁰ Circuits have not re-examined the issue since *Copperweld*, their early, nonsingle entity precedent has never been reversed. This single entity question remains a live concern, as professional sports leagues continue to face antitrust challenges.⁴¹

29. Fisher et al., *supra* note 28, at 5.

30. See *Chi. Prof'l Sports Ltd. P'ship*, 95 F.3d at 597 (finding that the NBA produces a single product, "NBA Basketball," that competes with other forms of entertainment).

31. *Id.* at 598.

32. *Id.* at 593.

33. *Id.* at 598.

34. *Id.* at 600.

35. But see *Seabury Mgmt., Inc. v. Prof'l Golfers' Ass'n of Am.*, Nos. 94-1814, 94-1688, 1995 WL 241379 (4th Cir. Apr. 26, 1995) (holding that the Professional Golfers' Association of America ("PGA") is a single entity). However, the PGA structure is substantially different than that of the NBA, NFL, MLB, NHL, or MLS, in that the PGA is a federation of individual golfers that sanctions competitive tournaments across the country, while the sports leagues possess much more control over their member teams.

36. *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002); *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994).

37. *St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851 (8th Cir. 1998). A district court within the Eighth Circuit has also ruled against the NFL on the single entity question. *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992).

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

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

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

41. See *Warnock v. Nat'l Football League*, No. 05-1530, 2005 U.S. App. LEXIS 24167 (3d Cir. Nov. 9, 2005) (rejecting a Pittsburgh man's antitrust suit against the NFL for allegedly forcing cities to build new stadiums with leases favorable to league franchises); *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004) (denying a college undergraduate's challenge to the NFL's draft eligibility rule).

In applying *Copperweld* to professional sports leagues, the circuit courts have failed to distinguish between suits involving nonlabor disputes and those involving suits by players against team owners. This distinction is critical and renders the Seventh Circuit's case-by-case approach unnecessary. Most nonlabor disputes, such as ownership restrictions, involve matters in which a unity of interest is present among the teams in the league. These teams share a common interest in the management and economic growth of the league.⁴² The same unity of interest does not exist among all teams in labor disputes. Further, the history of abusive labor practices by professional sports leagues underscores the players' need for antitrust remedies.⁴³ Therefore, efforts by Congress and the courts to balance antitrust and labor law should govern disputes between players and owners. Such a classification scheme will provide professional sports leagues the protection of the single entity defense, while remaining flexible enough to disallow the defense in the future should defendants fail to show that a unity of interest exists.

This Note argues that outside of labor disputes, sports leagues should be presumed to be single entities. Part I argues that professional sports leagues are single entities in disputes regarding league-wide, nonlabor policy. In particular, the focus of the Supreme Court's jurisprudence on economic reality rather than organizational form necessitates a finding that professional sports leagues are single entities in nonlabor disputes. Part II argues that professional sports leagues are not single entities for purposes of labor disputes; sports leagues, on the whole, do not involve a unity of interest for labor matters. More importantly, existing precedent outside of the professional sports context that balances labor and antitrust law should apply to professional sports. The Note concludes that the Seventh Circuit's case-by-case approach is unnecessary and should be rejected in favor of a more general classification scheme in which professional sports leagues are presumed to be single entities, with an exception for labor disputes.

I. PROFESSIONAL SPORTS LEAGUES ARE SINGLE ENTITIES IN MATTERS INVOLVING LEAGUE-WIDE, NONLABOR POLICIES

Although the Supreme Court has never decided whether its *Copperweld* decision implicates professional sports, sports leagues should be presumptively classified as single entities in nonlabor matters. Section I.A reviews the current framework for single entity analysis. Section I.B contends that under this framework, a unity of interest exists between teams in professional sports leagues. Section I.C argues that the court in *Sullivan v. National Football League*⁴⁴ misapplied the single entity framework.

42. See *infra* Section I.B.1.

43. See *infra* Section II.B.

44. 34 F.3d 1091 (1st Cir. 1994).

A. Current Judicial Framework for Single Entity Analysis

While the Supreme Court has never explicitly decided the issue, the Court has hinted that professional sports leagues are properly classified as single entities.⁴⁵ In response to a player challenge to NFL bargaining policies, the Court noted that the teams in a sports league “are not completely independent economic competitors” and, in fact, “depend upon a degree of cooperation for economic survival.”⁴⁶ Additionally, in 1982, then-Justice Rehnquist, dissenting from the denial of certiorari in *National Football League v. North American Soccer League*,⁴⁷ indicated that sports leagues are single entities. Justice Rehnquist stated that “‘individual [sports] [teams] are [the league’s] raw material,’”⁴⁸ necessary, interdependent elements that could not survive on their own. Rehnquist contended that NFL teams “rarely compete in the marketplace”⁴⁹ and acknowledged that the league structure is “a matter of necessity.”⁵⁰

Two years after *North American Soccer League*, the Court pronounced a single entity standard whose logic extends beyond simply a company and its wholly owned subsidiary and instead properly encompasses any organization with a complete “unity of interest.” In *Copperweld*, the Court ruled that a corporation and its wholly owned subsidiary have a “unity of interest” and are effectively a single entity.⁵¹ The Court stressed that economic reality,⁵² rather than organizational form, should be the primary consideration in single entity analysis.⁵³

With the Supreme Court failing to address the broader implications of *Copperweld*,⁵⁴ circuit courts have been forced to apply *Copperweld* without further guidance. The current framework for single entity analysis increasingly considers multiple entities with separate ownership to be single entities when the following factors, on the whole, are present: (1) the entities share a unity of interest, (2) the entities have a common decision-making structure, and (3) the entities serve to increase consumer welfare.

In *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*,⁵⁵ the Eighth Circuit considered whether an electric cooperative consisting of three corporations was a single entity. Even though each corporation was

45. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248 (1996).

46. *Id.*

47. *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari).

48. *Id.* at 1077 (citation omitted) (second alteration in original).

49. *Id.*

50. *Id.*

51. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984); see also *infra* Section I.B.2.

52. *Copperweld*, 467 U.S. at 774.

53. *Id.*

54. See *Fraser v. Major League Soccer*, 284 F.2d 47, 56 (1st Cir. 2002).

55. 838 F.2d 268 (8th Cir. 1989).

independently owned, set its own rates, and managed its own profits and losses,⁵⁶ the court held that the organization was a single entity.⁵⁷ The existence of separate corporations had little economic significance in determining whether the cooperative was a single entity.⁵⁸ The goals and interests of a single entity, not ownership, were the dispositive factors.⁵⁹ The court held that the logic of *Copperweld* extends “beyond its bare result,” and that courts should apply the reasoning of the Supreme Court, rather than stick to just the particular facts of the decision.⁶⁰ As a result, individually owned but ultimately interdependent economic actors should be considered a single entity as long as their interests do not diverge too greatly.⁶¹

Following this decision, some courts have granted judicial accommodation toward independent enterprises.⁶² Such accommodation derives from the original intent of the Sherman Act. As “Senator Sherman stated: ‘It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination.’”⁶³ As a result, some commentators believe that the policy goal of enhancing consumer welfare is the sole basis for the Supreme Court’s antitrust jurisprudence.⁶⁴ This aim means that courts should be increasingly likely to rule that multiple entities have a unity of interest, as long as efficiency and consumer welfare are increased.⁶⁵

56. *Id.* at 271.

57. *Id.* at 276.

58. *Id.* at 275.

59. See Heike K. Sullivan, Comment, *Fraser v. Major League Soccer: The MLS’s Single-Entity Structure Is a “Sham”*, 73 TEMP. L. REV. 865, 886 (2000) (arguing that a single entity inquiry is fact intensive and that the court must consider the entities’ common goals and interests).

60. *City of Mt. Pleasant*, 838 F.2d at 274.

61. *Id.* at 277; see also *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 598 (7th Cir. 1996) (holding that complete unity of interest is not necessary to qualify as a single entity, but rather that some conflict is acceptable).

62. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003) (“Some decisions have found a single entity even in the absence of economic unity.”); *Bell v. Fur Breeders Agric. Corp.*, 348 F.3d 1224, 1237 (10th Cir. 2003) (following the logic of *City of Mt. Pleasant*); *Williams v. I.B. Fischer Nev.*, 794 F. Supp. 1026 (D. Nev. 1992) (holding that a food franchisor and franchisee were a single entity); see also *Fraser v. Major League Soccer*, 284 F.3d 47, 58 (1st Cir. 2002) (“Certainly the trend of section 1 law has been to soften *per se* rules and to recognize the need for accommodation among interdependent enterprises.”).

63. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 774 n.23 (1984) (quoting 21 CONG. REC. 2457 (1890)).

64. See, e.g., *Jordan*, *supra* note 14, at 238 (citing 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 19.02, at 19-4 (Gary A. Uberstine & Clark Boardman Callaghan eds., 1988)).

65. See, e.g., Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 23 (1983) (“If an aspect under scrutiny could be intended to aid the entity in achieving its goals more efficiently, the court should discount the fact that the particular aspect, if examined in the abstract, might imply the existence of multiple economic entities.”).

B. *Professional Sports Leagues Are Single
Entities in Nonlabor Disputes*

Courts should find that professional sports leagues are single entities for two reasons. First, a unity of interest exists among all franchises in a league because teams depend on each other for competition and revenue. Second, per *Copperweld*, the economic realities of the professional sports industry dictate a general classification scheme in which sports leagues are considered single entities.

1. *A Unity of Interest Exists among All Franchises
in a Professional Sports League*

In the nonlabor context, the professional sports league structure satisfies the *Copperweld* "unity of interest" standard. Although most courts ruling on the issue have found that professional sports leagues are not single entities,⁶⁶ most of these cases were decided in the labor context.⁶⁷ As both courts and commentators have noted, the goals and interests of a single entity are the primary consideration in analyzing its legal standing.⁶⁸ The unity of interest among professional sports teams is apparent when this standard is applied.

Professional sports teams produce a single product: the league sport.⁶⁹ In other words, a combination of NBA teams produces "NBA Basketball," a combination of NFL teams produces "NFL Football," a combination of MLB teams produces "Major League Baseball," and a combination of NHL teams produces "NHL Hockey."⁷⁰ These respective products consist of officially sanctioned games between league teams, over the course of a preseason, regular season,⁷¹ and playoff or postseason. The league product ultimately culminates in the crowning of an overall league champion.⁷² One, two, or even

66. *Fraser*, 284 F.3d 47 (1st Cir. 2002) (alleging that that the MLS monopolized the market by preventing any other entity from running a competing professional league); *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994) (involving a suit by the owner of the New England Patriots challenging the NFL's ownership policies); *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992) (contesting the NFL's elimination of severance benefits and the player retirement system).

67. See *Fraser*, 284 F.3d 47 (1st Cir. 2002); *McNeil*, 790 F. Supp. 871 (D. Minn. 1992); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (challenging the NFL's football draft on antitrust grounds); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (opposing an NFL policy requiring franchises signing a free agent to compensate the player's former team); see also *infra* Part II.

68. See *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 707 (N.D. Cal. 1994) ("[S]ister subsidiaries of Hitachi, cannot conspire to restrain trade. They all act pursuant to the same interests and goals . . ."); *Sullivan*, *supra* note 59, at 885.

69. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599 (7th Cir. 1996).

70. See *id.*

71. The MLB regular season consists of 162 games per team. NBA and NHL teams both play eighty-two regular season games, while the NFL regular season lasts sixteen games.

72. See *Grow*, *supra* note 6, at 33 (discussing the benefits of the league structure in MLB).

a handful of teams could not produce this product.⁷³ Professional sports are unique in that their product can only be created when a sizeable number of teams work closely together.⁷⁴

The predominant competition that occurs between teams in a professional sports league is for the league championship. Judge Williams, dissenting in *Los Angeles Memorial Coliseum Commission v. National Football League*,⁷⁵ noted that “[v]irtually every court to consider this question has concluded that N.F.L. member clubs do *not* compete with each other in the economic sense.”⁷⁶ The same is true of the other sports leagues.⁷⁷ League teams generate most of their revenue from ticket sales and the licensing of local and national television broadcasts.⁷⁸ The overwhelming majority of sports teams operate in different media markets,⁷⁹ and fans in these media markets largely root for the hometown franchise.⁸⁰ Even in the

73. Fisher et al., *supra* note 28, at 1.

74. *Id.*; see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

75. 726 F.2d 1381 (9th Cir. 1984).

76. *Id.* at 1405 (Williams, J., concurring in part and dissenting in part); see also Shawn Treadwell, Note, *An Examination of the Nonstatutory Labor Exemption From the Antitrust Laws, in the Context of Professional Sports*, 23 *FORDHAM URB. L.J.* 955, 962 (1996) (“[T]eams in a [professional sports] league are not economic competitors.”).

77. See, e.g., *S.F. Seals v. Nat’l Hockey League*, 379 F. Supp. 966, 969–70 (C.D. Cal. 1974) (finding that there is no economic competition between NHL teams).

78. For instance, the NFL recently sold television broadcasting rights for the 2006 through 2011 seasons to CBS and Fox for \$8 billion. Additionally, satellite television provider DirecTV will pay the NFL \$3.5 billion over five years for the exclusive rights to the “Sunday Ticket” subscription service. Larry Stewart, *New TV Deal Gives NFL the Night Shift*, *L.A. TIMES*, Nov. 9, 2004, at D1. Previously, in 1998, NFL teams earned an average of over \$73 million each, per season, from the league’s national television contract. Soonhwan Lee & Hyosung Chun, *Economic Values of Professional Sport Franchises in the United States*, 5 *SPORT J.* 3, ¶ 5 (2002), <http://www.thesportjournal.org/2002Journal/Vol5-No3/economic-values.asp>; see also Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 *U. ILL. L. REV.* 519, 578 (observing that NBA franchises receive significant revenue from luxury boxes, game tickets, and local broadcasting rights). Merchandising revenue is relatively insignificant. See *infra* note 117 and accompanying text.

79. Only a few teams share a media market with another franchise in the same league. The New York City media market hosts two MLB teams (the Yankees and Mets), two NFL teams (the Jets and Giants), two NBA teams (the Knicks and New Jersey Nets), and three NHL teams (the Rangers, Islanders, and New Jersey Devils). Chicago is home to two MLB teams (the Cubs and White Sox). The Los Angeles media market has two MLB teams (the Dodgers and Los Angeles Angels of Anaheim), two NBA teams (the Lakers and Clippers), and two NHL teams (the Kings and Anaheim Mighty Ducks). Finally, the San Francisco Bay Area hosts two MLB teams (the Giants and Oakland Athletics) and two NFL teams (the 49ers and Oakland Raiders). These twenty-one teams account for only seventeen percent of the 122 total franchises in professional baseball, basketball, hockey, and football.

80. In conjunction with its fiftieth anniversary in 2004, *Sports Illustrated* conducted surveys of sports fans in each of the fifty states. These surveys show that, of states hosting professional franchises, fans largely support the home-state teams. *SI.com*, *Sports Illustrated 50th Anniversary*, <http://sportsillustrated.cnn.com/magazine/features/si50/> (last visited Aug. 18, 2006). The numbers would likely be even greater if captured on a city-by-city level. See also David Morris & Daniel Kraker, *Rooting the Home Team: Why the Packers Won’t Leave—and Why the Browns Did*, *AMERICAN PROSPECT*, Sept.–Oct. 1998, at 38 (noting that cities support their local professional teams with “frenzied enthusiasm”). Further, merchandise sales are largely regional, with hometown fans buying hometown team merchandise. See Steve Luhm, *Jerseys Wearing Well; ‘Tis the Season: Pro Gear a*

few instances in which teams share a media market, each franchise has its own fan base, so the teams generally do not compete for fan loyalty.⁸¹ As a result, the only economic competition engaged in by professional sports leagues is with other, competing forms of entertainment.⁸² For example, sports teams compete against teams in other leagues in the same city. MLB's Detroit Tigers compete for Detroiters' entertainment dollars with the NBA's Detroit Pistons, the NFL's Detroit Lions, and the NHL's Detroit Red Wings, in addition to other forms of entertainment, such as movies, theater, and concerts. Competition between teams in the same league, however, is extremely limited. Even if some competition exists between two franchises in a shared media market, that competition is not enough to require a finding that the league *as a whole* lacks a unity of interest when formulating *league-wide* policy. As the Seventh Circuit has recognized, "*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities."⁸³

Moreover, not only is there minimal or nonexistent competition between franchises in a professional sports league, but an individual team's economic success depends on cooperation with its league partners.⁸⁴ A team cannot make money unless it has another team to play: "in effect, all team revenue is jointly produced."⁸⁵ Further, most sports leagues have revenue-sharing agreements, in which individual teams pool their revenue and split it among their fellow league members.⁸⁶ The NFL has the most extensive revenue-sharing system, with over ninety percent of all revenue shared among the

Popular Gift Item; Kirilenko a Popular Choice Among Jazz Fans; Jerseys Fluctuate with Wins, Injuries, SALT LAKE TRIB., Dec. 25, 2005, at C7 (noting that NBA and NFL merchandise sales are regionally driven).

81. See Mike Berardino, *If 2 is Company, 3 may be a Crowd*, ORLANDO SENTINEL, Oct. 29, 2000, at D4 (noting that the New York Yankees and New York Mets have separate fan bases); David Lennon & Oli Schepers, *Two-Minute Drill*, NEWSDAY, Sept. 17, 2003, at A71 (remarking that the Chicago "Cubs and White Sox [have] very distinct fan bases").

82. See Fisher et al., *supra* note 28, at 13 ("[S]ports leagues compete with other entertainment products.")

83. See *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598 (7th Cir. 1996); *City of Mt. Pleasant v. Associated Elec. Coop., Inc.* 838 F.2d 268, 277 (8th Cir. 1988) ("Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are *independent sources* of that power They are interdependent, not independent.")

84. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1195 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part).

85. *L.A. 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).

86. The NFL and MLB have both implemented revenue-sharing agreements, while the NBA has enacted indirect revenue sharing in the form of luxury-tax systems. Derrick Goold, *On Thin Ice: The NHL's Defining Moment*, ST. LOUIS POST-DISPATCH, Sept. 14, 2003, at D1. The luxury tax requires an owner to pay a fine to the other teams if his team's payroll is higher than a predetermined ceiling. *Id.* In its new Collective Bargaining Agreement, the NHL agreed to a system in which the league's "top 10 revenue teams pay into the revenue-sharing fund and the bottom 15 clubs share it." Pierre Lebrun, *NHL's Salary Cap Set to Rise Next Year*, LONDON FREE PRESS, Dec. 16, 2005, at D1.

franchises.⁸⁷ Because of such revenue sharing, the economic success of an individual team is directly dependent upon the economic success of the other teams in the league.⁸⁸ As Judge Williams recognized in dissent in *Los Angeles Memorial Coliseum Commission*, no distinction exists between the league structure and its member teams.⁸⁹ The two are intertwined. Therefore, the relevant entity for antitrust analysis in professional sports is not the individual team, but the league structure.

2. *The Economic Realities of Professional Sports Leagues Dictate That Leagues Should Be Considered Single Entities*

Copperweld provides further justification for professional sports leagues' classification as single entities, since economic reality, rather than organizational form, is the primary consideration in single entity analysis.⁹⁰ While single entities will normally have a single owner, single ownership is not required under the defense.⁹¹ The economic realities of the business of professional sports make professional sports leagues single entities for purposes of league-wide policy.

Although single entities typically share common ownership,⁹² such a structure is not feasible for professional sports leagues. Independent ownership of sports teams is necessary for the public to have confidence that games are not fixed.⁹³ The biggest threat to a sports league's credibility is the possibility that games have predetermined outcomes. Fans have little reason to follow, let alone pay to attend, an athletic competition in which the outcome has been fixed. For instance, the 1919 "Black Sox" scandal substantially damaged professional baseball's reputation, damage that took years to heal.⁹⁴ "League sports demand a form of organization in which local

87. See Mendelsohn, *supra* note 10, at 92. The MLB revenue-sharing agreement was expected to reallocate approximately \$250 million from high-revenue to low-revenue clubs during the 2005 season. Ken Rosenthal, *In Free Agency, Money Will Flow; Players, Rejoice: Market Appears Ready to Move Up*, CHI. TRIB., Oct. 10, 2004, at C5.

88. See *L.A. 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).

89. *Id.* at 1406.

90. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 774 (1984).

91. *City of Mt. Pleasant v. Associated Elec. Coop., Inc.* 838 F.2d 268 (8th Cir. 1988) (holding that a cooperative consisting of three separate corporations qualified as a single entity); see also *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962) (holding, before *Copperweld*, that separately owned companies were a single enterprise on the grounds that "[t]here is no indication that the use of separate corporations had economic significance in itself").

92. See *Copperweld*, 467 U.S. at 771 (discussing a parent company and its wholly owned subsidiary).

93. See *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 605 (7th Cir. 1996) (Cudahy, J., concurring) (contending that sports leagues insist independent ownership is necessary to enhance "the appearance of competitiveness demanded by fans").

94. See CHARLES C. ALEXANDER, *OUR GAME: AN AMERICAN BASEBALL HISTORY* 129 (1991) (finding that regaining the public's confidence "in the competitive integrity" of the sport was "a lot tougher" than many had supposed). The "Black Sox" scandal involved the Chicago White

autonomy is both present and [evident].”⁹⁵ Independent ownership prevents the threat of centralized management dictating the results of any given contest. With independent ownership, one owner’s defection can destroy a manipulated outcome. Many owners in professional sports take great pride in fielding the most competitive team possible, simply because they want to win championships. George Steinbrenner of the New York Yankees and Jerry Jones of the Dallas Cowboys are two such examples.⁹⁶ The existence of such independently minded owners diminishes the possibility that the league as a whole could successfully execute planned outcomes to sporting events. The league simply lacks the authority or ability to force independent league owners to acquiesce to predetermined outcomes.

One of the biggest problems that faced the World Wrestling Federation’s failed XFL football league was the fact that all teams were run by a central authority.⁹⁷ With one party in charge of all teams, there was no way to assure the public that competitions were not fixed. Even the recently formed MLS recognized the importance of having each franchise operated by an independent management team.⁹⁸ The economic realities of professional sports dictate that leagues must have independently owned teams.

The fact that owners are motivated to win on the field does not diminish the unity of interest shared by franchises in a particular league. While winning generally increases ticket sales, most teams in a league do not compete with each other for ticket sales because they are not within close geographic proximity to other teams in their league.⁹⁹ Rather, a winning team helps its owner compete for ticket sales with other forms of entertainment.¹⁰⁰

A second economic reality of professional sports is that competitive balance between teams must be maintained. In order to hold the public’s attention, professional sports leagues must have exciting on-field competition.¹⁰¹ Such competition requires a balanced distribution of players across all the teams in the league. Yet, a finite number of highly skilled players exist in each sport.¹⁰² League-wide policies, such as new player

Sox, prohibitive favorites who intentionally lost the 1919 World Series. Eight White Sox players (“Shoelless” Joe Jackson, Eddie Cicotte, Chick Gandil, Hap Felsch, Lefty Williams, Buck Weaver, Charles “Swede” Risberg, and Fred McMullin) intentionally lost the Series after being bribed by gamblers. *Id.* at 123–24.

95. Fisher et al., *supra* note 28, at 6.

96. See Mike Lupica, *Time for the Big Spenders to Settle Up*, N.Y. DAILY NEWS, Dec. 4, 2005, available at <http://www.nydailynews.com/front/story/371548p-316099c.html>.

97. See Dan Ackman, *XFL Exterminated*, FORBES, May 11, 2001, available at <http://www.forbes.com/2001/05/11/0511topnews.html> (“The XFL mistakenly called itself an eight-team ‘league.’ A league implies separate and distinct teams with different owners . . .”).

98. See Mendelsohn, *supra* note 10, at 72 (reporting that although the league owns a share of each team, each franchise has a separate “owner-operator” who runs the team).

99. See *supra* notes 76–83 and accompanying text.

100. See *supra* note 82 and accompanying text.

101. Fisher et al., *supra* note 28, at 6.

102. See Grow, *supra* note 6, at 60–61 (noting that the supply of major league caliber baseball players is much less than the demand for such players).

drafts, are necessary in order to ensure a balanced distribution of players.¹⁰³ Consequently, maintaining competitive balance necessarily requires interaction among all teams in the league. Without a league structure to create and uphold competitive balance, competitions would just be glorified “pick-up games.”¹⁰⁴

C. *The Sullivan Court Misapplied Copperweld*

Despite the unity of interest in professional sports leagues, courts have nevertheless ruled that leagues are not single entities. Of the three courts to rule on the single entity status of professional sports leagues since the *Copperweld* decision, only one considered a nonlabor league policy: *Sullivan v. National Football League*.¹⁰⁵ In *Sullivan*, the owner of the New England Patriots sought to sell shares of his franchise publicly.¹⁰⁶ Sullivan’s plan was disallowed for two reasons: First, Article 3.5 of the NFL constitution required three-fourths of league teams to approve the sale of a league franchise, and second, an uncodified policy precluded the public sale of ownership interests in an NFL club.¹⁰⁷ Sullivan sued, alleging that the NFL’s denial of his plan constituted a violation of the Sherman Act. In deciding the case, the *Sullivan* court ruled that the league was not a single entity because teams compete with one another “for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia.”¹⁰⁸ The court also deferred to the district court’s factual finding “that NFL teams . . . compete against each other for the sale of their ownership interests.”¹⁰⁹

This Section argues that *Sullivan* incorrectly applied *Copperweld* in two ways. First, it wrongly focused on organizational form, not economic reality. Second, the *Sullivan* court was mistakenly swayed by the logic of pre-*Copperweld* decisions finding that sports leagues are not single entities.

103. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1198 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part) (arguing that player drafts are necessary for competitive balance).

104. See *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1408 (9th Cir. 1984) (Williams, J., concurring in part and dissenting in part) (“Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition.”).

105. 34 F.3d 1091 (1st Cir. 1994). Two other post-*Copperweld* cases have involved challenges to league labor policies. *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002) (contesting MLS’s league structure and transfer fee system, which required a franchise acquiring a player to pay the player’s former team); *McNeil v. Nat’l Football League*, 790 F. Supp. 871 (D. Minn. 1992) (challenging an NFL plan to fix all player salaries according to a wage scale). While teams in a professional sports league have a unity of interest in nonlabor matters, the same is not true in player policy because teams actively compete for players. See *infra* Section II.B.1.

106. *Sullivan*, 34 F.3d at 1096.

107. *Id.* at 1095.

108. *Id.* at 1098.

109. *Id.*

1. Sullivan *Incorrectly Focused on Organizational Form,
Rather Than Economic Reality*

The *Copperweld* court stressed that economic reality, rather than organizational form, should be the primary consideration in single entity analysis.¹¹⁰ The goals and interests of a single entity, not ownership, are dispositive.¹¹¹ In *Sullivan*, however, the court held that a unity of interest did not exist among NFL teams because the teams competed “for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia.”¹¹² As the *Mt. Pleasant* court indicated, though, an absolute, complete unity of interest is not necessary for a finding that a single entity exists; some competition and conflict is permissible.¹¹³

The *Sullivan* court overemphasized trivial competition between teams and ignored the number of common interests shared in the league.¹¹⁴ With few exceptions—namely New York City and the San Francisco Bay area, the only two-team NFL markets—NFL franchises generally do not compete with each other economically.¹¹⁵ Even in those instances in which competition may exist, most NFL games sell out, so teams are not cutthroat competitors with one another for ticket sales.¹¹⁶ Furthermore, the NFL has a national television deal, so teams do not compete for local broadcast revenue. The sale of paraphernalia is rather insignificant for most franchises, as most team revenue is generated from ticket sales and the NFL's national television deal.¹¹⁷ In professional sports, paraphernalia sales are largely regional, with hometown fans buying hometown team merchandise.¹¹⁸ In the NBA, such merchandise revenue is split fifty-fifty between the league and players, not teams.¹¹⁹ Most sports leagues require merchandise to be licensed

110. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 774 (1984).

111. *See Sullivan*, *supra* note 59, at 885–86.

112. *Sullivan*, 34 F.3d at 1098.

113. The *Mt. Pleasant* court ruled that an electric cooperative had a unity of interest, even though the companies were each separately owned. *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 271 (8th Cir. 1988); *see also Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962) (holding, pre-*Copperweld*, that three related corporations were a single enterprise).

114. *See supra* Section I.B.1.

115. *See sources cited supra* notes 79–82 and accompanying text.

116. NFL attendance averaged ninety-seven percent of capacity in 2002. Richard Weiner, *Playoff Jumble*, USA TODAY, Dec. 27, 2002, at 1C.

117. *See Paul Doyle, Watch While You Can: Lockout May End Careers, Franchises*, HARTFORD COURANT, Oct. 8, 2003, at C8 (reporting that NFL teams each receive \$77 million a year from the NFL's national television deal); Gary Haber, *Trophy Won't Alter Bucs' Value*, TAMPA TRIB., Jan. 30, 2003, at Moneysense 5 (“[NFL] owners derive most of their revenue from a national television contract . . .”).

118. *See Luhm*, *supra* note 80.

119. *Id.*

through the league office, rather than by individual teams.¹²⁰ Therefore, individual teams do not rely on merchandise sales for a significant proportion of their profits. Any competition in the merchandising realm is not enough to alter the single entity analysis for professional sports leagues.¹²¹

Moreover, the economic realities of the business of professional sports dictate that teams must be separately operated. Without independent management, the public will reasonably wonder whether outcomes have been fixed.¹²² Each team in a league should not have to be league-owned and operated in order for the single entity defense to apply. The *Sullivan* court erred in ignoring the economic realities of the business of professional sports and misapplied *Copperweld* in finding that NFL teams do not have a unity of interest.

The *Sullivan* court should have ruled as a matter of law that NFL teams do not compete against each other for the sale of their ownership interests. Purely selfish, competitive motivations do not explain the passage of Article 3.5 of the NFL constitution, which places significant restrictions upon all owners attempting to sell their franchises. Instead, the rule advances a legitimate league interest in ensuring that only owners with the requisite financial capital to run a franchise effectively are able to purchase a team.

In most sectors of the economy, if someone overextends himself financially when purchasing a business, his decision will generally have little effect on the industry as a whole or the public at-large. In professional sports, however, franchises with undercapitalized owners can harm not only their entire league but also their home city. Having even a single team go out of business would have a destructive effect on both the city and league in which it is located. Many cities have invested hundreds of millions of dollars in stadiums for professional sports, investments that would largely be lost should franchises cease operations.¹²³ Further, the effect of a team going out of business would take a huge toll on its league, requiring rescheduling, realignment, and reallocation of players.¹²⁴

Even aside from a franchise going “out of business,” undercapitalized owners are detrimental to league-wide competitiveness. Many

120. See Stephen C. Fehr, *Pricey New Sports Venues Help Make Washington No. 1 for High-Cost Tickets*, WASH. POST, Oct. 31, 1997, at C01.

121. See text accompanying *supra* note 83.

122. See discussion *supra* notes 92–98 and accompanying text.

123. Matt Welch, *If You Build It, They Will Leave*, REASON, Jan. 2004, <http://www.reason.com/0401/co.mw.if.shtml> (noting that municipalities spent over \$14.7 billion on stadiums for professional sports leagues in the twentieth century). This trend shows no signs of stopping anytime soon. See David Nakamura & Thomas Heath, *For Some Fans, Stadium Designers Whiffed Big-Time*, WASH. POST, Mar. 18, 2006, at B01 (reporting that the city of Washington D.C. committed \$611 million to build MLB’s Washington Nationals a new stadium); Jeffrey Spivak & Deann Smith, *Is Deal Good For Teams? Taxpayers? Fans?*, KAN. CITY STAR, Mar. 5, 2006 (noting that both the NFL’s Kansas City Chiefs and MLB’s Kansas City Royals are seeking public financing for renovations to their current home stadiums).

124. Marc Topkin, *Contraction Could Help Tampa Bay*, ST. PETERSBURG TIMES, Jan. 13, 2002, at 9C (reporting that elimination of some MLB franchises would result in reallocation of players and realignment of teams among the divisions and leagues).

underperforming teams are owned by penny-pinching owners and harm the overall strength of the league.¹²⁵ Thus, leagues have good reason to institute rules ensuring that new owners have the requisite financial backing to run a professional sports franchise effectively.¹²⁶ Also, because professional sports ownership is “the ultimate millionaire’s dream . . . an ego trip and a half,”¹²⁷ a large pool of potential, well-financed buyers is always available to purchase a sports franchise.¹²⁸ Accordingly, competition between current owners for potential purchasers is not a significant enough concern to prevent a finding that sports leagues are single entities.

Moreover, as noted above, public confidence in the legitimacy of the outcomes of professional sporting events depends largely on independent franchise ownership.¹²⁹ Without regulations requiring league approval of franchise sales, one owner could purchase several competing franchises in the same league. Under such a scenario, games or trades between two teams with a shared owner would be ripe for public skepticism.

2. Sullivan *Mistakenly Relied on Pre-Copperweld Precedent*

In addition to its misapplication of *Copperweld*, the *Sullivan* court also erred by mistakenly following the logic of precedent determined before *Copperweld*. As primary support for its decision, the *Sullivan* court relied on the Ninth Circuit’s opinion in *Los Angeles Memorial Coliseum Commission v. National Football League*.¹³⁰ This reliance was misguided, as that court made several incorrect assertions in finding that the NFL was not a single entity.

First, the *Los Angeles Memorial* court improperly focused on the fact that league policies are not determined by “one individual or parent corporation, but by the separate teams acting jointly.”¹³¹ While this is true in one sense, it is not entirely accurate. The *Los Angeles Memorial* court itself

125. See, e.g., Bob Cook, *Competence in Clippers-land? It's True!*, MSNBC.COM, Dec. 1, 2005, <http://msnbc.msn.com/id/10188125/> (detailing the correlation between the NBA’s Los Angeles Clippers’ notoriously frugal owner Donald Sterling’s spending habits and the franchise’s losing history); Drew Sharp, *Revolt Needs Dose of Apathy*, DETROIT FREE PRESS, Dec. 17, 2005, available at <http://www.freep.com/apps/pbcs.dll/article?AID=/20051217/SPORTS01/512170308/1089/COL08> (arguing that the infamously cheap spending habits of Mike Brown, owner of the NFL’s Cincinnati Bengals, relegated his team to years of misfortune).

126. While league approval could potentially have the paradoxical effect of preventing under-financed owners from selling their team to a richer purchaser, there is no reason to believe that league owners would use these rules in such a perverse way.

127. Alan Snel, *Owning Sports Team “All About Ego”*, TAMPA TRIB., Jan. 23, 2004, at Mon-eyense 1.

128. Richard Sandomir, *Newest Game Is Buying and Selling Teams*, N.Y. TIMES, Apr. 30, 2000, § 8, at 11 (reporting that twenty-six professional sports teams were bought and sold during the prior twenty-eight months).

129. See sources cited *supra* notes 92–98 and accompanying text.

130. See *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1097–1100 (1st Cir. 1994) (citing *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984)).

131. *L.A. Mem’l Coliseum Comm’n*, 726 F.2d at 1388–89.

noted a few paragraphs later that then-NFL Commissioner Pete Rozelle made many of the “day-to-day decisions regarding League operations.”¹³² Admittedly, limited joint decision-making alone cannot lead to a finding that an organization is a single entity; otherwise any price-fixing behavior would be protected from antitrust law. Professional sports leagues’ joint decision-making is much more comprehensive, however, involving league rules, standards, dates, locations, and so forth.¹³³ The NFL’s unified decision-making process illustrates the NFL franchises’ unity of interest. NFL teams cannot be divergent, cutthroat economic competitors when they must work so closely together to set league-wide policies.

Second, the *Los Angeles Memorial* court’s analysis incorrectly emphasized the fact that NFL teams do not share profits and losses.¹³⁴ In doing so, the court discounted the fact that NFL teams share up to ninety-five percent of their revenue,¹³⁵ arguing that even with revenue sharing, profits vary among teams in the league.¹³⁶ The *Copperweld* Court was concerned with the alignment of economic interests and never required a complete sharing of profits and losses in order for an organization to qualify as a single entity.¹³⁷ By discounting the NFL’s significant revenue sharing, the *Los Angeles Memorial* court mistakenly focused on the organizational form rather than the economic realities of the NFL.

Finally, the *Los Angeles Memorial* court erred in analogizing the NFL to the organization considered in *United States v. Sealy, Inc.*¹³⁸ In *Sealy*, thirty bedding manufacturers were licensed to use the Sealy name and allocated territories in which to use the license.¹³⁹ The thirty licensees owned Sealy.¹⁴⁰ The *Sealy* Court held that this arrangement was a per se violation of the Sherman Act.¹⁴¹ The *Los Angeles Memorial* court analogized the NFL structure to that disallowed in *Sealy*. *Sealy*, however, is easily distinguishable from the situation of the NFL and other professional sports leagues because in *Sealy* each licensee “had a viable product that did not require cooperation with competitors.”¹⁴² The same is not true of professional sports, which re-

132. *Id.* at 1389.

133. Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 275–76 (1993) (“[T]eams must agree on the rules of the game, uniforms and equipment, the dates and locations of each contest, and so on.”).

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

135. See Mendelsohn, *supra* note 10, at 92. The NFL has had a revenue-sharing plan in place since 1961, allocating all television revenue evenly among franchises. Clay Moorehead, *Revenue Sharing and the Salary Cap in the NFL: Perfecting the Balance Between NFL Socialism and Unrestrained Free-Trade*, 8 VAND. J. ENT. & TECH. L. 641, 642 (2006).

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

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

138. 388 U.S. 350 (1967).

139. *Id.* at 352.

140. *Id.* at 352–53.

141. *Id.* at 357–58.

142. Mathias, *supra* note 4, at 213.

quire cooperation in order to produce the final product, the league sport.¹⁴³ Therefore, courts should generally classify professional sports leagues as single entities for matters of league-wide, nonlabor policy.

II. PROFESSIONAL SPORTS LEAGUES ARE NOT SINGLE ENTITIES FOR PURPOSES OF LABOR DISPUTES

Conceptually, one of the most difficult areas of antitrust analysis occurs when antitrust law intersects with labor law.¹⁴⁴ While antitrust law establishes a mechanism by which to attack illegal collusion, labor law seeks to protect and regulate collective action by laborers, particularly in the form of labor unions.¹⁴⁵ Since many of the antitrust challenges faced by professional sports leagues result from disputes with labor unions, this question is particularly important in determining professional sports leagues' antitrust status. This Part argues that professional sports leagues are not single entities for purposes of labor disputes.¹⁴⁶ Section II.A examines the current judicial balance between antitrust and labor law, and contends that professional sports leagues' labor disputes are properly adjudicated under this general framework. Section II.B argues that under *Copperweld*, a unity of interest does not exist among sports teams in the labor market, and thus the single entity defense is inapplicable to labor disputes.

143. See text accompanying *supra* notes 69–74; see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (finding entity's activities lawful when cooperation was necessary to produce a new product).

144. Cf. Brian T. Coolidge, Casenote, *Form Over Function: The Goals of Labor and Antitrust Laws Sacrificed Upon a Collective Bargaining Impasse*, *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996), 38 S. TEX. L. REV. 841, 844 (1997) (remarking that antitrust and labor law “are sometimes said to have competing interests under the law”).

145. Labor law's statutory exemptions seek to “insulate legitimate collective activity by employees, which is inherently anticompetitive, but is favored by federal labor policy, from the proscriptions of the antitrust laws.” *Mackey v. Nat'l Football League*, 543 F.2d 606, 611 (8th Cir. 1976) (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940)).

146. While this Section of the Note only discusses disputes between players and owners, players are not the only unionized group of employees in professional sports. Each league's umpires or referees have unionized. For discussion of the MLB Umpires Association, see Heather R. Insley, Comment, *Major League Umpires Association: Is Collective Bargaining the Answer to or the Problem in the Contractual Relationships of Professional Sports Today?*, 29 CAP. U. L. REV. 601 (2001). See also Clayton: *Officials not voting by e-mail*, ESPN.COM, Sept. 17, 2001, <http://espn.go.com/nfl/news/2001/0917/1251891.html> (reporting on a labor dispute between the NFL Referees Association and the league); *NHL Officials Without Work During Player Lockout*, HOCKEYREFS.COM, Oct. 13, 2004, <http://www.hockeyrefs.com/intheheadlines/10132004.htm> (discussing the 2004–05 NHL lockout's impact on the NHL Officials Association); *Stern Upset Over Protest by NBA Refs*, MSNBC.COM, Feb. 29, 2004, <http://www.msnbc.msn.com/id/204402659/> (noting that the National Basketball Referees Association protested the three-game suspension of one referee).

Sports leagues' single entity status in disputes between referees and owners is not considered in this Note, although the author observes that the analysis may very well differ, since teams would not appear to have divergent, competitive interests in this realm. Referees and umpires serve the entire league, rather than individual teams, so franchises do not have any individual interest in these labor negotiations, outside of the success of the league as a whole. Therefore, it would seem there is no divergence of interest between teams in a league with regards to labor disputes involving referees or umpires.

A. *The Current Judicial Framework for Balancing
Antitrust and Labor Law*

Both Congress and the courts have long struggled to create a balance between antitrust and labor law. During the initial Congressional debate over the Sherman Act, many senators expressed concern over the bill's impact on labor.¹⁴⁷ In fact, Senator Sherman proposed an amendment to the act "expressly exempt[ing] labor and agricultural combinations."¹⁴⁸ Ultimately, Congress deemed the amendment "unnecessary" and passed the bill without the labor exemption.¹⁴⁹ The courts, though, saw matters differently and used the Sherman Act against labor unions.¹⁵⁰ In response, Congress passed three different pieces of legislation intended to exempt labor combinations from antitrust scrutiny: section 6 of the Clayton Act in 1914,¹⁵¹ the Norris-LaGuardia Act in 1932,¹⁵² and finally the National Labor Relations Act ("NLRA") in 1935.¹⁵³ Together, these acts form a statutory exemption for labor activity from the antitrust laws.¹⁵⁴

The Supreme Court supplemented this legislative framework "[t]o further encourage collective bargaining between unions and multi-employer bargaining units"¹⁵⁵ by developing the so-called "nonstatutory labor exception," a principle by which cases implicating both antitrust and labor law are adjudicated. In the seminal cases of *Apex Hosiery Co. v. Leader*¹⁵⁶ and *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*,¹⁵⁷ the Supreme Court established the rule that "absent a motive to impose direct restraints on commercial competition or to monopolize unlawfully a relevant business market," agreements resulting from collective bargaining are exempt from antitrust scrutiny.¹⁵⁸ Thus, "if a collective bargaining agreement substantially affects market conditions without promoting legitimate union concerns, courts will not grant antitrust immu-

147. Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 15–16 (1983).

148. *Id.* at 16.

149. *Id.* at 18–19.

150. *See* *Loewe v. Lawlor*, 208 U.S. 274 (1908) (finding that the Sherman Act is applicable to labor organizations).

151. Clayton Act, 15 U.S.C. § 17 (2000).

152. 29 U.S.C. § 160 (2000).

153. *Id.*; *see also* Coolidge, *supra* note 144, at 845 (reporting that the NLRA was enacted to balance "the inequality of bargaining power that employees possessed in relation to management by promoting collective bargaining thereby 'leveling the playing field'").

154. *See* Treadwell, *supra* note 76, at 955.

155. *Id.* at 960.

156. 310 U.S. 469 (1940).

157. 381 U.S. 676 (1965).

158. Hoffmann, *supra* note 147, at 32–33 (citation omitted).

nity.”¹⁵⁹ Otherwise, collective bargaining agreements are generally immune from antitrust laws.¹⁶⁰

Despite this established framework balancing the concerns of antitrust and labor law, at least one court has departed from the *Apex Hosiery* and *Jewel Tea* rule in the sports context. *Mackey v. National Football League*¹⁶¹ involved a suit by thirty-six players challenging the NFL's so-called “Rozelle Rule.”¹⁶² The *Mackey* court departed from Supreme Court precedent and instead applied a three-part test to determine whether the Rozelle Rule should be exempted. The court, citing *Jewel Tea*, held that the labor policy in question must (1) primarily affect “only the parties to the collective bargaining relationship,” (2) concern mandatory subjects of collective bargaining, and (3) be the product of bona fide arm's-length bargaining.¹⁶³ The court held that while the Rozelle Rule satisfied the first two criteria, it failed to meet the third, finding that the league had unilaterally imposed the rule on players.¹⁶⁴

Unless labor disputes in professional sports can be differentiated from other industries on some relevant grounds, leagues should be held to the *Apex Hosiery* and *Jewel Tea* balancing test, rather than the three-part *Mackey* test. After Congress created the nation's labor laws, commentators argued that those laws embodied a recognition that “the rules of the commercial market place are inapposite” to the labor market.¹⁶⁵ Instead, Congress sought to create a system in which parties have roughly equal bargaining power, resulting in wages “fair to labor and commercially feasible for their employers.”¹⁶⁶ Considering the history of abusive labor practices by

159. Jonathan C. Latimer, Comment, *The NBA Salary Cap: Controlling Labor Costs Through Collective Bargaining*, 44 CATH. U. L. REV. 205, 215 (1994).

160. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 391 (S.D.N.Y. 2004), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004) (“The nonstatutory exemption, created by the courts, was designed to favor labor law over antitrust law by permitting collective bargaining between unions and employers over wages, hours and working conditions.”).

Note that the extent of protection offered by the nonstatutory labor exemption once a collective bargaining agreement has expired—a question rather uniquely implicated by the professional sports industry—remains unsettled. Kieran M. Corcoran, Note, *When Does the Buzzer Sound?: The Non-statutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1045 (1994); *see also* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 352; Treadwell, *supra* note 76, at 966.

161. 543 F.2d 606 (8th Cir. 1976).

162. *Id.* at 609. The Rozelle Rule provided the following:

[If] a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable.

Id. at 609 n.1.

163. *Id.* at 614.

164. *Id.* at 615–16.

165. Hoffmann, *supra* note 147, at 1.

166. *Id.* at 2.

professional sports owners,¹⁶⁷ the same concerns targeted by Congress in other industries are present in professional sports.¹⁶⁸ Therefore, professional sports should be bound by the same judicial test¹⁶⁹ as other professions. While professional athletes certainly garner higher salaries than workers in most other fields,¹⁷⁰ none of the applicable statutes or case law makes any mention of salary as a relevant consideration in protecting labor activity from antitrust laws.¹⁷¹

Furthermore, the additional factors delineated by the *Mackey* court¹⁷² are unnecessary. The professional sports industry does not require a more comprehensive test than that imposed upon all other industries. While the *Apex Hosiery* and *Jewel Tea* test generally extends an antitrust exemption to any collective bargaining agreement, as long as it does not restrain or monopolize competition,¹⁷³ *Mackey* adds two requirements: that the agreement (1) concerns “a mandatory subject of collective bargaining,” and (2) is the product of “arm’s-length bargaining.”¹⁷⁴ The Supreme Court’s formulation sufficiently protects the interests of the athletes and their unions. By permitting the agreements to address matters beyond mandatory subjects of collective bargaining, the *Apex Hosiery* and *Jewel Tea* rule gives players and owners greater leeway in negotiations. Players and owners may well be able to gain key concessions in return for negotiating away other, “nonmandatory” issues, reaching agreements that benefit both parties.

As for the *Mackey* court’s “arm’s-length bargaining” requirement, current doctrine already accommodates such concerns. Players have the option of decertifying their union and challenging disputed provisions in an antitrust action should terms be imposed upon them in bad faith.¹⁷⁵ This

167. See *infra* notes 190–197 and accompanying text.

168. This existing legal framework adequately accounts for the unique needs of the business of professional sports. Courts can consider the fact that leagues need to maintain competitive balance when analyzing an antitrust challenge to a labor policy. Richard E. Bartok, Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503, 523 (“[F]ree agency restrictions’ impact on the sports league as a product is relevant to Section 1 scrutiny.”).

169. The *Apex* and *Jewel Tea* test. See sources cited *supra* notes 156–160 and accompanying text.

170. The NBA’s average salary is \$4.5 million per season. MLB players receive an average of \$2.5 million. NHL players average \$1.65 million, while NFL players average \$1.25 million per season. Mike Ulmer, *The Last Word*, TORONTO SUN, Nov. 4, 2003, at 87.

171. See Clayton Act, 15 U.S.C. § 17 (2000); Norris-LaGuardia Act, 29 U.S.C. §§ 101–10, 113–15 (2000).

172. See discussion *supra* notes 161–164 and accompanying text.

173. See discussion *supra* notes 156–160 and accompanying text.

174. *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

175. Latimer, *supra* note 159, at 231. NFL players decertified their union in the late 1980s. Marc J. Yoskowitz, Note, *A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move into the Realm of Antitrust*, 1998 COLUM. BUS. L. REV. 579, 580; see also Eric. R. McDonough, Comment, *Escaping Antitrust Immunity—Decertification of the National Basketball Players Association*, 37 SANTA CLARA L. REV. 821 (1997).

Congress recently extended this privilege to MLB players by partially revoking the sport’s antitrust exemption in the Curt Flood Act of 1998. 15 U.S.C. § 26(b) (2000 & Supp. III 2003). The Act

procedure has become increasingly popular across the economy in recent years.¹⁷⁶ Owners are less likely to engage in bad faith negotiations knowing that their actions could be subject to an antitrust challenge by the players in court. The mechanism is far from a guaranteed success for players, however, as they must still go through a number of legal steps after decertification in order for a judge to declare their negotiations with the league at an impasse.¹⁷⁷ Thus, both the threat and procedural requirements of decertification provide strong motivation for owners and players, respectively, to participate in the negotiations in good faith.¹⁷⁸ Because players already have a tool with which to attack unilaterally imposed provisions, adding an "arm's-length" requirement to the judicial test is unnecessary.

While it may be possible that a collective bargaining agreement protected under *Apex Hosiery* and *Jewel Tea* is unsatisfactory to some players, U.S. labor policy has been calibrated to allow the majority of employees to act on behalf of all employees.¹⁷⁹ Further, the added elements of the *Mackey* test do not provide any further protection for "marginalized" players. Therefore, professional sports owners and athletes should be given the same leeway as other management and labor in other industries. The *Apex Hosiery* and *Jewel Tea* test can sufficiently adjudicate labor disputes encompassing antitrust challenges to professional sports leagues.

B. Sports Leagues Are Not Single Entities in Labor Disputes

While this Note has argued that professional sports leagues should be classified as single entities, one exception to this general classification is for matters involving suits by players and their unions against the sports leagues. The various teams in a league do not share a unity of interest in matters involving labor disputes. First, although teams share a common economic interest in nonlabor policy to see that the league as a whole thrives, teams have divergent interests in the labor market.¹⁸⁰ Second, even if a unity of interest exists within the labor market, history shows an economic reality that leagues are prone to instituting abusive labor policies, meaning that a general, single entity exception shielding such policies from antitrust review would be

left baseball's antitrust exemption in place for nonlabor disputes. *Antitrust Exemption Lifted for Labor Issues*, BALT. SUN, Oct. 28, 1998, at 3D. While the Act was largely symbolic, it nevertheless granted MLB players the ability to take owners to court for antitrust violations, placing players on equal footing with their colleagues in the other professional sports. Grow, *supra* note 6, at 56.

176. David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268, 1320 (1988).

177. Yoskowitz, *supra* note 175, at 615–17.

178. Latimer, *supra* note 159, at 231.

179. *See id.* at 229 n.168 (arguing that section 9(a) of the National Labor Relations Act prefers collective action to individual employee representation).

180. *See Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 603 (7th Cir. 1996) (Cudahy, J., concurring) (observing that independent economic interests are the essence of single entity analysis).

improper.¹⁸¹ More specifically, any unity of interest among sports franchises in the realm of labor policy is generally not the result of necessity or economic reality, but simply driven by a desire to reduce labor costs. Consequently, the *Copperweld* rule is improper for sports leagues in this context.

1. A Unity of Interest Does Not Exist in the Labor Market

No unity of interest exists for professional sports leagues in the labor market. At the most basic level, all teams in a professional sports league have an interest in obtaining the best players possible.¹⁸² While leagues generally need competitive balance to survive,¹⁸³ individual teams nevertheless benefit by placing the best team possible on the field each season.¹⁸⁴ Winning increases ticket sales, leading to greater profits overall.¹⁸⁵ In this vein, teams also compete to acquire the best coaches and management personnel.¹⁸⁶ Thus, the interests of the individual teams diverge in the labor market.¹⁸⁷ Admittedly, all teams share a common interest in the labor market, in that all would benefit by keeping labor costs low.¹⁸⁸ However, this interest is not sufficient to qualify the league as a single entity in the labor context. All businesses in any given industry have a common interest in keeping the

181. See text accompanying *infra* notes 190–197.

182. Mathias, *supra* note 4, at 227.

183. See text accompanying *supra* notes 101–104.

184. Quirk and Fort identify a fascinating tension between the need for competitive balance within a league to maintain fan interest throughout the league, and the yearning of owners and fans alike for truly memorable dominant teams, like the 1927 Yankees, the 1931 Athletics, the 1962 Packers, the 1965 Celtics, the 1967 76ers, the 1972 Lakers, or the 1973 Dolphins—the teams that fans and sportswriters talk about for years afterwards. QUIRK & FORT, *supra* note 2, at 242.

185. See Fisher et al., *supra* note 28, at 7 (noting that richer owners “have an incentive to buy up the best players”). This motivation for on-field success mainly implicates competition *vis-a-vis* other forms of entertainment, such as local teams in other professional sports leagues, movies, concerts, etc. See text accompanying *supra* notes 76–82. Even in the few cases in which teams share a media market with another franchise in their league, fan bases are largely separate, meaning that relatively little competition for ticket sales exists between shared market franchises. *Id.* Therefore, the motivation for on-field success does not have a significant impact on each league’s overall unity of interest.

186. See, e.g., McNeil v. Nat’l Football League, 790 F. Supp. 871, 879 n.10 (D. Minn. 1992).

187. Fisher et al., *supra* note 28, at 7. Further, aside from each individual team’s motive to acquire the best available talent, most professional sports leagues feature a regular divide between so-called “small market” and “large market” teams in regard to labor policy. This divide is particularly evident in MLB. See MICHAEL LEWIS, MONEYBALL (2003) (analyzing the differences between “small market” and “large market” teams in MLB); Lock, *supra* note 160, at 406 (observing that it can be difficult for “smaller market” teams in all sports, such as those located in Green Bay and Kansas City, to compete with teams from larger markets for free agents); Brian Kamenetzky, *Talking With: Mitch Kupchak, Lakers GM (Part I)*, LAKERS BLOG, http://lakersblog.latimes.com/lakersblog/2005/12/talking_with_mi_1.html (noting that the same limitations exist for “small market” NBA franchises).

188. See Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 937 (1999) (finding that leagues institute salary caps to lower player salaries).

cost of resources low. *Copperweld* must require more of a unity of economic interest than this.¹⁸⁹

2. *The Economic Realities of Professional Sports Leagues Make Single Entity Status for Labor Disputes Improper*

Even if teams had a unity of interest in labor disputes, single entity status for leagues in labor disputes could injure players.¹⁹⁰ The history of professional sports leagues' labor practices points against finding single entity status in labor disputes. Team owners have implemented unilateral, abusive labor practices without consulting the player unions. Perhaps the most notorious instance of such unilateral action occurred in the mid-1980s, when MLB owners colluded to drive down player salaries.¹⁹¹ The owners agreed not to bid on other teams' free agent players or to pay exorbitant salaries to their own players.¹⁹² Consequently, salary increases took a dramatic plunge between 1986 and 1990.¹⁹³ While the owners eventually agreed to a \$280 million settlement with players,¹⁹⁴ the incident nevertheless illustrates the danger of granting professional sports leagues universal single entity protection in labor matters.

Professional baseball is not the only sport to experience such abuses by ownership. *Mackey*¹⁹⁵ involved the unilateral imposition of the "Rozelle Rule" on NFL players.¹⁹⁶ Furthermore, in *McNeil*, NFL players contested the league's unilateral implementation of a plan eliminating severance benefits and discontinuing the player retirement system.¹⁹⁷ While these incidents of labor abuse are not particularly relevant under a strict antitrust analysis, they illustrate the importance of giving professional athletes the protections of labor law in their dealings with the leagues. Allowing a single entity defense to trump the application of labor law would be inappropriate.

Although circuit courts have refused to permit the single entity status in labor disputes involving professional sports leagues,¹⁹⁸ the simple bifurcated classification scheme proposed in this Note offers a better and more consistent approach than the case-by-case approach these courts used. Granting

189. See *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (stating that sports leagues might not properly be considered single entities in labor disputes).

190. See *Jordan*, *supra* note 14, at 248 (finding that permitting the single entity defense in labor matters could "be detrimental to the players").

191. Murray Chass, *With No Ceremony, Collusion Agreement Is Reached*, N.Y. TIMES, Dec. 22, 1990, at 49.

192. *Id.*

193. *Id.*

194. *Id.*

195. 543 F.2d 606 (8th Cir. 1976).

196. See text accompanying *supra* note 162.

197. *McNeil v. Nat'l Football League*, 790 F. Supp. 871, 876 (D. Minn. 1992).

198. *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002); *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).

professional sports leagues single entity protection in labor disputes would run contrary to Supreme Court precedent and would jeopardize players' ability to enforce their rights under current labor law doctrine. These considerations compel the categorical approach advocated in this Note and render the current case-by-case approach unnecessary.

CONCLUSION

Courts should adopt a general classification scheme for determining whether to permit the single entity status defense by professional sports leagues. This approach extends upon the Seventh Circuit's suggestion in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n* that professional sports leagues' single entity status must be determined on a case-by-case basis. First, courts should generally presume that professional sports leagues are single entities in matters involving nonlabor policy, according to the reasoning of the Supreme Court's decision in *Copperweld*. Although a unity of interest exists among league franchises in nonlabor matters, most courts have misapplied *Copperweld* and its progeny in ruling that leagues are not single entities. Second, courts should create an exception to this general classification scheme by disallowing the single entity defense in labor disputes between players and leagues. Franchises lack a unity of interest in such matters, and the existing judicial balance between antitrust and labor law serves as a sufficient framework to adjudicate these cases. Consequently, courts should reject the majority rule and adopt the proposed classification scheme to settle future antitrust challenges to professional sports leagues.