1983

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Recommended Citation

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 (1983).

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RECOGNITION OF THE NATIONAL FOOTBALL LEAGUE AS A SINGLE ENTITY UNDER SECTION 1 OF THE SHERMAN ACT: IMPLICATIONS OF THE CONSUMER WELFARE MODEL

Myron C. Grauer*

In two recent antitrust actions against the National Football League (NFL), *Los Angeles Memorial Coliseum Commission v. NFL* (the *Oakland Raiders* case),¹ and *North American Soccer League v. NFL* (the *NASL* case),² the teams of the NFL were held to be separate entities capable of conspiring to violate section 1 of the Sherman Act³ when deciding how the NFL should operate. In the *Oakland Raiders* case, the district court judge's holding that the NFL teams were separate entities meant that the Los Angeles Memorial Coliseum Commission and the Oakland Raiders could continue to prosecute their section 1 claim. This claim was based on an allegation that League members were engaged in an illegal conspiracy in attempting to prohibit the movement of the Raiders' franchise from Oakland to Los Angeles.⁴ In the *NASL* case, the Second Circuit

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The author would like to thank Professors Mark R. Lee and Keith H. Beyler of the Southern Illinois University School of Law for their helpful comments on an earlier draft, and Frank A. Hess, Southern Illinois University School of Law, Class of 1983, for his invaluable research and editorial assistance. The author would also like to thank Barbara Bennett and Kathy Tuthill, secretaries at the Southern Illinois University School of Law, for their skillful typing of this Article.

1. 519 F. Supp. 581 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982). This case will be referred to as the *Oakland Raiders* case because the Oakland Raiders club is a cross-claimant against the NFL and the suit has received much publicity growing out of the Oakland Raiders' move from Oakland to Los Angeles. Indeed, scholarly comment on the litigation in this case is already beginning to appear. See, e.g., Kurlantzick, *Thoughts on Professional Sports and The Antitrust Laws: Los Angeles Memorial Coliseum Commission v. National Football League*, 15 CONN. L. REV. 183 (1983).

2. 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982).

3. Section 1 of the Sherman Act 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 declared to be illegal." 15 U.S.C. § 1 (1982).

4. See Kurlantzick, *supra* note 1, at 184. The conspiracy allegation in this suit was based on NFL CONST. AND BY-LAWS art. IV, § 4.3 (Supp. 1982), which states:

The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home

Court of Appeals' conclusion that the NFL teams were separate entities led it to enjoin the NFL from amending its constitution to add a cross-ownership ban, on the ground that this would be a conspiracy in violation of section 1.⁵ The cross-ownership ban would have prohibited an owner of an NFL team from owning any interest in a team in another major professional sport such as hockey, baseball, basketball or soccer.⁶

In reaching these results, both courts misused precedent and failed to understand what policy should underlie the antitrust laws. The Supreme Court missed a golden opportunity to correct some of these errors when it denied the NFL's petition for certiorari in the *NASL* case.⁷ Justice Rehnquist recognized the error that the Court was making and filed an opinion dissenting from the denial of certiorari.⁸ He noted that the NFL is a joint venture that produces a product (NFL football) that each of its teams could not produce independently.⁹ He further observed that the NFL "competes with other sports and other forms of entertainment in the entertainment market."¹⁰ Analogizing a NFL team owner's knowledge of NFL operations to a business employee's knowledge of trade secrets,¹¹ Justice Rehnquist concluded that a cross-ownership ban could be upheld as similar to a covenant not to compete that is intended to protect trade secrets.¹² Drawing a parallel to an enterprise familiar to most lawyers, he stated: "I cannot believe the Court of Appeals would expect a law firm to countenance its partners working part-time at a competing firm while remaining partners."¹³ As a result, Justice Rehnquist could not discern why a ban on cross-ownership by NFL owners would be impermissible.¹⁴

This article argues that Justice Rehnquist has analyzed the operational structure of the NFL in a manner that is consistent with proper antitrust enforcement policy, and expands upon the view that

territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

5. 670 F.2d at 1256-61.

6. NFL CONST. AND BY-LAWS art. IX, § 9.4 (Proposed 1978), reprinted in *NASL*, 670 F.2d 1249, 1255 (2d Cir.), cert. denied, 103 S. Ct. 499 (1982).

7. 103 S. Ct. 499 (1982).

8. 103 S. Ct. 499, 499 (1982) (Rehnquist, J., dissenting from denial of certiorari).

9. 103 S. Ct. at 500-01 (Rehnquist, J., dissenting from denial of certiorari).

10. 103 S. Ct. at 500 (Rehnquist, J., dissenting from denial of certiorari).

11. 103 S. Ct. at 501 (Rehnquist, J., dissenting from denial of certiorari).

12. 103 S. Ct. at 501 (Rehnquist, J., dissenting from denial of certiorari).

13. 103 S. Ct. at 501 (Rehnquist, J., dissenting from denial of certiorari).

14. 103 S. Ct. at 502 (Rehnquist, J., dissenting from denial of certiorari).

he espoused. It contends that the NFL is analogous to a law firm partnership, with the teams analogous to departments or partners that can make operating rules for the firm without fear of violating section 1 of the Sherman Act.¹⁵ In arriving at the opposite conclusion, both the *Oakland Raiders* and *NASL* courts relied on several cases involving player restraints¹⁶ that presupposed that teams in

15. See note 22 *infra* and accompanying text; Part III *infra*.

16. Player restraints include, for example, the draft, the "No-Tampering Rule," and the "Rozelle Rule." NFL CONST. AND BY-LAWS art. XIV (1976 & Supp. 1982), entitled "Selection Meeting," provides for an annual draft of players who have recently satisfied the eligibility requirements for playing in the NFL. Under article XIV, each NFL team, beginning with the team with the worst record in the previous season and ending with the team with the best record, picks one player. Once each team has chosen one player, the process is repeated in subsequent rounds. Permitting the team with the worst record to choose first is intended to help strengthen the weaker teams in order to promote competitive balance on the playing field. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175-76 (D.C. Cir. 1978). Once a player is drafted by a team, he is placed on that team's Selection and Reserve lists. See NFL CONST. AND BY-LAWS art. XIV, § 14.5 (1976). This draft system is essentially the same as the 1968 draft that was held to violate section 1 of the Sherman Act in *Smith*. Compare NFL CONST. AND BY-LAWS art. XIV (1976 & Supp. 1982) with *Smith*, 593 F.2d at 1175 (description of 1968 NFL player-draft procedures).

NFL CONST. AND BY-LAWS art. IX, § 9.2 (Supp. 1982), commonly referred to as the No-Tampering Rule, prohibits a team from negotiating with or making an offer to a player who is on the active, reserve, or selection list of any other team.

NFL CONST. AND BY-LAWS art. XII, § 12.1(H) (1976), commonly referred to as the Rozelle Rule, was successfully challenged in a section 1 action in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The *Mackey* court succinctly described the Rozelle Rule as follows:

The Rozelle Rule essentially provides that when 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.

543 F.2d at 609 n.1. The Rozelle Rule's compensation provision has been described as having an *in terrorem* effect on teams thinking of signing free agents. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1176 n.6 (D.C. Cir. 1978). In combination, the draft, No-Tampering Rule, and Rozelle Rule effectively precluded a player from being able to play for the team that was willing to make him the best offer.

After the player draft and the Rozelle Rule were invalidated in the *Smith* and *Mackey* cases, respectively, the NFL and the National Football League Players Association entered into a collective bargaining agreement that provided for an amended, but substantially similar, draft and Rozelle Rule. See Roberts & Powers, *Defining the Relationship between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 449-50 (1978). As part of a bona fide negotiated collective bargaining agreement, the new draft and Rozelle Rule may now be immune from antitrust challenge under the rationale of *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (reserve system incorporated in agreement between National Hockey League and National Hockey League Players Association as a result of good faith, arm's length bargaining was entitled to non-statutory labor exemption from antitrust laws). The collectively bargained changes in the draft and Rozelle Rule, and the fact that they may now be exempt from antitrust challenge under *McCourt*, are immaterial to this Article because this Article contends that the draft and Rozelle Rule challenged in *Smith* and *Mackey* should not have been held to violate section 1 of the Sherman Act. See Part IV *infra*.

For a discussion of the changes in the player draft and Rozelle Rule brought about by the subsequent collective bargaining agreement, see Rothenberg & Tellem, *Restraints on Professional Athletes*, 4 L.A. LAW. 35, 48 (June, 1981); Roberts & Powers, *supra*, at 449-50.

professional-sports leagues, such as the NFL, are separate entities capable of an *intraleague* conspiracy violating section 1.¹⁷ The *Oakland Raiders* and *NASL* courts reasoned that if the NFL teams are separate entities in some section 1 actions, such as player-restraint cases, they must be separate entities in all section 1 actions.¹⁸ However, both courts improperly relied upon the player-restraint cases because, as detailed below,¹⁹ a reexamination of the antitrust issues raised in the player-restraint cases undermines their precedential value.²⁰

The following hypothetical should help place the player-restraint cases in their proper perspective. Suppose an ambitious young attorney who worked in a major national law firm was dissatisfied with the manner in which he and his fellow associates were assigned to the different departments and were compensated. As a result, he asked that each department (such as labor or tax) be required to bid at the end of each fiscal year for the services of the various associates. Under his proposal, each associate could choose to work during the following year for the department that made the most attractive offer. The partners denied the young attorney's request, realizing that, if implemented, his proposal could have devastating effects on the firm. Teams working on litigation matters would be broken up and restructured at the end of each fiscal year. A department that had an exceptionally lucrative, intellectually interesting, or otherwise successful practice could become the dominant department in the firm by acquiring all the star associates. In short, such an internal system of assigning and compensating associates would make the firm operate inefficiently and would inhibit the firm's efforts to succeed as a full-service law firm.

Regardless of these considerations, suppose the young attorney then brought an action against the firm under section 1 of the Sherman Act, alleging that the partners had conspired to fix the associ-

17. See *NASL*, 670 F.2d at 1257 (citing *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Linseman v. World Hockey Association*, 439 F. Supp. 1315 (D. Conn. 1977); *Bowman v. NFL*, 402 F. Supp. 754 (D. Minn. 1975); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *affid. on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979)); *Oakland Raiders*, 519 F. Supp. at 583 (citing *Smith*, *Mackey*, and *Kapp*).

18. *NASL*, 670 F.2d at 1256-57; *Oakland Raiders*, 519 F. Supp. at 583.

19. See Part IV *infra*.

20. Twelve years ago, Jacobs and Winter declared that the issue of whether player restraints violate the antitrust laws "is an issue whose time has come and gone, an issue which has suffered that modern fate worse than death: irrelevancy." Jacobs & Winter, *Antitrust Principles and Collective Bargaining By Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 1 (1971). However, because of their use in non-player-restraint *Oakland Raiders* and *NASL* cases, the antitrust issues of the player-restraint cases must be reexamined.

ates' salaries and thus effectively engaged in a group boycott by refusing to permit associates to move from department to department at the end of each fiscal year. Three things would probably happen, though not necessarily in this order: (1) the associate would be fired, (2) the associate would be committed to a mental institution, and (3) the suit would be dismissed for failure to state a claim. The suit would fail to state a claim because section 1 of the Sherman Act requires more than one actor for a violation to occur.²¹ When operating decisions are made within a partnership or other business entity, the only person deemed to be acting is the business entity itself. The individuals who comprise the business entity are not deemed to be the multiple actors needed for a section 1 violation.²²

Because the NFL is analogous to a law firm,²³ any section 1 action brought against only the NFL or the NFL and its member teams, regardless of who brings it (be it players, member teams, or competing entertainment ventures), should be dismissed as summarily as the suit by our demented young law firm associate.²⁴ To demonstrate this position, this article will: (1) briefly explain the

21. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, § 108, at 311 (1977) ("Section 1 can be violated only by two [or more] separate entities acting in concert, by a 'contract, combination or conspiracy' in restraint of trade.").

22. See, e.g., *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 80-84 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974); see also Part II *infra*.

23. While this article deals in particular with the NFL, many of the arguments presented here are equally applicable to other sports leagues. For this reason and because some practices engaged in by the NFL and other sports leagues have been challenged under section 1 only in cases involving leagues other than the NFL, non-NFL cases will be used in some instances to demonstrate why certain NFL practices should not be deemed section 1 violations.

24. After this law firm hypothetical was formulated and drafted, a similar law firm hypothetical from the players' point of view came to the author's attention. This hypothetical analogizes the players' situation to that which would face law school graduates if all law firms in the United States were organized into a National Law Firm League, with each law firm having the right to bargain exclusively with those associates selected by it in an associates' draft. See *Rothenberg & Tellem, supra* note 16, at 35, 44. This hypothetical is not, however, analogous to the NFL situation. As this article will demonstrate, the NFL should be deemed a single entity in part because its component parts, the individual teams, could not produce the ultimate product, NFL football, on their own. A decision within the NFL by the teams on how to allocate players should therefore be viewed as efficiency producing because it aids in the production of the product at the highest possible level of quality, and not as anticompetitive because the teams in producing this product are not competing against each other economically any more than are the partners within one law firm.

A draft by a National Law Firm League, on the other hand, would be purely anticompetitive because each member firm can and does produce its own product (legal services) independently of the other league members, and each member law firm competes economically against other members. Such a National Law Firm League draft, therefore, would operate solely to eliminate competition for legal talent, which is a key area of competition between law firms in their quest for economic superiority. A National Law Firm League draft is more properly analogized to a common draft held by the NFL and the new United States Football League

concept of consumer wealth maximization and illustrate why it is the only proper goal of antitrust enforcement policy; (2) describe and analyze the intraenterprise conspiracy doctrine, concluding that courts should look to the economic substance of enterprise arrangements rather than their legal form; (3) demonstrate that the NFL, with the teams as partners (or law firm departments), is closely analogous to a law firm partnership, and thus should be deemed a single entity for purposes of section 1 of the Sherman Act; (4) discuss why the player-restraint cases, which treat the NFL teams as economically competing multiple entities for section 1 purposes, were improperly decided; and (5) show that the *Oakland Raiders* and *NASL* decisions are inconsistent with the proper goal of antitrust policy and that several of the non-player-restraint cases on which they rely are either theoretically unsound or improperly cited.

This Article does not contend that the NFL or any other sports league should be exempt from the antitrust laws, nor does it argue that the NFL should be immune from section 1 liability and therefore be free to combine with other entities to restrain competition. It simply argues that the NFL is a single entity for section 1 purposes. Furthermore, this Article does not contend that the NFL should be immune from section 2²⁵ liability and be permitted to engage in predatory practices against competing entertainment entities. Rather, the Article's position is consistent with the following comment made by Professor (now Judge) Bork before most of the cases discussed in this Article were decided:

We allow partnerships and their ancillary restraints, but the restraint ceases to be ancillary when two separate partnerships agree on the prices they will charge. Perhaps the Court should view the league as a firm and validate all its internal restraints on competition, but it is difficult to see why two leagues should be allowed to have a common player draft and a reserve clause that operates between the leagues as well as within them. Competition between leagues should be free. That solution may not please either the owners or the players, but it is consistent with antitrust principles. Sooner or later the Court is going to have to face the issues raised by the restraints in organized sports, and this solution seems to me dictated by the needs of leagues and by

(USFL). Because the NFL and USFL are two economic competitors, such a common draft could very well be open to a successful challenge under section 1 of the Sherman Act.

25. Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982).

the analogy of the league to partnerships or firms.²⁶

I. CONSUMER WEALTH MAXIMIZATION: THE ONLY PROPER GOAL OF ANTITRUST ENFORCEMENT POLICY

For almost two decades, commentators have debated the proper goals of the antitrust laws. On one side are those who view the antitrust laws as intended to promote multiple goals, including economic efficiency and individual liberty.²⁷ Proponents of this view contend that individual liberty is enhanced by limiting the size and power obtainable by any entity and by promoting the existence of many small rival entities. On the other side are those who see the promotion of consumer wealth maximization through economic efficiency as the only proper goal of antitrust policy.²⁸ This article sides with the latter position. Before explaining why it does so, however, it is necessary to digress momentarily to explain the concept of consumer wealth maximization.

A. *The Concept of Consumer Wealth Maximization*²⁹

The concept of consumer wealth maximization, also known as Pareto optimality after the economist Vilfredo Pareto,³⁰ is based upon several assumptions, and postulates a goal for any society. Pareto optimality assumes that society contains limited resources, that consumers as a whole desire as many goods and services as they can obtain at the lowest possible price, and that producers desire to maximize profits. The goal of Pareto optimality is to allocate society's limited resources in a manner such that no rearrangement of those resources (by judicial decree or otherwise) can make any one

26. *Debate—Resolved: Present Antitrust Restraints On Pricing Should Be Relaxed*, 41 A.B.A. ANTITRUST L.J. 5, 13 (1971) (quoting Bork giving the First Affirmative).

27. See, e.g., Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Redlich, *The Burger Court And The Per Se Rule*, 44 ALB. L. REV. 1 (1979); Sullivan, *Economics And More Humanistic Disciplines: What Are The Sources Of Wisdom For Antitrust?*, 125 U. PA. L. REV. 1214 (1977).

28. See, e.g., R. BORK, *THE ANTITRUST PARADOX* 57 (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 4 (1976); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7 (1966) (hereinafter cited as Bork, *Legislative Intent*); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965) (pt. 1), 75 YALE L.J. 373 (1966) (pt. 2) [hereinafter cited as Bork, *The Rule of Reason*]; Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 13 (1977).

29. This discussion of the concept of consumer wealth maximization is derived from R. BORK, *supra* note 28, at 58-62, 91-129; R. DORFMAN, *PRICES AND MARKETS* 174-76 (3d ed. 1978); and Bork, *The Rule of Reason* (pt. 2), *supra* note 28, at 466-67.

30. To see how the terms "Pareto optimality" or "Pareto criterion" and "consumer wealth maximization" or "consumer welfare" can be used interchangeably, compare R. BORK, *supra* note 28, at 90-91, with R. DORFMAN, *supra* note 29, at 174-75.

person better off (or more satisfied) without making another person worse off. This, of course, does not mean that each person should be able to get whatever he or she pleases. Rather, each person's ability to get what he or she pleases is limited by the scarcity of resources and the desires of others. In any event, Pareto optimality is an unattainable goal because a society's economy is dynamic (i.e., always in a state of flux rather than static) and because the perfect free-market economy does not exist. Nevertheless, Pareto optimality, like Hamlet's vision of death as a peaceful end to the traumas of life, is "a consummation [d]evoutly to be wisht."³¹

Producers can seek to maximize profits in one of two ways: (1) by behaving efficiently in order to produce as many goods and services as possible at the lowest possible price; or (2) by gaining monopoly power and restricting output,³² thus enabling them to raise prices because the demand exceeds the restricted output or supply.³³ The monopolist who restricts output and raises prices quite likely impedes the quest for Pareto optimality because his actions may prevent consumers as a whole from obtaining as many goods and services as they desire at the lowest possible price. On the other hand, the businessman who operates efficiently will aid society in its quest to attain the consumer welfare goal of providing the most goods at the lowest possible price.

In a free-market economy, the most efficient firm will generally be the one patronized by consumers, and its attempts at attaining efficiency should not be thwarted by the courts. The firm that restricts output, however, generally damages consumer welfare and should be the target of the antitrust laws. Thus, those who view maximization of consumer welfare as the sole goal of antitrust policy

31. 8 THE WORKS OF WILLIAM SHAKESPEARE 287 (New York: Duffield & Company, 1906) (Hamlet, Act III, Scene I, Lines 63-64).

32. Bork actually contends that there is a third way by which a business can seek to maximize profits, *viz.*, "by some device not related to either production or allocative efficiency, such as taking advantage of some wrinkle in the tax laws (neutral)." R. BORK, *supra* note 28, at 122. Bork believes that such neutral actions should be upheld as legal. *Id.* These neutral actions, however, could better be described as responses to efficiency reducing externalities (for example, taxes) that are built into the system and must, therefore, be tolerated. For example, the time and costs involved in determining how to take advantage of a wrinkle in the tax laws represents an inefficient allocation of resources that is required by the externality of taxes. This externality would not be present in a perfect free-market economy. When viewed as responses to accepted externalities, these neutral actions should drop out of the list of practices that should be examined in antitrust inquiries. Thus, for antitrust purposes, there are only two ways by which producers seek to maximize profits.

33. A business entity acting in its self-interest would not restrict output before it gained monopoly power, because if it tried to raise prices to reap profits from its output restriction before obtaining monopoly power, consumers would simply take their business to competing businesses that were not restricting output and that could thus afford to offer lower prices.

define competition as a goal that consists of the Pareto optimal state. Under this view, a court's role is to determine if an action is intended to restrict output or promote efficiency.³⁴ If an action is not intended to restrict output, it *must* be intended to promote efficiency, and therefore should be upheld. The converse of this statement, namely, "If an activity is intended to promote efficiency, it is not output restrictive and must be upheld," is not necessarily true. As Bork notes, there are certain mixed cases in which an activity can both produce efficiencies and restrict output. Bork adds, however, that this situation rarely arises outside of the context of a horizontal merger.³⁵ Because this article does not deal with cases involving horizontal mergers, we shall assume that if an activity is intended to promote efficiency, it is not output restrictive and should be upheld.

This does not mean that an activity or practice must succeed in producing the intended efficiencies for it to be upheld. Consumer wealth maximization theory assumes that consumers will make rational decisions based upon what is best for them, and if a business is not acting efficiently enough to succeed vis-a-vis its competitors, it will either adjust its operations or lose its customers. Therefore, when consumers have the freedom to choose among producers, and producers continually adjust their practices via trial and error to satisfy consumer demands, Pareto optimality or consumer wealth maximization is approached. Consequently, courts should not interfere with unilateral decisions on how a business should operate unless the business possesses monopoly power and the questioned practices are intended to restrict output. Judicial interference with practices that are not aimed at restricting output and that are therefore attempts to promote efficiency will quite likely interfere with the dynamics of the market place and produce anticompetitive effects.

B. *Why Consumer Wealth Maximization Is The Only Proper Goal Of Antitrust Enforcement Policy*

Scholars generally agree that the legislative history of the Sherman Act is so vague that no single underlying enforcement policy

34. A firm does not intend to operate efficiently or, alternatively, restrict output for its own sake, but only as a means to maximize profits. Thus, properly speaking, it might be more accurate to say that a court should inquire whether a firm is seeking to maximize profits by restricting output, or whether it is seeking to accomplish this end by operating efficiently. In this sense, enterprise actions are not *intended* to restrict output or promote efficiency; they are *intended* to maximize profits. However, because the goal of profit-maximization can be attained either through output restriction (if the business is a monopoly) or efficient operation, courts must determine which approach is being used when a firm takes a particular action.

35. See R. BORK, *supra* note 28, at 122-24.

can be derived from it and that several possible enforcement policies can be found in the congressional debates leading to its enactment.³⁶ Indeed, Judge Bork originally espoused this view³⁷ but later attempted to prove that consumer wealth maximization can be found as the sole underlying policy of the Sherman Act simply by examining the Act's legislative history.³⁸ Professor Elzinga, who generally agrees with Bork's antitrust philosophy, has described Bork's position as "ingenious and appealing, not only because of the pristine conclusion it reaches. But like King Agrippa after hearing the Apostle Paul, one remains only 'almost persuaded.'"³⁹ One may be "only 'almost persuaded'" by Bork's argument that the legislative history proves that consumer welfarism *is* the sole goal of the Sherman Act. However, Bork's arguments that consumer welfarism *should* be the sole goal of antitrust policy, which are based on more than simply the legislative history, are convincing.

Although Bork has devoted much of his scholarly research to locating an implied policy of consumer wealth maximization in many of the early antitrust cases,⁴⁰ his presentation of the advantages of having consumer wealth maximization as the sole goal of the antitrust laws is his most persuasive argument.⁴¹ Furnishing businesses with objective legal standards is the primary advantage of such an approach. For businesses to operate effectively, they must be able to predict the legal consequences of their actions. Therefore, objective legal standards are as badly needed in antitrust as in any other field.⁴² Since the antitrust laws are intended to promote competi-

36. See, e.g., Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 422-23 (1965); Elzinga, *The Goals Of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191-92 & n.2 (1977); Sullivan, *supra* note 27, at 1218.

37. See Bork, *The Rule of Reason* (pt. 1), *supra* note 28, at 783.

38. See Bork, *Legislative Intent*, *supra* note 28.

39. Elzinga, *supra* note 36, at 1192 n.2.

40. See Bork, *The Rule of Reason* (pts. 1 & 2), *supra* note 28.

41. See R. BORK, *supra* note 28, at 81-89; Bork, *The Rule of Reason* (pt. 1), *supra* note 28, at 833-47.

42. As Bork has stated:

No businessman can know what the law is if the "law" depends upon the sympathies and prejudices of any one of the hundreds of federal judges before whom he may find himself arraigned at some uncertain date in the future. He can know what the law is when the goal of the law is consumer welfare, because the major distinctions of such a system run along the same lines in which the businessman thinks, making lawful his attempts to be more efficient and making unlawful his attempts to remove rivalry through such improper means as cartelization, monopolistic merger, and deliberate predation. A consumer welfare goal, moreover, lends itself to relatively few and simple rules of substantive law, so that predictability is further enhanced. . . . Finally, a consumer welfare orientation makes change in the law predictable and less likely to produce unfairness.

R. BORK, *supra* note 28, at 81.

tion, such objective standards are best found in economic analysis. If the objective standards were derived elsewhere, anticompetitive results might be reached.⁴³ The Supreme Court apparently now agrees that objective standards must be derived from economic analysis, because it has stated: "[A]n antitrust policy divorced from market considerations would lack any objective benchmarks."⁴⁴ This statement represents a movement away from earlier cases that reflected the view that the antitrust laws could and should satisfy more than one goal, and toward a recognition that consumer wealth maximization should be the sole policy underlying antitrust enforcement.

The earlier view supporting multiple antitrust goals was expressed in *Brown Shoe Co. v. United States*,⁴⁵ a merger action under section 7 of the Clayton Act,⁴⁶ where the Supreme Court stated:

Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.⁴⁷

In this statement, the Court asserted that the antitrust laws protect competition instead of competitors and implied that efficient actions by businesses are not unlawful even if smaller competitors are harmed thereby. At the same time, however, it posited that protecting competition includes maintaining small businesses, despite their possible inefficiency. By these statements, the Court espoused positions so inconsistent that a businessman or his attorney could have a nervous breakdown while attempting to evaluate the legality of a proposed action.

43. See notes 45-47 *infra* and accompanying text. An objective standard that promotes the protection of small businesses can result in higher costs to the consumer than would be found in a Pareto optimal state. That is plainly an anticompetitive result under a consumer wealth maximization approach.

44. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

45. 370 U.S. 294 (1962).

46. At the time *Brown Shoe* was decided, Section 7 of the Clayton Act, provided in pertinent part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 370 U.S. at 296 (1962) (quoting 15 U.S.C. § 18 (amended 1980)).

47. 370 U.S. at 344.

In *United States v. Topco Associates*,⁴⁸ the Court recognized that objective legal tests are necessary for businessmen to make intelligent decisions. The Court found these tests in the *per se* rules. However, in so doing, the Court implied that economic theory was so complex that its use in antitrust cases was incompatible with the need for predictability satisfied by the *per se* rules.⁴⁹ The Court admitted the folly of this thinking only seven years later in *Continental T.V., Inc. v. GTE Sylvania Inc.*,⁵⁰ in the statement already noted that "an antitrust policy divorced from market considerations would lack any objective benchmarks."⁵¹ Indeed, the *Sylvania* Court went on to engage in the types of economic analysis suggested by those who believe that consumer wealth maximization is the only proper goal of antitrust enforcement policy, and cited Bork and Posner with approval.⁵² Furthermore, the *Sylvania* Court rejected the *Topco* position that the predictability supposedly given by *per se* rules was sufficient to justify their use:

[P]er se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, . . . but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.⁵³

While the Court has yet to state specifically that antitrust cases should be decided simply by determining whether an activity restricts output or is intended to promote efficiencies, the Court has intimated that businessmen should be permitted to decide for themselves the most efficient method of operation.⁵⁴ Additionally, the Court has stated that the Sherman Act "floor debates . . . suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'"⁵⁵

48. 405 U.S. 596 (1972).

49. 405 U.S. at 609-10 & n.10.

50. 433 U.S. 36 (1977).

51. 433 U.S. at 53 n.21; see also note 44 *supra* and accompanying text.

52. 433 U.S. at 54-57.

53. 433 U.S. at 50 n.16 (citation omitted).

54. See *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979). In *Broadcast Music*, the Court was unable to see how ASCAP's requirement that CBS pay "a flat fee regardless of the amount of use it made of ASCAP compositions" could constitute an antitrust violation inasmuch as "[s]ound business judgement could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. . . ." 441 U.S. at 8-9 n.13 (quoting *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950)).

55. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting R. BORK, *supra* note 28, at 66).

The Court has not yet stated that consumer wealth maximization should be the *sole* goal of antitrust enforcement policy, but it has traveled quite far along that road. Of course, like most travelers, the Court is bound periodically to detour from its path. An unfortunate detour recently occurred in *Arizona v. Maricopa County Medical Society*.⁵⁶ In an opinion reminiscent of *Topco*, the Court refused to engage in any economic analysis. Instead, the Court held as *per se* illegal an agreement among physicians on the *maximum* fees they would charge policy holders under certain health insurance plans. In a stinging dissent, Justice Powell noted that the Court disregarded the potential consumer benefits of a maximum fee schedule and the fact that the antitrust laws are intended to promote consumer welfare.⁵⁷ Apparently, while the Court when acting rationally now views consumer wealth maximization as the proper goal of the antitrust laws, some of the Justices⁵⁸ react to the word "price" as Pavlov's dogs did to bells, but, instead of salivating, they lose all sense of proportion and shout "*per se!*"

Notwithstanding the Court's recent detour, Bork remains convincing in arguing that unless consumer wealth maximization is the sole goal of antitrust enforcement policy, the goal of predictability of result will not be achieved and anticompetitive court decisions may ensue. Unless consumer welfarism is the only goal of antitrust policy, social policies inevitably affect each antitrust decision. Consequently, all predictability and hope for consistently pro-competitive results are lost because each case will turn on the political and social choices of the court deciding it.⁵⁹ As the Supreme Court is slowly

56. 102 S. Ct. 2466 (1982).

57. 102 S. Ct. at 2485 (Powell, J., dissenting).

58. The term "a majority" of the Justices would be inappropriate because *Maricopa County* was a 4-3 decision. Justices Blackmun and O'Connor took no part in the consideration of the case. 102 S. Ct. at 2480.

59. Bork, *The Rule of Reason* (pt. 1), *supra* note 28, at 838-39. For a cogent analysis of how Justice Brandeis' political and social choice of protecting small and potentially inefficient producers led to an anticompetitive result in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), see R. BORK, *supra* note 28, at 41-47.

Even a cursory examination of the principal justifications of a multi-dimensional antitrust policy reveals serious flaws in that position. Blake and Jones contend that economic efficiency could not be the sole goal of antitrust law. They reason that other modern industrial countries without similar antitrust laws have higher economic growth rates than the United States, making it apparent that considerations other than economic efficiency underlie United States antitrust policy. Blake & Jones, *supra* note 27, at 381-82. However, Blake and Jones fail to perceive that lower United States economic growth rates may be due to the American judiciary's failure to recognize that the antitrust laws should be intended solely to foster economic efficiency, thus leading to the judiciary's failure to apply those laws to achieve this goal. This failure is exemplified by the language quoted earlier from *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). See text accompanying note 47 *supra*. The *Brown Shoe* decision, and others like it, could, by misconstruing the proper purpose of the antitrust laws, produce the

realizing, only a consumer wealth maximization policy can give predictability and consistently procompetitive results. The next section of this Article will show how this policy should be used to determine whether multiple entities exist for purposes of section 1 of the Sherman Act.

II. THE INTRAENTERPRISE CONSPIRACY DOCTRINE

A conspiracy cannot exist under section 1 of the Sherman Act among the individuals or divisions of one business entity.⁶⁰ However, the courts are split on whether mere separate incorporation or organization of affiliated or controlled entities makes those separate entities capable of conspiring in violation of section 1.⁶¹ One view

same adverse effect on economic growth as any clear congressional statement that the antitrust laws serve multiple yet inconsistent policies.

In a further effort to refute the consumer welfare advocates' position that consumers fare best in a free competitive market, Blake and Jones state: "Here at home we do not find that economic progress is invariably linked to competitive markets. Monopolized industries such as telecommunications and electric power are not regarded as unprogressive." Blake & Jones, *supra* note 27, at 382. This statement fails to recognize that those who advocate consumer welfarism as the sole goal of the antitrust laws accept the reality of a dynamic economy and the impossibility of a perfect free-market economy due to the presence of certain externalities. Consumer welfare advocates also recognize that the efficiencies of some monopolies may outweigh any dead-weight loss that they cause. Thus, certain monopolies are tolerated in the quest for the unattainable Pareto optimal state. *See* R. BORK, *supra* note 28, at 192-95; R. DORFMAN, *supra* note 29, at 156. Furthermore, Blake and Jones' use of the term "monopolized industries" is misleading. It is not "monopolized industries" that society tolerates, but rather certain monopolies, for section 2 of the Sherman Act outlaws *monopolization* but not lawfully-obtained monopolies that do not misuse their lawfully-obtained monopoly power. *See generally* L. SULLIVAN, *supra* note 21, § 7, at 29-30 (1977) (outlining prohibitions of Sherman Act § 2).

While Blake and Jones also contend that individual liberty is an antitrust goal, Blake & Jones, *supra* note 27, at 383-84, and cite Senator Sherman's rhetoric for that proposition, Blake & Jones, *supra* note 36, at 422-23, it is Professor Sullivan who tries to justify the multi-goal approach by examining the Sherman Act in the context of American history at the time of its passage. Sullivan, *supra* note 27, at 1218-20. Sullivan suggests that when one considers American society during the late 19th century, with all the tensions and ambivalences caused by the industrial revolution, it is difficult to expect to find doctrinal purity underlying the Sherman Act. *Id.* at 1219. Sullivan cites R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 233 (1965), as arguing persuasively "that antitrust expresses an abiding American conservatism, a perennial American impulse to find ways to divide, limit and diffuse both governmental and non-governmental power." *Id.* Unfortunately, this historical approach to antitrust policy fails to provide aid in establishing a workable and predictable legal system. Historians do not have the obligation to establish and maintain a workable and predictable legal system. Judges do, however, and therefore should not have the luxury of deciding cases based upon their own interpretations of history, for history is subject to varying interpretations. Contrast Sullivan's reading of the historical record with Bork's use of history to show that promotion of consumer welfare was intended to be the sole goal of the antitrust laws. *Compare* Sullivan, *supra* note 27, with Bork, *Legislative Intent*, *supra* note 28. Courts, therefore, should be guided by the need for predictability in the law coupled with the avoidance of anticompetitive decisions.

60. *See* cases cited at note 22 *supra*.

61. *See* Handler & Smart, *The Present Status Of The Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 38-39 (1981).

holds that mere separate organization or incorporation (even of a parent and a wholly owned and controlled subsidiary) gives rise to the requisite plurality of actors needed for a section 1 violation.⁶² The opposing view analyzes all the facts and circumstances surrounding the relationship of the separately organized entities to determine if, based upon an economically realistic appraisal of those facts and circumstances, the requisite plurality of actors is present.⁶³ Each view finds support in inconsistent statements by the Supreme Court.

In *Perma Life Mufflers, Inc. v. International Parts Corp.*,⁶⁴ the Court held that International and its wholly-owned subsidiary, Midas, were separate entities that could conspire in violation of section 1. The Court explained: "[S]ince respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."⁶⁵ This approach can best be described as forcing a business to accept certain burdens if it desires to reap the benefits of separately incorporating its divisions.⁶⁶ *Perma Life* represents the high-water mark in the development of the intraenterprise conspiracy doctrine: the Court completely disregarded the economic substance of the transaction and only considered its form.⁶⁷

In reaching this high water mark, the *Perma Life* Court did not cite or distinguish its decision in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*⁶⁸ In *Sunkist*, the Court faced the question

62. See, e.g., *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 243-45 (5th Cir. 1978).

63. See, e.g., *White v. Hearst Corp.*, 669 F.2d 14, 15-16 (1st Cir. 1982); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587-90 (8th Cir. 1981); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980). There is arguably a third view differing somewhat from an all-the-facts-and-circumstances approach that "limit[s] liability for intracorporate conspiracy to cases where two corporations have held themselves out as competitors." Handler & Smart, *supra* note 61, at 39.

64. 392 U.S. 134 (1968).

65. 392 U.S. at 141-42.

66. This approach is advocated in a recent article by the attorneys who represented the Los Angeles Memorial Coliseum Commission in the *Oakland Raiders* case. See Blecher & Daniels, *Professional Sports And The "Single Entity" Defense Under Section One Of The Sherman Act*, 4 WHITTIER L. REV. 217, 225-26 (1982).

67. The Supreme Court began formulating the intraenterprise conspiracy doctrine in cases prior to *Perma Life*. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-28 (1947).

68. 370 U.S. 19 (1962).

of whether or not the three separate commonly-owned-and-controlled entities that comprised the Sunkist organization could conspire among themselves in violation of section 1 of the Sherman Act. Sunkist, as an agricultural association, claimed exemption from the antitrust laws by virtue of the agricultural association exemption found in the Capper-Volstead Act⁶⁹ and section 6 of the Clayton Act.⁷⁰ The Court stated that these Acts permitted citrus growers to combine into *one* association, but was unable from the Acts to infer approval for combining into *three* commonly-owned-and-controlled associations.⁷¹ Nonetheless, the Court concluded that these associations were not independent entities for purposes of the Sherman Act,⁷² stating:

Instead of a single cooperative, these growers through local associations first formed one area-wide organization (Sunkist) for marketing purposes. When it was decided to perform research and processing on a joint basis, separate organizations were formed At a later date one of these (Exchange Orange) was acquired by the Sunkist organization and is presently held as a subsidiary. The other (Exchange Lemon) is still owned by the lemon-grower associations, all of whom are also member associations of Sunkist. With due respect to the contrary opinions of the Court of Appeals and District Court, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations. That the packing is done by local associations, the advertising, sales, and traffic by division of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association⁷³

Although some courts have limited the *Sunkist* rationale to cases involving agricultural associations covered by the Clayton and Capper-Volstead Acts,⁷⁴ others have extended *Sunkist* to Sherman Act

69. 7 U.S.C. § 291 (1982).

70. 15 U.S.C. § 17 (1982).

71. 370 U.S. at 28-29.

72. 370 U.S. at 27.

73. 370 U.S. at 29.

74. See, e.g., *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 34 n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978).

cases not involving any statutory exemption.⁷⁵

This latter application is the sounder one. Because the Court in *Sunkist* refused to infer from the Clayton and Capper-Volstead Acts approval for combining into three commonly-owned-and-controlled entities,⁷⁶ the Court did not base its single-entity finding upon any policy applicable only to agricultural organizations. Thus, if *de minimis* organizational distinctions do not preclude commonly owned and controlled *agricultural* organizations from being deemed a single entity, neither should they preclude commonly owned and controlled *non-agricultural* organizations from being deemed a single entity. To hold otherwise gives rise to an antitrust policy divorced from market considerations and economic reality, a policy that the Court itself condemned in *Continental T.V., Inc. v. GTE Sylvania Inc.*⁷⁷

Indeed, strict application of the intraenterprise conspiracy doctrine as in *Perma Life* has been condemned in an Article and two student Notes that present the history of the doctrine in greater detail than this Article.⁷⁸ One of the Notes clearly demonstrates that in each case where the Supreme Court applied the intraenterprise conspiracy doctrine, section 1 violations could have been found under existing case law without resort to that doctrine.⁷⁹ Thus, not only is the intraenterprise conspiracy doctrine ill-advised from the standpoint of consumer wealth maximization, but it has been unnecessary to the results reached in those cases where the Court purported to apply it.⁸⁰ In light of these considerations, use of an all-the-facts-and-circumstances approach, which takes into account economic criteria,⁸¹ is the better way to determine whether the requisite plurality of actors exists for section 1 liability.⁸²

75. See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1054-55 (9th Cir.), cert. denied, 103 S. Ct. 58 (1982); *Giant Paper and Film Corp. v. Albermarle Paper Co.*, 430 F. Supp. 981, 985-86 (S.D.N.Y. 1977); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635, 639-41 (S.D.N.Y. 1976).

76. See note 71 *supra* and accompanying text.

77. 433 U.S. 36, 53 n.21, 54-57 (1977); see notes 44 & 51 *supra* and accompanying text.

78. See, e.g., *Handler & Smart*, *supra* note 61, at 73-74; Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 HARV. L. REV. 661 (1982) [hereinafter cited as Note, *Conspiring Entities*]; Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977) [hereinafter cited as Note, *Intra-Enterprise Conspiracy*].

79. Note, *Intra-Enterprise Conspiracy*, *supra* note 78, at 718-27.

80. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

81. See note 63 *supra* and accompanying text.

82. Of the three pieces cited earlier, see note 78 *supra*, the Article and one of the Notes

In evaluating all the facts and circumstances to determine the number of entities that exist for antitrust purposes, courts have considered a number of factors.⁸³ The relevance of some of these factors

submit that the intraenterprise conspiracy doctrine should not apply where a parent corporation exercises substantial control over its subsidiary. Handler & Smart, *supra* note 61, at 73-74 (no intraenterprise conspiracy can exist where parent can change corporate form of subsidiary); Note, *Intra-Enterprise Conspiracy*, *supra* note 78, at 735-38 (no intraenterprise conspiracy can exist where parent exercises day-to-day control over subsidiary). It is suggested that such an approach gives rise to greater predictability than does examining all the facts and circumstances. See Handler & Smart, *supra* note 61, at 74-75. However, neither piece completely clarifies what elements of behavior are significant when the intraenterprise conspiracy doctrine is applied only to commonly-owned brother-sister corporations. The uncertainty inherent in an all-the-facts-and-circumstances approach would also be alleviated by the approach suggested by the third commentator, who contends that the only way to achieve predictability is to immunize all agreements among related business entities from section 1 attack. See Note, *Conspiring Entities*, *supra* note 78. This approach, which seeks complete predictability, may at first appear contrary to the Supreme Court's recognition that predictability should not be achieved by rigid rules that are not based upon economic analysis. See notes 44 & 51 *supra* and accompanying text. However, further analysis reveals much merit in this *per se* legal approach, which as yet has not been adopted by any court. The commentator who espouses this approach notes:

Nor is a rule that separate incorporation suffices to make related corporations possible conspirators under section 1 consistent with the general goals of antitrust policy. A firm will select the organizational form that enables it to operate most efficiently, and there are legitimate business reasons for preferring the subsidiary form of organization. Potential section 1 liability, however, will artificially discourage operation through subsidiaries. Because the antitrust laws aim to promote economic efficiency and because no court has suggested that operation through subsidiaries itself threatens competition, it is inconsistent with antitrust goals to make section 1 liability turn on the firm's choice of organizational form.

Note, *Conspiring Entities*, *supra* note 78, at 667-68; see also Note, *Intra-Enterprise Conspiracy*, *supra* note 78, at 728-29 (language supporting a similar point of view). This is but another way of saying that a business that operates via multiple legal entities should be treated no differently under section 1 than a business that is composed of multiple divisions that operate within one legal entity, because operation via multiple entities is not by itself output restrictive. However, because no court has accepted this *per se* legal approach and because the NFL structure does not fit squarely within a parent-subsidiary or brother-sister corporation framework, this Article will examine the NFL via an all-the-facts-and-circumstances approach.

83. See, e.g., *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982), *cert. granted in part, cert. denied in part*, 103 S. Ct. 3109 (1983). In *Independence Tube*, the Seventh Circuit approved a jury charge that provided:

So, in order to find that a combination or conspiracy to violate the antitrust laws existed between Copperweld and Regal, you must find that the two companies, in fact, operated as separate entities. In making this decision, you should consider the following matters:

1. The history of the two companies, that is, whether they functioned as separate companies before they became affiliated;
2. Whether the two companies are run by separate management staffs;
3. Whether the two companies maintained separate corporate offices;
4. Whether the parent corporation pays the salaries, expenses, or losses of the subsidiary;
5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of his business. In this connection you should consider both the day-to-day operating decisions and the major or executive policy decisions;
6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries;
7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans;
8. Whether both companies were separate participants in the alleged unlawful activity complained of by Independence;

might be open to question when viewed in the light of the proper goal of the antitrust laws: consumer wealth maximization.⁸⁴ However, one factor, not generally recognized by courts as controlling, should invariably lead to the conclusion that only one entity exists for antitrust purposes. That factor is the production of a product that each entity under consideration could not produce on its own. A court that purports to recognize the existence of such a product, however, implicitly recognizes that while a product of equal value might be produced by separate entities, the cost of production by separate entities would be prohibitively expensive.⁸⁵ Thus, the joint action of what are apparently separate entities to produce the product is an attempt to promote efficiencies rather than an attempt to restrict output. As a result, both the determination of whether one distinct product is being produced and the determination of whether a single entity exists for antitrust purposes are inextricably interwoven with a determination of whether the challenged practice is unlawful because it is intended to restrict output or lawful because it is intended to promote efficiency. It must therefore be remembered that for purposes of this Article the term "all the facts and circumstances" and the term "new product" or "distinct product" are used as terms of art in an inquiry as to whether an activity is intended to promote efficiency or restrict output.

In *Broadcast Music, Inc. v. Columbia Broadcasting System*,⁸⁶ the Supreme Court had to decide, *inter alia*, whether the members of the American Society of Composers, Authors and Publishers (ASCAP) were engaging in *per se* illegal price fixing. ASCAP was a clearinghouse for the licensing of copyrighted materials and the collection of royalties.⁸⁷ By using ASCAP as a common sales agent, ASCAP's members offered a person who wished to use copyrighted works in the ASCAP repertory only the right to use the entire ASCAP reper-

9. Whether both companies have common officers or directors. The existence of some common officers or directors does not alone render the two companies incapable of conspiracy.

You must consider all of the facts, and that includes the nine that I have given you here, and any other facts that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other.

691 F.2d at 331-32 (appendix).

84. For example, whether a parent and subsidiary have common officers and directors is irrelevant to an economic approach to intraenterprise conspiracy. See note 83 *supra*.

85. A law firm is a single business producing legal services. Each of the lawyers in the firm could also produce legal services, but by joining together in a law firm they can produce more valuable legal services than they could alone in a manner that is not prohibitively expensive.

86. 441 U.S. 1 (1979).

87. 441 U.S. at 5.

tory even if that prospective licensee desired to use only one or two works in the repertory.⁸⁸ Persons wishing to use copyrighted works but not ASCAP's services could search for and attempt to deal with each individual copyright owner.⁸⁹ However, it generally proved much more convenient simply to deal with ASCAP.⁹⁰

The Court held that ASCAP's method of granting licenses was not a price-fixing scheme that was *per se* illegal under section 1, but instead should be examined under the Rule of Reason.⁹¹ In reaching its decision, the Court did not specifically hold that ASCAP was a single entity whose members, therefore, could not conspire in violation of section 1. Nonetheless, it did intimate that it held this belief when it stated:

The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. . . . Thus to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.

. . . .
 . . . ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue.⁹²

88. See 441 U.S. at 5.

89. 441 U.S. at 6, 23-24.

90. See 441 U.S. at 22.

91. See 441 U.S. at 8-10, 16-25. Section 1's ban on restraints of trade is not effected directly, "but through two subsidiary rules, the [R]ule of [R]eason and the *per se* doctrine, which, taken together, tend to condemn arrangements which have the purpose or effect of significantly restraining competition and to validate those which do not." L. SULLIVAN, *supra* note 21, § 63, at 166 (1977). Stated differently, even efficiency-producing agreements restrain trade to some extent. Therefore, in enforcing the antitrust laws a distinction must be drawn between *per se* illegal agreements "in which the parties engage in no significant dealings other than the elimination of competition," R. BORK, *supra* note 28, at 27, and legitimate agreements whose subordinate and collateral restraints on trade are merely ancillary to the legitimate agreements. These latter agreements, when judged under Rule of Reason analysis, should be upheld. See R. BORK, *supra* note 28, at 26-28. Professor Sullivan describes the *per se* doctrine as a "special case of Rule of Reason analysis." L. SULLIVAN, *supra* note 21, § 72, at 196. "Where experience teaches that a particular practice is of a kind which blatantly restricts competition, we then know without further analysis how the balance will come out; we are spared the need for elaboration." *Id.*

As noted earlier, Professor Sullivan does not adhere to the position that consumer wealth maximization should be the sole goal underlying antitrust policy. See note 59 *supra*. Thus, his use of the term "competition" does not necessarily comport with the way in which a consumer wealth maximization adherent would use it. However, Professor Sullivan's analysis of the distinction between the *per se* and Rule of Reason approaches does comport with that which a consumer wealth maximization adherent would make if the term "competition" were defined in a consumer wealth maximization manner, i.e., a goal that consists of the Pareto optimal state. See Part I, Sec. A *supra*.

92. 441 U.S. at 21-23 (citations and footnotes omitted). Indeed, Justice Rehnquist, in noting that the NFL produces a product different from that which each of its teams could produce

Most likely, the Court went no further than it did in its holding because ASCAP had never specifically raised the issue of whether or not it was a single entity whose members when acting in concert could not violate section 1. Moreover, ASCAP probably did not claim single-entity status because it believed that it could succeed with the argument that, inasmuch as prospective licensees could deal with copyright owners directly, price fixing, a *per se* violation, had not taken place. Since the district court had agreed with ASCAP on this issue⁹³ and found no violation under a Rule of Reason approach,⁹⁴ ASCAP probably made a tactical decision that its chances of winning were greater if it did not raise the single-entity issue as such.⁹⁵ Still, the above-quoted language of the Court demonstrates its receptivity to the argument that if multiple entities act together to produce a product different from that which each entity could produce on its own, those multiple entities should be deemed a single entity for antitrust purposes.

Eight Justices joined in the 1979 *Broadcast Music* opinion.⁹⁶ Since it postdated the *Sylvania* decision, *Broadcast Music* can be regarded as part of the Supreme Court's progression toward adopting consumer wealth maximization as the sole policy governing antitrust decisions. As already noted, in moving toward adopting this consumer welfare approach, the Court demonstrated a more sophisticated understanding of economic principles than it had shown only a few years earlier in the 1972 *Topco* case.⁹⁷ Consequently, it is unlikely that the 1945 case of *Associated Press v. United States*,⁹⁸ in which three Justices dissented,⁹⁹ could now support the proposition

independently, analogized the NFL to ASCAP and quoted some of the language quoted in the text with approval. *NASL*, 103 S. Ct. 499, 500-01 (Rehnquist, J., dissenting from denial of certiorari).

93. *Columbia Broadcasting System v. American Society of Composers*, 337 F. Supp. 394, 398 (S.D.N.Y. 1972), 400 F. Supp. 737, 781 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

94. 400 F. Supp. at 780-83.

95. While ASCAP did not claim single-entity status, in an amicus brief for Aaron Copland, Judge (then-Professor) Bork, as Copland's counsel, hinted at a single-entity approach in arguing that ASCAP was analogous to a law firm or sports league. Bork argued that if ASCAP's actions were found to be *per se* illegal, then no law firm or sports league could function legally. Amicus Brief for Aaron Copland at 8-14, *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979). Still, even this brief did not specifically claim that ASCAP was a single entity so that all of its internally determined practices should be immune from section 1 attack.

96. *See* 441 U.S. at 3. Justice Stevens filed a dissenting opinion. 441 U.S. at 25-38 (Stevens, J., dissenting).

97. *See* notes 48-49 *supra* and accompanying text.

98. 326 U.S. 1 (1945).

99. 326 U.S. at 29-49, (Roberts, J., dissenting, joined by Stone, C.J.); 326 U.S. at 49-60 (Murphy, J., dissenting).

that a business composed of multiple entities cannot claim single-entity status when it produces a product that its component entities are incapable of producing alone.

Associated Press (AP) was a cooperative of over 1,200 newspapers¹⁰⁰ that, according to Justice Frankfurter's concurring opinion, was organized "for the gathering, editing, and distributing of news which [its] member papers cannot collect single-handed, and which requires their pooled resources."¹⁰¹ The Court found that even though AP did not have monopoly power, AP had violated sections 1 and 2 of the Sherman Act by, *inter alia*, prohibiting AP members from selling news to non-members and allowing AP members to veto membership applications of competing newspapers.¹⁰² AP could have argued that as a producer of a product that its members could not produce alone, it was a single entity for section 1 purposes. However, the single-entity issue was not specifically raised in *Associated Press*, just as it was not specifically raised in *Broadcast Music*. As a result, the Court in *Associated Press* was not squarely faced with the issue of whether AP should have been deemed a single entity. However, Justice Roberts' dissent appeared to recognize AP as a single entity in noting that AP was merely a producer that decided to keep its product for itself.¹⁰³ Justice Murphy, in his compelling dissent, described the problem in a manner that was a harbinger of the Court's consumer welfare approach in *Broadcast Music*:

As I view the situation, the members of the Associated Press were entirely within their legal rights in forming a cooperative organization with facilities for the collection and exchange of news and in limiting the membership therein. Members of an incorporated society, as a general rule, may extend the privilege of membership or withhold it on such terms as they see fit. And if exclusive access to these facilities and reports gave the members of the Associated Press a competitive advantage over business rivals who were not members, that alone would not make the advantage unlawful. In restricting the admission of business rivals they were merely trying to preserve for themselves an advantage that had accrued to them from the exercise of business sagacity and foresight. Such an advantage, as I see it, is not a violation of the Sherman Act. Nor does this advantage require the Associated Press to share its products with competitors. Such a doctrine would discourage competitive enterprise and would carry the anti-trust laws to absurd lengths. In the words of the court below, "a combination may be

100. 326 U.S. at 3.

101. 326 U.S. at 26 (Frankfurter, J., concurring).

102. 326 U.S. at 8-13.

103. 326 U.S. at 30-33 (Roberts, J., dissenting).

within its rights, although it operates to the prejudice of outsiders whom it excludes.”

Thus for the first time the Court today uses the Sherman Act to outlaw a reasonable competitive advantage gained without the benefit of any of the evils that Congress had in mind when it enacted this statute. On the main issue before us, the record shows a complete absence of any monopoly, domination, price fixing, coercion or other predatory practices by which competition is eliminated to the injury of the public interest.¹⁰⁴

Although the Court in *Broadcast Music* did not discuss or distinguish *Associated Press*, its approach to a similar problem greatly reduces the *Associated Press* opinion’s precedential value on the single-entity issue.

If antitrust decisions are to be based upon economic reality, courts should look to all the facts and circumstances when deciding if the requisite plurality of actors is present for section 1 purposes. In particular, the production of a product that could only be created through the joint efforts of the separate entities should weigh heavily in favor of a finding that the requisite plurality of actors is absent. The next part of this Article, by analogizing the NFL to a law firm partnership, will demonstrate that the NFL is producing something that each of its members could not produce alone or in a different league: an entertainment product for sale to the public and the television networks.

III. THE SIMILARITIES BETWEEN THE NATIONAL FOOTBALL LEAGUE AND A LAW FIRM PARTNERSHIP

When a court applies the all-the-facts-and-circumstances test, it must examine the operation of an enterprise from an economically realistic viewpoint. In doing this, a court should not examine each aspect of the enterprise in a vacuum. Rather, it must examine each aspect in light of the overall goals of the enterprise. 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.

In *Smith v. Pro Football, Inc.*,¹⁰⁵ the District of Columbia Circuit Court of Appeals correctly noted that the goal of the NFL is to produce entertainment that will both attract fans at the gate and lure in lucrative television contracts.¹⁰⁶ The *NASL* and *Oakland Raiders*

104. 326 U.S. at 50 (Murphy, J., dissenting) (citation omitted).

105. 593 F.2d 1173 (D.C. Cir. 1978).

106. 593 F.2d at 1178-79.

courts, in examining various aspects of the NFL's operations, did not consider how those operational aspects might aid the NFL in reaching its goal efficiently. Rather, the courts examined those aspects without reference to the NFL's business aims and thus concluded that they indicated the existence of separate economic entities. This part will first explore the unique business nature of the NFL. Then it will demonstrate that those aspects of the NFL's operations that the *NASL* and *Oakland Raiders* courts found indicative of multiple entities actually aid the NFL in promoting the efficient production of an attractive entertainment product, or are analogous to methods that a law firm partnership could properly use to provide legal services more efficiently, or both.

Although the teams of the NFL compete against each other on the field, they must not compete against each other economically, or all will be harmed. This was recognized by one district court as long ago as 1953 in *United States v. NFL*.¹⁰⁷ The *United States v. NFL* court acknowledged that the NFL needs certain rules, such as player-mobility restraints, to attempt to equalize the playing ability of the various teams. This conclusion was derived from the recognition that relative equality of playing ability is needed to sustain fan interest, which is necessary for the economic survival of the League.¹⁰⁸ The court noted that if the teams competed against each other economically, weaker teams either would be driven out of business or would no longer be competitive on the field.¹⁰⁹ If this were to happen, the victory for the stronger teams would be Pyrrhic. With only weak competition, fans would lose interest, and consequently even the stronger teams would fail financially.¹¹⁰ Indeed, one of the major causes of the failure of the All-America Conference, a league that competed with the NFL in the 1940's, was the near-total domination of the Conference by the Cleveland Browns. Once it became obvious that the Browns were the dominant team, average per game attendance at Browns' games over a four-year span dropped from between 60,000 to 70,000 spectators to 20,000 spectators.¹¹¹ Furthermore, the court noted that the domination of baseball's American League by the New York Yankees weakened major league baseball as a product.¹¹²

107. 116 F. Supp. 319 (E.D. Pa. 1953).

108. 116 F. Supp. at 324.

109. 116 F. Supp. at 323-24.

110. 116 F. Supp. at 323-26.

111. Note, *The NFL's Final Victory Over Smith v. Pro-Football, Inc.: Single Entity—Interleague Economic Analysis*, 27 CLEV. ST. L. REV. 541, 556 n.87 (1978).

112. 116 F. Supp. at 324 n.6.

This evidence of the need for economic cooperation among NFL teams, however, did not lead the *United States v. NFL* court to the conclusion that the NFL was a single entity. The single-entity issue was never raised, and the decision in *Associated Press v. United States*,¹¹³ which was only eight years old at the time, apparently influenced the court in its assumption that the requisite plurality of actors was present.¹¹⁴ The need for cooperation among the various teams did, however, convince the court that the Rule of Reason approach should be used in analyzing the challenged practices. The court then upheld a provision of the NFL by-laws that prohibited the telecasting of outside games into the home territory of a third team on a day that the third team was playing at home (for example, the telecasting of a Chicago-New York game into the Pittsburgh area on a day that the Pittsburgh Steelers were playing at home). The court believed that this prohibition was a reasonable means of assisting weak home teams in bolstering their home attendance, thereby strengthening the League as a whole.¹¹⁵ In determining whether all of the challenged practices were reasonable, the court primarily examined the potential effect of the practices on attendance at football games.¹¹⁶ Under this analysis, other broadcasting and telecasting restrictions were struck down because they were not reasonably necessary to bolster attendance at games.¹¹⁷

Since the decision in *United States v. NFL*, other courts have recognized that the teams of the NFL are not typical economic competitors. This recognition has led to various consequences in the courts. It has precluded application of the *per se* rule to find certain player restraints to be an illegal group boycott.¹¹⁸ The unique business nature of the NFL also led to the following statement by the Eighth Circuit Court of Appeals in striking down a version of the Rozelle Rule under the Rule of Reason: "[T]he NFL assumes *some* of the characteristics of a joint venture"¹¹⁹ Furthermore, in invalidating the NFL player draft under the Rule of Reason, the District of Columbia Circuit Court of Appeals stated in *Smith v. Pro Foot-*

113. 326 U.S. 1 (1945). See notes 98-104 *supra* and accompanying text.

114. See 116 F. Supp. at 321 (citing *Associated Press* for the proposition that the NFL by-laws constitute a "contract" within the meaning of Sherman Act § 1).

115. 116 F. Supp. at 324-25.

116. 116 F. Supp. at 325.

117. 116 F. Supp. at 326-27.

118. *Kapp v. NFL*, 390 F. Supp. 73, 80-82 (N.D. Cal. 1974), *affd. on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

119. *Mackey v. NFL*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (emphasis in original).

ball, Inc.:¹²⁰

[T]he NFL clubs which have 'combined' to implement the draft are not *competitors* in any economic sense. The clubs operate basically as a joint venture in producing an entertainment product—football games and telecasts. No NFL club can produce this product without agreements and joint action with every other team.¹²¹

In none of the foregoing player-restraint cases, however, did the court fail to find the requisite plurality of actors.¹²² The *Smith*

120. 593 F.2d 1173 (D.C. Cir. 1978).

121. 593 F.2d at 1178-79 (emphasis in original).

122. Prior to *Smith*, two cases found sports leagues other than the NFL to be single entities when the Sherman Act § 1 issues raised did not involve player restraints. In *Levin v. National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974), the court upheld, in the face of a section 1 challenge, the right of National Basketball Association owners to veto the sale of the Boston Celtics to Messrs. Levin and Lipton. The *Levin* court found the team owners "to be partners in the operation of a sports league for . . . profit." 385 F. Supp. at 152. Since there was no anticompetitive purpose in rejecting Levin and Lipton's franchise application, the court held that the team owners, as partners, were free to reject the application to join the partnership. 385 F. Supp. at 152. The *Levin* court believed that cases holding that player restraints violated section 1 could be reconciled as striking down provisions that limited competition in the *players'* market. 385 F. Supp. at 152 n.6.

In *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974), the court held that a refusal by the member teams of the National Hockey League (NHL) to permit the San Francisco/Oakland franchise to move to Vancouver did not violate section 1. Noting that "there must be at least two independent business entities accused of combining or conspiring to restrain trade" for a section 1 violation to exist, 379 F. Supp. at 969, the *Seals* court found that the NHL's teams constituted a single business entity that produced a product in competition with other sports leagues. 379 F. Supp. at 369. Unlike the *Levin* court, the *Seals* court did not offer any dicta about the player-restraint cases.

Nonetheless, prior to *Smith*, at least one court expressed doubt about whether or not player-restraint provisions could violate section 1. In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), the court held that the NHL's reserve and other player-restraint systems violated section 2 of the Sherman Act because they were operated with the purpose and effect of precluding a competing league from obtaining high-quality hockey players. 351 F. Supp. at 504-13. The court, however, expressed doubt about whether the NHL's player-restraint system violated section 1. In noting its doubts, the court observed that the NHL had an interest in maintaining a competitive balance among its teams, and that player restraints might aid in preserving that balance. 351 F. Supp. at 503-04.

After the *Smith* case, the district court in *NASL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *revd.*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982), held that while the member teams of the NFL can violate section 1 by agreements that affect areas in which they compete with one another, a cross-ownership ban does not violate section 1 because it does not affect competition between the member teams but rather aids the NFL as a whole in competing with other sports leagues for fan dollars. 505 F. Supp. at 677. Consequently, the NFL was deemed a single entity by the district court for purposes of the cross-ownership ban issue. 505 F. Supp. at 677. The failure to recognize that the member teams of the NFL should be deemed a single entity whenever *any* of their internal agreements are challenged under section 1 has led to inconsistent treatment of the NFL in section 1 cases. The Second Circuit, unfortunately, eliminated this inconsistency by compounding the error and finding a section 1 combination in the *NASL* case when clearly there was not one. *See NASL*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 499 (1982). As noted earlier, the purpose of this article is to present an approach under which the NFL can consistently be found to be a single entity for section 1 purposes. *See* notes 7-24 *supra* and accompanying text.

Finally, in *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558 (E.D. Pa. 1982), the court cited *Levin v. National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974), with approval in

court's statement is inconsistent with its conclusion that section 1 was violated, and the subsequently erroneous analysis by the *Smith* court that led to this conclusion will be discussed in the next part of this article.¹²³ Before further examining the section 1 analysis used by the *Smith* court, however, it is necessary to examine the structural and operational aspects of the NFL that led the *Smith* court to conclude that the NFL is like a joint venture, and the structural and operational aspects of the NFL that led the *NASL* and *Oakland Raiders* courts to conclude that the NFL is composed of multiple economic entities. An examination of these aspects in the light of the overall goals of the NFL should demonstrate that these aspects are intended to aid the NFL in reaching its business goals more efficiently or are analogous to ways in which law firms could legitimately operate, or both. As a result, the inescapable conclusion should be that the NFL is a single entity under the all-the-facts-and-circumstances test.

In finding the NFL teams "operating basically as a joint venture in producing an entertainment product—football games and telecasts,"¹²⁴ the *Smith* court noted: "[T]he League not only determines franchise locations, playing schedules, and broadcast terms, but also ensures that the clubs receive equal shares of telecast and ticket revenues."¹²⁵ Apparently, it was the sharing of revenues that greatly influenced the *Smith* court in finding an economic joint venture. Yet the fact that it is revenues, rather than overall profits and losses, that are shared appears to have troubled the *Oakland Raiders* court with

upholding a decision by the NFL not to expand and grant an expansion franchise to the plaintiffs. 550 F. Supp. at 567-68. In *Mid-South Grizzlies*, however, the court did not specifically find the NFL to be a single entity. Rather, the court used the NFL's need for joint activity as justification for a Rule of Reason approach to the alleged group boycott. 550 F. Supp. at 565-69. The court then held that the decision not to grant an expansion franchise to the plaintiffs was grounded on valid business reasons. The court noted that the NFL was, at the time of plaintiff's request for NFL membership, still trying to absorb two other new teams, and any expansion then would have hurt the operation of the League. 550 F. Supp. at 568-69. Additionally, the court noted that if the NFL were ordered to grant franchises to all acceptable applicants, the result would be anticompetitive in that no rival league might develop. 550 F. Supp. at 568. Indeed, the court noted that one of the plaintiffs had become a team owner in the NFL's new rival, the United States Football League. 550 F. Supp. at 570.

While *Mid-South Grizzlies* did not specifically hold that the NFL is a single entity, that implication was strongly present. The court upheld the challenged practice by in effect determining that it was intended to promote efficiencies and that to strike down the practice might restrict output by inhibiting the growth of new football leagues. 550 F. Supp. at 568. *Mid-South Grizzlies*, while not perfectly reasoned on the single-entity issue, demonstrates the most sophisticated approach taken to date.

123. See Part IV, Sec. A *infra*.

124. 593 F.2d at 1179.

125. 593 F.2d at 1179.

respect to the single-entity issue.¹²⁶

The degree of revenue sharing is quite substantial. The NFL divides its television receipts equally among all its teams. Pre-season gate receipts are shared equally between the competing teams in each game, and regular season gate receipts are split 60 percent for the home team and 40 percent for the visiting team. The only revenues not shared are concession receipts, parking receipts, certain local television and radio receipts,¹²⁷ and certain additional revenues that the Super Bowl teams receive.¹²⁸ As a result of revenue sharing and the large impact on revenues caused by national television receipts, the NFL teams in effect pool 90 to 95 percent of all their revenues.¹²⁹

How determinative, therefore, should be the fact that after 90 to 95 percent of the revenues are shared, some teams may fare better financially than others as a result of being more successful in earning unshared revenues? Not very! A law firm may allocate a base dollar amount to each partner as a draw throughout the year and further compensate each partner in differing amounts at the end of each year. The total compensation might depend upon various factors, such as the success of each partner's legal efforts and the number and quality of clients generated by each partner. Alternatively, a law firm may allocate base revenues to each department to cover overhead, salaries, and partners' draws. The firm could further compensate each department at the end of each year so that the total compensation depends upon the success of legal efforts, fees generated, and new clients obtained. Within a law firm, therefore, a certain degree of competition exists among the partners and among the departments. This results in differing financial rewards for different partners and departments. This competition, however, is healthy, since rewarding those who are most successful in their legal endeavors or who generate more business induces each partner and department to act in a manner that strengthens the law firm as a whole.

Similarly, in the NFL, the pooled revenues can be analogized to

126. *Oakland Raiders*, 519 F. Supp. 581, 582 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

127. *NASL*, 670 F.2d 1249, 1251-52 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982).

128. NFL Defendants' Proposed Findings of Fact and Conclusions Of Law at 11, *NASL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *revd.*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982) (copy on file with the Michigan Law Review); *see also* Axthelm, McAlevy, Fineman, Ma, Contreras, & McCormick, *They're Playing for Keeps*, *Newsweek*, Sept. 20, 1982, at 70 ("The teams share 97 percent of their revenues and the stadiums are almost always full.").

129. NFL Defendants' Proposed Findings of Fact and Conclusions of Law at 11, *NASL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *revd.*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982) (copy on file with the Michigan Law Review).

the base partner's draws or the revenues allocated to each department for overhead, salaries, and partners' draws. The unshared revenues are like the incentives given to law firm partners or departments to operate in a manner that will benefit the firm as a whole. For example, giving each home team 60 percent of its gate receipts induces the team to attempt to sell out the stadium. But a sold-out stadium does much more than benefit the home team. It benefits the entire League because it enables the NFL to demand greater sums from the television networks for the sale of television rights, which is the NFL's prime source of revenue. The right of each home team to retain parking and concession fees is simply an additional incentive to fill the stadium so that the product is more marketable to the television networks. The television networks, in deciding how much to pay to broadcast NFL football games, must compare the popularity of NFL football with the popularity of all other forms of entertainment that they could broadcast. A filled stadium thus makes local broadcast rights more valuable, so the right to retain fees from them is also an appropriate reward to each team. Each of the foregoing opportunities for teams to earn additional monies on their own is evidence not of competing business entities, but rather of incentives to each of the business partners to make the NFL as a whole as successful and marketable a business as possible.

The right of the Super Bowl teams to retain certain additional revenues can similarly be viewed as benefitting the entire NFL. For the NFL to be marketable to television networks, the teams must not only be evenly matched, but also must demonstrate a very high caliber of play. By additionally rewarding Super Bowl teams, the NFL encourages each team to provide the highest caliber of play possible. Viewed in this light, it is difficult to distinguish the financial reward system of the NFL from that of a major law firm.

The *Oakland Raiders* court, however, noted that the NFL appears to consist of 28 separate businesses because some teams are corporations, some are partnerships, and none are commonly owned.¹³⁰ Yet this may also be considered analogous to a law firm. A cursory review of the *Martindale-Hubbell Law Directory*¹³¹ will show many law firms in which some or all of the partners are separately incorporated.¹³² Additionally, no two partners in a law firm

130. *Oakland Raiders*, 519 F. Supp. 581, 582 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

131. See, e.g., 5 MARTINDALE-HUBBELL LAW DIRECTORY 1370B (11th ed. 1983) (law firm of Reed, Smith, Shaw & McClay).

132. It should be noted that I.R.C. § 269A (1982), which was added to the Internal Revenue Code by section 250(a) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L.

usually have a common "owner." Therefore, the mere fact that each team is separately organized as a business entity should not lead to the conclusion that the NFL consists of multiple economic entities for section 1 purposes.

Similarly, the simple fact that some teams may operate at a loss for one or more years while other teams operate at a profit should not prevent the NFL from being analogous to a partnership. Under the Internal Revenue Code, a partnership agreement can allow partners to share profits and losses unequally so long as the agreement has a "substantial economic effect."¹³³ It can even permit some partners to receive profits while others receive losses.¹³⁴ A partnership agreement has a "substantial economic effect" if the profit and loss allocation affects the dollar amount of the partners' shares independently of tax consequences.¹³⁵ Whether or not there is a valid business purpose for the allocation apart from a desire to save taxes should be relevant to whether or not the allocation affects the amount of the partners' shares independently of tax consequences.¹³⁶ The NFL allows teams to receive differing rates of return, which can result in some operating at a profit while others operate at a loss. However, this induces each team to operate efficiently and profitably, so as to benefit the League as a whole by enabling the NFL, as a single entity, to concentrate its efforts on providing as marketable a product as possible.

Furthermore, if single-entity status were determined by whether or not all the component entities were simultaneously operating at either a profit or loss, the determination would in effect be based on the *Perma Life Mufflers, Inc. v. International Parts Corp.*¹³⁷ approach that elevates form over substance.¹³⁸ Quite often one wholly-owned-and-controlled subsidiary operates at a loss while a sister corporation and the parent of both of them operate at a profit. However, to let this fact alone give rise to finding a multiplicity of actors would require ignoring economic reality, especially if one subsidiary, by

No. 97-248, 96 Stat. 324 (1982), eliminates many of the advantages that flow from such a law firm structure. As a result, this type of law firm structure may become less prevalent. However, the existence of I.R.C. § 269A (1982), and the practical effect it may have on the future structure of law firms, do not negate the fact that a law firm can be composed of partners who are separately incorporated.

133. I.R.C. § 704 (a)-(b) (1982).

134. See Treas. Reg. § 1.704-1(b)(2) (1956) (example 3).

135. Treas. Reg. § 1.704-1(b)(2) (1956).

136. See Treas. Reg. § 1.704-1(b), T.D. 6771, 1964-2 C.B. 177, 178.

137. 392 U.S. 134 (1968).

138. See notes 64-67 *supra* and accompanying text.

operating at a loss, could affect the operations of the profitable sister and parent and thus the operations of the units as a whole.

If one or more NFL teams failed financially, the NFL as a whole would be damaged because the surviving teams would be left with fewer teams to play, and fan interest in the geographic areas where teams had failed could deteriorate. Deterioration of fan interest could in turn lead to a deterioration in the marketability of the NFL for network television, thus lowering the revenues of all teams. To prevent teams from failing financially, the NFL has assumed responsibility for the satisfaction of certain debts of some of its member teams.¹³⁹ Funds to satisfy these debts must, of course, come from the financially stronger teams.¹⁴⁰ To imply, therefore, as did the *NASL* court,¹⁴¹ that the NFL is not a single entity because one team may operate at a profit while another operates at a loss ignores the fact that a partnership can allocate profits and losses among the partners in any manner so long as the allocation is motivated by something other than tax avoidance. Furthermore, such an implication ignores the economic reality that the ultimate financial success of each team is intertwined with the financial success of every other team and affects the operation of the League as a whole. Thus, the conclusion that the NFL consists of multiple entities due to its profit and loss allocations is economically unrealistic.

The *Oakland Raiders* court also contended that the NFL is unlike a partnership because the teams do not exchange books and

139. NFL's Brief In Support Of Single Entity Theory at 28, *Oakland Raiders*, 519 F. Supp. 581 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982) (copy on file with the Michigan Law Review).

140. The NFL operates in much the same manner as other sports leagues. Teams in other leagues sometimes assist one league member financially in order to aid the league as a whole. These activities in other leagues are helpful in determining the types of actions that NFL teams could take to aid a member team.

When the World Hockey Association was being formed, the Winnipeg team drafted Bobby Hull, but to sign him, Winnipeg had to offer him a million-dollar bonus. Winnipeg apparently was unable to afford such a large bonus. However, because Bobby Hull's presence in the WHA would benefit the league as a whole, each WHA team contributed a pro rata share of Mr. Hull's bonus. *See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 492 (E.D. Pa. 1972). No evidence of similar action by the NFL could be found. However, if a new football league decided to raid one financially weak NFL team for its stars, nothing would preclude the other NFL teams from similarly aiding that team.

The Bobby Hull situation is, however, similar to another means by which the NFL teams do cooperate as partners. Whenever an expansion franchise is granted, the new team can select players from the rosters of existing teams. In other words, existing teams provide player personnel to staff new teams. *See, e.g., Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 561 n.5 (E.D. Pa. 1982). This practice is analogous to the manner in which a law firm could staff a new department or a new branch office.

141. *NASL*, 670 F.2d 1249, 1252 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982).

records.¹⁴² However, since 90 to 95 percent of the revenues are pooled, and game attendance figures, and ticket, concession and parking prices are published, each team has a general knowledge of the revenue earned by every other team. Further, to determine whether responsibility for the debts of a weak team should be assumed, certain financial information must be made available to the other teams. Thus, when the League as a whole must act to protect its overall financial interests, the separate teams cannot as a practical matter act as separate fiefdoms and keep all their internal financial information to themselves.

Another point raised by the *Oakland Raiders* court to demonstrate that the NFL consists of multiple entities was the fact that each team hires its own personnel.¹⁴³ However, law firms could permit the partners in one department to decide which applicants to hire, especially if the person hired was to work exclusively in that department. A law firm could even permit the partners in one department to offer a prospective associate a higher salary than that offered to associates in other departments. Each department could be allocated a base amount to cover overhead, associate salaries, and base partner draws. By offering an associate more than he would ordinarily be paid, a department's partners would be gambling that the higher-paid associate would be more productive and profitable than a lower-paid associate. For the gamble to be profitable, the higher-paid associate would have to be so productive that the partners would not have to reduce their total draws to pay him. Greater productivity by the associate could even result in larger bonus payments for the partners of that department. Such a system could encourage interdepartmental competition that could strengthen the entire law firm. If the practice were successful for one department, all departments could increase the amount offered to attract top-quality associates, thereby strengthening the firm as a whole. Therefore, separate hiring by each NFL team is closely analogous to what could be done by a law firm and is consistent with a finding of single-entity status.¹⁴⁴

Furthermore, it can be argued that each NFL team does not have complete independence in hiring its own personnel. Not only is each

142. *Oakland Raiders*, 519 F. Supp. 581, 582 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

143. 519 F. Supp. at 582.

144. A system that allowed each department to set its pay scale for associates might be inadvisable for numerous reasons, not the least of which is that associates could be demoralized if they were in departments that paid less initially than other departments. What is important for the discussion here, however, is that a law firm *could* adopt this system.

team limited in its ability to hire any unsigned player that it desires,¹⁴⁵ but also each contract between a team and a player must be executed on a standard form contract adopted by the NFL.¹⁴⁶ Any amendment of the form contract by a team must first be approved by the Commissioner.¹⁴⁷ Additionally, the Commissioner may invalidate any player contract if the contract violates the NFL Constitution and By-Laws or if the team or player has acted in a manner detrimental to professional football.¹⁴⁸ In fact, it was Commissioner Rozelle's insistence that Joe Kapp execute the standard player contract that precipitated Kapp's suit challenging various player-restraint practices.¹⁴⁹ A law firm that permits each department to do its own hiring must first have made a firm-wide decision to delegate hiring to each of the departments. The NFL, however, has not even gone that far. Its delegation to each of the teams to do its own player hiring is always subject to final approval by the NFL Commissioner.¹⁵⁰

Thus, in the final analysis, the unitary nature of the NFL's product should weigh heavily in favor of finding single-entity status. The NFL attempts to make NFL football as popular as possible so that it can compete effectively against other forms of entertainment for network television revenues.¹⁵¹ The internal restraints and agreements made by the League are designed to promote efficiencies in attaining this end. They are only ancillary to the main purpose of producing a more marketable product. Viewed in this manner, these restraints should not be subject to successful challenge under the Sherman Act.¹⁵²

In the *Oakland Raiders* case, however, the court did not perceive NFL football as a unitary product. It noted that the Raiders themselves had previously belonged to a rival league and did not see why

145. For a description of the operation of the player restraint rules, see note 16 *supra*.

146. NFL CONST. AND BY-LAWS art. XV, § 15.1 (1976).

147. NFL CONST. AND BY-LAWS art. XV, § 15.1 (1976).

148. NFL CONST. AND BY-LAWS art. XV, § 15.4 (1976).

149. Kapp v. NFL, 390 F. Supp. 73, 77-78 (N.D. Cal. 1974), *aff'd. on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 401 U.S. 907 (1979).

150. Presumably, the delegation of authority to a department in a law firm would be subject to similar restraints. If a department hired in a manner that displeased the firm as a whole, the entire partnership would most likely revoke the hiring authority that had previously been delegated.

151. The need to make football popular explains why the NFL does not attempt to formalize its single-entity status by incorporating. "[T]he appearance of total separation and independence between teams is clearly a vital element in the sale of NFL football to consumers. The integrity of the games depends on the separation of the teams, and that aura of legitimacy is an essential component of fan interest." Blecher & Daniels, *supra* note 66, at 225.

152. See note 91 *supra*.

they could not secede from the NFL to join a new league that would compete against the NFL.¹⁵³ However, by joining a new league, the Raiders would be attempting to market a new product: football produced by that new league. Unless that product appeared to be competitive in the overall entertainment field, it might not be purchased by network or cable television and would quite likely suffer financial collapse. Indeed, the failure of the World Football League to compete successfully with the NFL was caused in great measure by its inability to sell its product to the major television networks.¹⁵⁴ This belies the contention of the *Oakland Raiders* court that the NFL's product does not have a unitary quality.¹⁵⁵

A sports league, therefore, must structure itself so that it can best compete for the network or cable television dollar. The NFL is a single entity that has no monopoly power when competing against other forms of entertainment.¹⁵⁶ Consequently, it should be left to

153. *Oakland Raiders*, 519 F. Supp. 581, 584 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

154. See, e.g., Johnson, *The Day the Money Ran Out*, Sports Illustrated, Dec. 1, 1975, at 84; Wall St. J., Oct. 23, 1975, at 23, col. 2; Garnett, *As WFL Struggles, Players Count House and Sign Autographs*, Wall St. J., Oct. 21, 1975, at 1, col. 4. Eddie Einhorn, who held the World Football League's television franchise in 1974, which he refused to renew in 1975, said:

In the final analysis, the World Football League had mediocrity written all over it. . . . I think the lack of a national television package definitely hurt their credibility, too. If a league's not good enough to have a national TV game of the week, a guy doesn't want to go. It's bush and he's not going to pay money to see it.

Johnson, *The Day the Money Ran Out*, Sports Illustrated, Dec. 1, 1975, at 88.

155. 519 F.Supp. at 584 n.5. Indeed, the ability of the Raiders to leave the NFL to join a new league is indistinguishable from the ability of a law partner to switch law firms. But unlike a law partner, the Raiders could not depart from the "firm" to set up a solo practice. A football team is in this sense even *less* an independent business entity than a partner, whose agreements with his co-partners would not be considered § 1 violations.

156. This article argues that because the NFL should be considered a single entity, it cannot be held liable under Sherman Act § 1, which requires a plurality of actors. See notes 3 & 21 *supra*. However, it might still be held liable under Sherman Act § 2 for the offense of monopolization if it possesses substantial market power and engages in some prohibited conduct. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Market power is generally measured indirectly through defining relevant product and geographic markets, and then measuring a particular enterprises's share of the market as defined. The higher the market share, the more likely the enterprise possesses monopoly power.

The complexities of the process of market definition are too involved for discussion here. Suffice it to say that this article posits that the relevant product market for NFL football is the "entertainment" market, rather than narrower markets such as "sports," "football," "professional football," or "major league professional football." Should the quality of the NFL's product deteriorate to any perceptible degree or should the cost of "using" its product rise, some fans undoubtedly would turn to another form of entertainment, whether that be college football, professional basketball, John Wayne westerns, classical music, or something else. Because of the broad possibilities for alternative forms of entertainment to NFL football, the NFL properly belongs in the broader "entertainment" market rather than in any of the narrower markets mentioned above. This was recognized by Justice Rehnquist in his dissent from denial of certiorari in the *NASL* case, where he stated: "The NFL owners are joint ventures [sic] who produce a product, professional football, which competes with other forms of en-

its own devices in determining what action will make it more efficient, more profitable, and its product more marketable. Determinations as to cities in which franchises should be located are analogous to a law firm's decision about whether to have a department that covers certain areas of the law such as labor. Decisions on whether a territory should have one or more than one team should be viewed as internal determinations of whether or not competition for fan dollars within one territory will help or hurt the NFL. Since the NFL does not have monopoly power in the entertainment market, the courts should uphold decisions of this nature even if they fail to produce the desired efficiencies. The role of the courts should be to determine if a practice is *intended* to promote efficiencies, not to regulate business so that only actions that actually are efficiency producing are legal.¹⁵⁷ The decision by the NFL that a city should not have two teams that compete with one another can be analogized to a decision by a law firm that all tax work should be done in the tax department and all labor work in the labor department, even if certain tax work is brought to the firm by a labor lawyer and certain labor work brought by a tax lawyer. The decision to preclude lawyers in the labor department from, in effect, competing against lawyers in the tax department when a tax problem arises is intended to produce efficiencies and is legal. So, too, a decision that two teams should not locate and compete for fans in one territory is intended to produce efficiencies and therefore should also be deemed legal.

The next section of this article will examine a few player-restraint cases to show that the practices held illegal in them were actually efforts by a single entity to produce efficiencies and thus should have been upheld. Given this, the *Oakland Raiders* and *NASL* courts' reliance upon these cases was misplaced.

IV. THE PLAYER-RESTRAINT CASES

The courts in the *NASL* and *Oakland Raiders* cases relied on several player-restraint cases for the proposition that the NFL consists of multiple entities for section 1 purposes.¹⁵⁸ However, neither

tertainment in the entertainment market." *NASL*, 103 S. Ct. 499, 500 (1982) (Rehnquist, J., dissenting from denial of certiorari). *But see* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462, 500-05 (E.D. Pa. 1972) (finding the relevant product market to be "major league hockey" where the issue was whether or not the National Hockey League was attempting to monopolize the pool of high-quality hockey players and exclude the World Hockey League from the market for major league hockey).

157. See Part I, Sec. A *supra*.

158. See *NASL*, 670 F.2d 1249, 1257 (2d Cir.) (citing *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Linseman v. World Hockey Association*, 439 F. Supp. 1315 (D. Conn. 1977); *Bow-*

the Second Circuit nor the Ninth Circuit, whose rulings were binding precedent for the *NASL* and *Oakland Raiders* courts, respectively, had previously ruled on the single-entity status of the NFL in any context.¹⁵⁹ Consequently, both courts were free to reject the player-restraint cases. Moreover, the reliance placed on the player-restraint cases was inappropriate because, as this part will illustrate, those cases were improperly decided.

It is worth noting at the outset that in neither the *NASL* case nor the *Oakland Raiders* case did the NFL press the issue that the player-restraint cases were improperly decided insofar as they did not find the NFL to be a single entity.¹⁶⁰ Rather, the NFL contended in both these actions that the NFL should be deemed a single entity under the particular circumstances presented, even though it might not be a single entity in other instances such as the player-restraint cases.¹⁶¹ This line of reasoning most likely represented a tactical decision by the NFL that to engage in a broadside attack on the player-restraint decisions would appear to be a request for total antitrust immunity. However, as noted in the introduction to this article,¹⁶² total antitrust immunity does not follow from a holding that the NFL is a single entity whenever it acts. Thus, in retrospect, the NFL's failure to make a broad attack on the player-restraint cases may have been a tactical error.

This part will avoid making a similar mistake by examining three

man v. NFL, 402 F. Supp. 754 (D. Minn. 1975); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *affd. on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979), *cert. denied*, 103 S. Ct. 499 (1982); *Oakland Raiders*, 519 F. Supp. 581, 583 (C.D. Cal. 1981) (citing *Smith*, *Mackey*, and *Kapp*), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

159. As one of its player-restraint cases, the *Oakland Raiders* court cited Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *affd. on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). 519 F. Supp. at 583. Although the district court in *Kapp* found that the Rozelle Rule, the No-Tampering Rule, and the draft violated section 1, no appeal was permitted from that interlocutory decision. The case therefore went to the jury, which found that Kapp was not injured by the Sherman Act violations. In the appeal by Kapp, the only antitrust issue resolved by the Ninth Circuit was whether the jury instructions that led to the finding that Kapp was not damaged were correct. 586 F.2d at 648-50. Consequently, single-entity antitrust issues were never before the Ninth Circuit in the *Kapp* case, and the *Oakland Raiders* court was free to rule that the NFL was a single entity.

160. The NFL did note in passing in the *Oakland Raiders* case that it believed that *Smith v. Pro Football*, 593 F.2d 1173 (D.C. Cir. 1978), discussed in Part IV, Sec. A *infra*, was improperly decided for other reasons. NFL's Brief in Support of Single Entity Theory at 38-41, *Oakland Raiders*, 519 F. Supp. 581 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982) (copy on file with the Michigan Law Review).

161. Reply Brief for Cross-Appellant NFL at 10-12, *NASL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982) (copy on file with the Michigan Law Review); NFL's Brief in Support of Single Entity Theory at 38-41, *Oakland Raiders*, 519 F. Supp. (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982) (copy on file with the Michigan Law Review).

162. See notes 25-26 *supra* and accompanying text.

of the principal player-restraint cases. Each case represents a different type of restraint, yet each type of restraint is intended to promote economic efficiency. Therefore, the analogy of the NFL to a law firm partnership is not merely a smokescreen entitled "single entity" behind which the NFL can hide when acting in an anticompetitive manner. Rather, it should become clear that the challenged practices were intended or could be found as intended to promote the efficiency of the NFL in producing its product. Consequently, the practices challenged in these cases should have been upheld against antitrust attack.

A. Rules Inhibiting Free-Agent Status

The player-restraint rules, which consist of the draft, the Rozelle Rule, and the No-Tampering Rule, can be treated together because they have one common goal: the elimination or minimization of free-agent status for players.¹⁶³ While several courts have held that these player restraints violate section 1,¹⁶⁴ we shall concentrate our analysis on *Smith v. Pro Football, Inc.*,¹⁶⁵ because it is the most recent such case and demonstrates the most sophisticated approach of the player-restraint cases.

The district court in *Smith* held that the NFL draft in 1968 constituted a classic group boycott and therefore was *per se* illegal under section 1.¹⁶⁶ On appeal, the District of Columbia Circuit Court of Appeals found that the NFL teams were not economic competitors. Rather, they were joint venturers working together to produce a single product: football games and telecasts.¹⁶⁷ The appeals court further found that *Smith* was not seeking to compete with the NFL teams, and any refusal to deal with him did not restrict the output of football games.¹⁶⁸ Consequently, the draft was not a classic group

163. See note 16 *supra*.

164. *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (striking down the draft under a Rule of Reason approach); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (striking down the Rozelle Rule under a Rule of Reason approach); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *affd. on other grounds*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (a myriad of player restraints found illegal under a Rule of Reason approach).

165. 593 F.2d 1173 (D.C. Cir. 1978).

166. *Smith v. Pro-Football*, 420 F. Supp. 738, 744 (D.D.C. 1976) *affd. in part, revd. in part sub nom. Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978). In dicta, the district court expressed the belief that the draft would be illegal under a Rule of Reason analysis because the NFL could not prove that the draft actually aided the League in reaching the goal of competitive balance on the field, and even if it did, it was more restrictive than necessary to achieve that goal. 420 F. Supp. at 745-47.

167. 593 F.2d at 1178-79.

168. 593 F.2d at 1179.

boycott that should be declared *per se* illegal.¹⁶⁹ The court stated: "The draft, indeed, is designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive equality."¹⁷⁰ However, the court used this single-entity type analysis only to determine whether the draft was *per se* illegal. The court then disregarded its earlier single-entity intimation and treated the NFL teams as separate entities in its Rule of Reason inquiry. Examination of how the court made this error will demonstrate why player-mobility restraints should be legal under section 1.

The appeals court in *Smith* began its Rule of Reason inquiry by stating that it must balance "the 'anticompetitive evils' of the challenged practice . . . against its 'procompetitive virtues' to ascertain whether the former outweighs the latter."¹⁷¹ This balancing test, however, is appropriate only if there are multiple actors for section 1 purposes.¹⁷² If there are not multiple actors, the inquiry under the Sherman Act should be limited to a section 2 inquiry as to whether the challenged practice is intended to restrict output.¹⁷³ If the practice is not intended to restrict output, it should be deemed legal.¹⁷⁴ The *Smith* court had already suggested not only that the restraint was intended to improve the NFL's entertainment product by enhancing the teams' competitive equality (i.e., intended to promote efficiencies), but also that it did not restrict the output of football games.¹⁷⁵ Furthermore, while *Smith* had alleged a section 2 violation, neither the district court nor the appeals court treated the case as a section 2 case.¹⁷⁶ Consequently, the *Smith* court's inquiry should have ended, and the draft should have been held legal. So long as the draft was intended to promote efficiencies in the production of football, it should not have been the court's concern whether or not it succeeded in that effort.¹⁷⁷

The appeals court, however, apparently overlooked the fact that

169. 593 F.2d at 1179-80. The Court observed that "[t]he 'group boycott' designation . . . is properly restricted to concerted attempts by competitors to exclude *horizontal competitors*; it should not be applied . . . to concerted refusals that are not designed to drive out competitors but to achieve some other goal." 593 F.2d at 1179-80 (emphasis added) (footnote omitted). As *Smith* was not a horizontal competitor of the NFL teams, their refusal to deal with him on an individual basis was not held to constitute a *per se* illegal boycott.

170. 593 F.2d at 1179 (footnote omitted).

171. 593 F.2d at 1183 (footnote omitted).

172. See note 21 *supra*.

173. See note 156 *supra*.

174. See Part I, Sec. A *supra*.

175. See 593 F.2d at 1179.

176. 593 F.2d at 1174-75 n.1.

177. See Part I, Sec. A *supra*.

the district court made two analytical errors. First, the district court improperly concerned itself with the actual effect of the draft upon playing-field balance. Second, the district court failed to recognize that the NFL teams were joint venturers working together to produce a single product, a recognition that should have led to the conclusion that the NFL is a single entity. As a result of its failure to note these errors of the district court, the appeals court then made several interrelated errors in its own Rule of Reason analysis.

First, the appeals court unnecessarily devoted an inordinate amount of space to demonstrating that the district court had properly determined from the evidence that the draft was ineffective in promoting balance on the field.¹⁷⁸ Second, it examined whether the restrictions on competition for rookie players caused by the draft could legally be counterbalanced by the promotion of playing-field balance that the draft might aid.¹⁷⁹ However, as has already been noted, the intimation by the court that the NFL was a single entity made it inappropriate for the court to engage in any balancing test.¹⁸⁰

These first two errors by the appeals court then led to its third error: viewing the promotion of playing-field balance as an unacceptable justification for the draft. The court apparently misconstrued the NFL's contention that the draft aided in producing more interesting football by promoting team balance. The court viewed this as a mere contention that the public was better served by high-quality football. The court then analogized this justification to an attempt to justify banning competitive bidding by engineers because competitive bidding would harm the public safety by leading to shoddy workmanship. The court noted that in *National Society of Professional Engineers v. United States*¹⁸¹ the Supreme Court specifically rejected this public-interest justification.¹⁸² The Supreme Court held in *National Society of Professional Engineers* that only justifications based upon the procompetitive effects or purposes of the challenged actions would be considered in a Rule of Reason analysis.¹⁸³ The Court stated that well-intentioned social policies that were not formulated to promote economic competition could not be consid-

178. 593 F.2d at 1183-85 & n.46.

179. 593 F.2d at 1186-89.

180. See notes 166-77 *supra* and accompanying text.

181. 435 U.S. 679 (1978).

182. 593 F.2d at 1186-87.

183. 435 U.S. at 688-92.

ered in a Rule of Reason analysis.¹⁸⁴ The *Smith* appeals court thus perceived the promotion of playing-field balance as a non-economic justification that was not based upon its effect upon competition. This justification could not, therefore, be considered as counterbalancing the anticompetitive effects of the draft on the market for rookie players.¹⁸⁵

The draft, however, operates in conjunction with the other rules restraining player mobility to promote balance on the playing field and thus aids in producing a more marketable product. Thus, if as we have postulated, the teams in the NFL are analogous to departments in a law firm, a suit to strike down the draft should be as unfounded as a suit to require competitive bidding for associates' services among the law firm's departments at the end of each fiscal year.¹⁸⁶ The only difference is that in challenging the draft, the plaintiff is merely attempting to force the law firm to require each department to bid against the others for the services of *incoming* associates. While a firm could do this if it were so inclined, no court would force it to do so even though the lack of bidding restrains the market for associates' services. A decision to avoid competitive bidding among law firm departments can be viewed as an effort to minimize internal dissension that could damage the ultimate legal product of the firm. The firm, however, does not act to produce a better legal product simply because a better legal product is a social good. It acts to produce a better legal product so that it can compete more effectively for legal business.

Similarly, the NFL does not conduct a draft because it believes that high-quality football is a social good (as the *Smith* court contended). Rather, it conducts a draft because it believes that it must produce high-quality football to compete effectively against other sports for sports fans' dollars,¹⁸⁷ and against other forms of entertainment for network television dollars. The *Smith* court's conclusion that the draft impermissibly restrained competition in the player market reflects a failure to carry the single-entity finding to its logical and proper conclusion. Once the court regarded the NFL as a single entity, it should have found that any restraint on the player market caused by the draft was ancillary to the overall legal agreement of the teams to act together to produce high-quality football.

184. 435 U.S. at 693-96.

185. See 593 F.2d at 1186-89.

186. See text accompanying notes 21-22 *supra*.

187. For an excellent student work that reaches a similar conclusion via a slightly different route, see Note, *supra* note 111, at 554-61.

Such a restraint is just as legal as an internal decision by a law firm on how to assign associates to various departments. Furthermore, after intimating that the NFL was a single entity that produced football, the court should have recognized that the promotion of team balance was not a non-economically motivated social good, but rather an economically motivated attempt by the League to compete better for the entertainment dollar.

One last aspect of *Smith* that reflects a concern common to all player-mobility-restraint cases deserves attention. The appeals court stated:

The trial judge was likewise correct in finding that the draft was significantly anticompetitive in its effect. The draft inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power. The draft, as the District Court found, "leaves no room whatever for competition among the teams for the services of college players, and utterly strips them of any measure of control over the marketing of their talents."¹⁸⁸

Thus, if the draft (and other player-mobility restraints) had been upheld, top athletes desiring to play NFL football would have faced take-it-or-leave-it offers, since there were no competing football leagues at that time. As top-rank attorneys desiring to practice in a major national law firm have many firms to choose from, it might appear that the analogy of the NFL to a law firm breaks down when viewed from the players' (associates') viewpoint. While the players' situation may generate more sympathy than that of the associates, it is no different when viewed from an antitrust perspective.

Under the antitrust laws, a monopoly can be lawful if it is lawfully obtained and if the monopoly power is not used to tighten the monopolist's hold on the market. Only the act of monopolization, which excludes obtaining a monopoly by legal means, is outlawed.¹⁸⁹ We permit legal monopolies because we assume that if they are obtained legally, they produce some efficiencies that counterbalance the dead-weight loss that they cause. Consequently, when a monopolist buys goods and services as a monopsonist, the law does not restrict the monopsonist's freedom to structure its buying as it pleases because restrictions might injure the efficiencies obtained.¹⁹⁰ Thus,

188. 593 F.2d at 1185 (emphasis omitted) (footnotes omitted).

189. See L. SULLIVAN, *supra* note 21, § 7, at 29-30.

190. This statement assumes that the monopolist is not offering terms and conditions that would illegally strengthen its hold on the market. For example, it assumes that the monopolist is not telling his supplier: "If a company arises to compete against me, and you deal with it, I will never deal with you again." These terms and conditions might violate section 2, but no such blacklisting or similar practice was alleged in any of the NFL player-restraint cases that

if a business is established for the sole purpose of providing goods and services to a legal monopoly, that business does not have a valid antitrust claim against the monopoly merely because it cannot sell its good and services elsewhere and must accept what the monopolist offers.¹⁹¹

Prior to the merger of the American Football League (AFL) and the NFL, football players could choose between two buyers. If not satisfied with the offer received from a team in one league, a player could negotiate with a team in the other league. In 1966, Congress enacted a law that immunized from antitrust attack the merger by which the AFL and NFL combined to form a new, expanded NFL.¹⁹² The conference committee report on the merger bill indicates that it "would not extend to the combined league any greater antitrust immunity than that now existing for the existing professional football leagues" and that its "sole effect . . . is to permit the combination of the two leagues to go forward without fear of antitrust challenge"¹⁹³ However, the full ramifications of this statement were unclear. Indeed, Representative Celler, Chairman of the House Judiciary Committee, believed that the bill might have far-reaching effects, including the authorization of a single draft that would leave the players faced with a monopsonistic market.¹⁹⁴ Since Congress authorized the AFL-NFL merger after being informed that it might be authorizing a monopsonistic players' market, the present NFL should be treated like a legal monopoly.¹⁹⁵ The football players should be treated like providers of goods and services to a legal monopoly who cannot complain when they dislike the terms offered

were decided on the merits. *Cf. Radovich v. NFL*, 352 U.S. 445 (1957) (arose out of an allegation that NFL was blacklisting players who had played for a competing league, but only addressed the issue of whether football was exempt from the antitrust laws).

191. *See, e.g., Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981) (company with a monopoly on the publication of airline schedules did not violate section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982), by refusing to publish certain connecting schedules of commuter airlines, even though these airlines were placed at a significant competitive disadvantage vis-a-vis airlines whose schedules were published).

192. 15 U.S.C. § 1291 (1982).

193. H.R. REP. NO. 2308, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 4372, 4378.

194. 112 CONG. REC. 28,231 (1966) (statement of Rep. Celler).

195. The market for player services discussed here, in which the NFL exercised monopoly (monopsony) power from the time of the AFL-NFL merger until at least the recent formation of the United States Football League, should be distinguished from the market for entertainment discussed earlier, in which the NFL competes with other forms of entertainment. *See* note 156 *supra* and accompanying text. The NFL has neither monopoly power nor immunity from the antitrust laws in the entertainment market. *See id.*

by the monopoly.¹⁹⁶ While this result may appear harsh, the football player should be treated like the businessman who has made a business decision to provide goods and services to a legal monopoly. The football player may dislike this result, but the antitrust laws should not be his source of relief. Instead, he should seek relief through the collective bargaining process.

B. *The Four-Or-Five-Year Rule*

The NFL Constitution and By-Laws prohibit any person who has played college football from playing in the NFL until his college eligibility has expired, he has received a college diploma, or five years have elapsed since he first attended college.¹⁹⁷ They also prohibit any person who has never played college football from playing in the NFL until four football seasons have elapsed since he first attended college.¹⁹⁸ This rule prevents outstanding college football players from playing in the NFL until their college eligibility has expired. While this provision of the NFL Constitution and By-Laws has never been challenged, a similar provision of the National Basketball Association (NBA) by-laws was found to violate Sherman Act § 1 in *Denver Rockets v. All-Pro Management, Inc.*¹⁹⁹ (hereinafter referred to as the *Haywood* case, because it involved a challenge by Spencer Haywood).

At the time of the *Haywood* suit, the NBA by-laws prohibited a person from playing in the NBA until four years after his high school class had graduated.²⁰⁰ The American Basketball Association

196. Congress has statutorily authorized only the merger of two competing football leagues. See 15 U.S.C. § 1291 (1982). Thus, the analysis presented in the text is inapplicable to other sports leagues. It cannot be used in another sport that has only one bidder for players' services after one of two competing leagues has folded and the surviving league has granted franchises to some teams in the failing league.

Nevertheless, the surviving league in this situation should still be treated as a single entity. The proper question is whether or not the surviving league attained its monopoly (monopsony) legally. If it did, any player-mobility restraints should be held legal unless they are used to maintain the league's monopoly (monopsony) position. In other words, player-mobility restraints should be examined as a Sherman Act § 2 issue rather than as a Sherman Act § 1 issue, unless it can be demonstrated that the monopoly (monopsony) resulted from an agreement between the two competing leagues to merge with the intent to effectuate a common draft and eliminate bidding wars. Furthermore, even if section 1 were then applicable, the merger and resulting player-mobility restraints should not be declared illegal until after an inquiry is made into whether or not the dead-weight loss caused by the monopoly (monopsony) is outweighed by certain efficiencies. See text accompanying notes 35 and 190 *supra*.

197. NFL CONST. AND BY-LAWS art. XII, § 12.1(A) (1976).

198. NFL CONST. AND BY-LAWS art. XII, § 12.1(A) (1976). The NFL Constitution and By-Laws do not explicitly address the eligibility of players who never attended college.

199. 325 F. Supp. 1049 (C.D. Cal. 1971).

200. 325 F. Supp. at 1055, 1060.

(ABA) had a similar rule, but waived it in "hardship" cases.²⁰¹ After receiving a hardship waiver, Haywood joined the Denver Rockets of the ABA two years after he had graduated from high school. Haywood played for one year in the ABA, during which time he attained superstar status by earning both the "Rookie of the Year" and "Most Valuable Player" awards.²⁰² After that one year, however, Haywood alleged that his contract with Denver was invalid because it had been obtained by fraud. Haywood then signed a contract to play with the Seattle Supersonics of the NBA.²⁰³ Because that contract violated the NBA's four-year rule, Haywood sued for an order declaring that the four-year rule violated section 1.

The court found the four-year rule to be a group boycott *per se* violative of section 1,²⁰⁴ implicitly holding that the NBA teams were multiple actors for purposes of section 1 even though it never specifically addressed this issue. In rejecting a Rule of Reason approach, the court refused to consider whether the four-year rule promoted the efficient operation of the NBA by strengthening college basketball so that the NBA could forego developing a farm system.²⁰⁵ This refusal to consider whether the four-year rule could promote this type of efficiency demonstrates the court's lack of understanding of antitrust policy.

Had the court in *Haywood* understood the proper goal of antitrust policy, it could have found that the NBA was as much a single entity as the NFL. Like the NFL teams, who cooperate in the production of a unique "product," NFL football, the NBA teams produce a single "product," NBA basketball, that each could not produce alone or in a different league. Furthermore, the *Haywood* court could have found that the four-year rule was the result of an internal decision intended to promote efficiencies within the NBA by strengthening college basketball as a farm system so that the NBA need not develop its own farm system. This finding should have resulted in a holding that the rule was legal.

The four-year rule could strengthen college basketball by keeping the best college players in college basketball. Consequently, the level of play in college basketball could rise, and the skills of all

201. See 325 F. Supp. at 1060.

202. 325 F. Supp. at 1060.

203. 325 F. Supp. at 1054.

204. 325 F. Supp. at 1066. Unlike the court in *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), the *Haywood* court failed to appreciate the difference between the situation it faced and a classic group boycott. See note 169 *supra* and accompanying text.

205. 325 F. Supp. at 1066.

college basketball players training for the NBA would be better honed. The four-year rule was imperfect because it temporarily excluded players who for one reason or another never attended college. It also forced players prepared for NBA competition to remain in the farm system longer than necessary. Nevertheless, these imperfections should not have changed the outcome. The NBA may have decided that it was more efficient to use a blanket rule with these imperfections than to operate on a case-by-case basis as a hardship exemption would require. Under a consumer wealth maximization approach to antitrust, the courts should not direct the NBA how to structure its business operations.²⁰⁶ If the imperfections in such a rule are significant, a rival league without such a rule (such as the ABA) might arise to sign gifted players like Spencer Haywood should the NBA refuse to do so. If many such players were signed by a rival league, the market would force the NBA either to change its rule or suffer a decline in the quality of its product. As with the player-mobility restraints, the result might appear to be harsh on promising young athletes, but principled enforcement of antitrust policy demands this result.

It should be noted that active players affected by player-mobility restraints can achieve their goals through collective bargaining. It is unlikely, however, that players ineligible due to the four-year rule could cause the rule to be changed through collective bargaining. Because they are not yet eligible to play in the league, they are not members of a players' union. Furthermore, it is not in the interest of the players' union to amend the rule. The four-year rule provides some job security for active marginal players who might face an earlier retirement if the restriction were lifted to allow gifted players to enter the league at an earlier date.

In light of this fact, Haywood could have alleged that the four-year rule was not actually intended to produce efficiencies, but was the result of a conspiracy between the players' union and the owners to protect marginal players. If he had proved this allegation, the multiplicity of actors required for section 1 would have been present, and a section 1 violation might properly have been found.²⁰⁷ Fur-

206. See Part I, Sec. A.

207. The Sixth Circuit Court of Appeals has held that an action that would otherwise violate the antitrust laws is immune from antitrust attack if it is incorporated into a collective bargaining agreement and primarily affects only the parties to the agreement. See *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979) (citing *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977)). However, the four-year rule seems primarily to affect college players who are not parties to any collective bargaining agreement. Thus, even if it were made part of a collective bargaining agreement between the

thermore, Haywood could have alleged that the NBA had formulated its four-year rule in an agreement with the National Collegiate Athletic Association (NCAA) to protect the NCAA's interests in retaining the best college players. If he had proved such an allegation, the requisite plurality of actors would have been present, and a section 1 violation could have been found. However, because neither of these allegations was apparently made or proved in the *Haywood* case, the finding of a section 1 violation cannot be justified.²⁰⁸ Therefore, any reliance on a four-or-five-year-rule case to find multiple entities within a sports league is misplaced.

C. Roster Limitation And Player-Acquisition Deadline

The NFL limits the number of players that any team may carry on its roster.²⁰⁹ It also prohibits teams from trading players after the season is a certain number of weeks old.²¹⁰ Additional restrictions limit the ability of teams to add players to their rosters during the season.²¹¹ While players or prospective players might contend that these rules constitute an agreement among the teams to limit job opportunities for players, Weistart and Lowell properly find these restraints to be reasonably related to the NFL's goal of producing a marketable product. They state:

The apparent purpose of such rules is to promote the equality of competition by controlling the clubs' access to playing talent during the playing season. If clubs could freely add players, early season games would lose their significance, and the race for the championship would lose much of its appeal.²¹²

owners and the players' union, the four-year rule would not appear to qualify for antitrust immunity under the standard set forth in *McCourt*.

208. A similar critique can be made of *Linseman v. World Hockey Assn.*, 439 F. Supp. 1315 (D. Conn. 1977), in which the World Hockey Association (WHA) was preliminarily enjoined from enforcing a rule that prohibited persons under the age of twenty from playing in the league. The court found the rule to be a group boycott by the WHA's member teams and found the case to be indistinguishable from *Haywood*. 439 F. Supp. at 1326. However, while the *Linseman* court may have made the same mistakes as the *Haywood* court in not realizing that the WHA was a single entity, the result in *Linseman* may be correct. In *Linseman*, unlike *Haywood*, evidence indicated that the WHA intended the rule to protect and strengthen Canadian amateur hockey, which acted as a farm system for the WHA. 439 F. Supp. at 1322. The WHA also promulgated and enforced the rule at the insistence of the Canadian Amateur Hockey Association (CAHA). The CAHA was able to demand such cooperation from the WHA because the CAHA could prevent the WHA from entering lucrative contracts for WHA teams to compete against European teams which toured Canada. 439 F. Supp. at 1318, 1325. It therefore appears that the WHA and the CAHA constituted the requisite plurality of actors for section 1 purposes.

209. NFL CONST. AND BY-LAWS art. XVII, § 17.1 (1976 & Supp. 1982).

210. NFL CONST. AND BY-LAWS art. XVI, § 16.6 (1976).

211. See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.08(b), at 634 (1979).

212. *Id.*

Although Weistart and Lowell do not argue that the NFL should be deemed a single entity with respect to this issue, their analysis of the rationale for the rule is compatible with a single-entity analysis.

Bowman v. National Football League,²¹³ cited with approval by the *NASL* court in holding that the NFL consisted of multiple actors,²¹⁴ involved a variation on the typical roster limitation and player-acquisition deadline. *Bowman* arose as a result of the demise of the World Football League (WFL). It became apparent part of the way through the 1975 NFL season that the WFL would fold. At that time, the NFL teams agreed, for the 1975 season only, not to sign players who had any remaining contractual obligations to a WFL team.²¹⁵ They also agreed that players who had played in the WFL in 1975, but had no further contractual obligations to the WFL or to any of its teams, could not be signed by an NFL team after October 24, 1975.²¹⁶ The district court preliminarily enjoined the NFL from enforcing this agreement.

In an opinion almost totally bereft of any legal analysis, the district court in *Bowman* found it likely that the plaintiffs could prove that the defendant teams were engaging in a group boycott.²¹⁷ Instead, the court should have recognized the NFL as a single entity. Then, the court's only inquiry should have been, pursuant to Sherman Act § 2, whether or not the challenged policy was intended to restrict output or was intended to promote efficiencies within the League that would enhance its product. Just as the court in *Smith v. Pro Football, Inc.*²¹⁸ had found that player-mobility restraints did not restrict the output of football games,²¹⁹ the court in *Bowman* could have found that the restraints in hiring former WFL players did not restrict the output of football games. The restraints lasted only for the duration of the 1975 season. Thus, the restraints did not constitute a predatory practice intended to inform NFL players that they would be blacklisted if they played for a rival league. On the

213. 402 F. Supp. 754 (D. Minn. 1975).

214. *NASL*, 670 F.2d 1249, 1257 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982).

215. 402 F. Supp. at 755.

216. 402 F. Supp. at 755. The signing deadline originally corresponded to the NFL's trading deadline of October 28, 1975, but was moved up, apparently in an attempt to avoid threatened litigation by a WFL franchise owner who wanted his franchise accepted into the NFL. *J. WEISTART & C. LOWELL*, *supra* note 211, § 5.08(b), at 635; *see also* 402 F. Supp. at 755.

217. 402 F. Supp. at 756.

218. 593 F.2d 1173 (D.C. Cir. 1978).

219. *See* note 175 *supra* and accompanying text.

contrary, the evidence indicated that the hiring restraints were intended to promote efficiencies within the League. The court stated:

NFL Commissioner Pete Rozelle testified at the hearing and said the action of the defendants was taken to prevent threatened litigation by a WFL franchise holder if former WFL players were engaged and also so as not to disturb the competitive balance between the NFL teams in midseason. He also said many of the WFL players had formerly played in the NFL and there are contract rights to them in some NFL clubs and that working out the claims of these clubs would be a difficult and time-consuming job, especially if undertaken in midseason.²²⁰

The court not only failed to note any evidence rebutting Rozelle's testimony, but also stated: "There is no dispute as to the facts."²²¹ Apparently, however, the court did not deem this uncontroverted evidence of intended efficiencies as relevant to whether an antitrust violation might have occurred. This failure to recognize the relevance of intended efficiencies evidences the court's failure to understand the policy that should guide antitrust enforcement.

Viewed in their proper perspective, the restraints on hiring former WFL players should have been upheld. The restraints were an effort by a single entity to minimize the negative effects that the demise of a competing business could have on the surviving business. Reasonable action taken with the intent to avoid litigation instituted by the dying business should not be condemned. Nothing could be more reasonable than deciding not to hire employees of a moribund competitor unless one is certain that those employees have no further contractual obligations to that competitor. Furthermore, the October 24, 1975, deadline on hiring former WFL players not contractually obligated to a WFL team was probably needed to maintain the competitive balance that the trading deadline was intended to promote.²²² Weistart and Lowell note that the NFL's position was somewhat undermined by the League's failure to prohibit the late-season signing of free agents who were not associated with the WFL during its 1975 season. They correctly add, however, that a late-season influx of numerous top-quality, well-conditioned WFL players could have more significantly upset the competitive balance that the NFL had established than would the occasional signing of a free agent who had not recently been playing professional football.²²³ Such an influx of well-conditioned WFL players could have damaged both the integrity of the NFL and the marketability of its prod-

220. 402 F. Supp. at 755-56.

221. 402 F. Supp. at 755.

222. See notes 220-21 *supra* and accompanying text.

223. J. WEISTART & C. LOWELL, *supra* note 211, § 5.08(b), at 638.

uct. Given the *Bowman* court's failure to analyze NFL operations in the context of proper antitrust policy, the *Bowman* case is not persuasive precedent for holding that the teams of the NFL constitute multiple actors for purposes of section 1.

V. THE MISUSE OF PRECEDENT AND MISAPPLICATION OF
ANTITRUST POLICY IN THE *OAKLAND RAIDERS* AND
NASL OPINIONS

Most of the factors relied upon by the *Oakland Raiders* and *NASL* courts to hold that the NFL consists of multiple actors have been critically examined in earlier parts of this article. As already noted in Part IV, the NFL failed to argue that the player-restraint cases used by the *Oakland Raiders* and *NASL* courts to bolster their multiple-entity findings were wrongly decided,²²⁴ as is posited by this article. However, many of the points raised in Parts II and III pertaining to the intraenterprise conspiracy doctrine and the similarities between the NFL and a law firm partnership, respectively, were raised by the NFL in both actions, albeit without extensive elaboration.²²⁵ Because the *Oakland Raiders* and *NASL* courts ignored these arguments, one wonders whether each court strove to find multiple entities for reasons unrelated to antitrust enforcement policy. The supposition that each court was engaged in result-oriented opinion writing is supported by the additional fact that each opinion misused precedent to support its conclusion. This part will examine this misuse of precedent and discuss why the practice struck down in each case should have been upheld as designed to promote efficiencies.

A. *The Oakland Raiders Case*

In holding that the NFL was not a single entity in the *Oakland Raiders* case, the court relied on or attempted to distinguish three cases in addition to the *Associated Press* case discussed earlier.²²⁶ These were *Silver v. New York Stock Exchange*,²²⁷ *San Francisco Seals, Ltd. v. National Hockey League*,²²⁸ and *Knutson v. Daily Re-*

224. See note 160 *supra* and accompanying text.

225. See generally Reply Brief for Cross-Appellant NFL, *NASL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982) (copy on file with the Michigan Law Review); NFL's Brief in Support of Single Entity Theory, *Oakland Raiders*, 519 F. Supp. 581 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982) (copy on file with the Michigan Law Review).

226. See notes 98-104 *supra* and accompanying text.

227. 373 U.S. 341 (1963).

228. 379 F. Supp. 966 (C.D. Cal. 1974).

*view, Inc.*²²⁹ The court's treatment of each of these three cases is disconcerting when examined carefully.

Associated Press was used by the *Oakland Raiders* court for the proposition that members of an organization that produces a unitary product can nonetheless be multiple actors for purposes of section 1 of the Sherman Act.²³⁰ As already noted, though, the precedential value of *Associated Press* has been undermined by the Supreme Court's more recent ruling in the *Broadcast Music* case.²³¹ In addition, however, the *Oakland Raiders* court relied on *Silver v. New York Stock Exchange*²³² for the same proposition, stating:

Likewise, in *Silver*, [373 U.S. at 365] . . . the Court held that the Exchange had violated section 1 of the Sherman Act. Yet the Exchange "perform[ed] an important function" by "serv[ing] . . . as an indispensable mechanism through which corporate securities can be bought and sold" — a function that none of its individual broker-members could perform on its own. *Id.* at 349.²³³

Even though the court did not place the phrase, "a function that none of its individual broker-members could perform on its own," in quotation marks, its use of that phrase, combined with its placement of the citation to a page in the reports immediately after that phrase, strongly suggests that the opinion paraphrased the language of the Supreme Court. However, this is an improper interpretation of *Silver*. In *Silver*, the Court's statement was: "Stock exchanges perform an important function in the economic life of this country. They serve, first of all, as an indispensable mechanism through which corporate securities can be bought and sold[,] . . . [thereby] facilitating the successful marshaling of large aggregations of funds that would otherwise be extremely difficult of access."²³⁴ However, the Court made this statement to reconcile congressionally authorized self-regulation by stock exchanges with the potential anticompetitive effects in contravention of antitrust policy that such self-regulation might have. The Court did not make this statement, as the *Oakland Raiders* opinion implies, to find that the New York Stock Exchange produced a service or product that each of its members could not produce on its own. Indeed, while Justice Frankfurter, in his *Associ-*

229. 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

230. *Oakland Raiders*, 519 F. Supp. 581, 583 (C.D. Cal. 1981), *appeal docketed*, No. 82-5572 (9th Cir. June 14, 1982).

231. See notes 86-104 *supra* and accompanying text.

232. 373 U.S. 341 (1963).

233. 519 F. Supp. at 583-84 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 349 (1963) (brackets in original)).

234. 373 U.S. at 349.

ated Press concurrence, and Justices Roberts and Murphy, in their dissents in that same case, either expressly stated or strongly intimated that the Associated Press produced a product that its members could not produce on their own,²³⁵ such an intimation is absent from the *Silver* opinion with respect to stock exchanges. Moreover, the issue was not raised in any briefs before the Supreme Court in *Silver*. While the *Oakland Raiders* court's conclusion that a stock exchange produces a service or product that each of its members cannot produce on its own may be true, the implication that *Silver* addressed that issue is unwarranted.

The *Oakland Raiders* court's attempt to distinguish the second case cited, *San Francisco Seals, Ltd. v. National Hockey League*,²³⁶ is misleading and unconvincing. *San Francisco Seals*, which was decided by the same district court that decided the *Oakland Raiders* case, presented essentially the same issue as that case. Consequently, the *Oakland Raiders* court should have relied on *San Francisco Seals* and ruled that the NFL is a single entity.

In *San Francisco Seals*, the San Francisco Seals sued the National Hockey League (NHL) under section 1 of the Sherman Act after the NHL Board of Governors denied the Seals' request to move the franchise from San Francisco to Vancouver. The *San Francisco Seals* court granted summary judgment for the NHL by holding the NHL to be a single entity. Vancouver, unlike Los Angeles, which already had an NFL team,²³⁷ had no NHL team at the time. The *Oakland Raiders* court emphasized this fact in its attempt to distinguish *San Francisco Seals* by stating: "*San Francisco Seals* turned on a finding that denial of the Seals' proposed move to Vancouver had no anticompetitive effect. That finding cannot automatically be transferred to this case, because the Seals, unlike the Raiders here, were not being prevented from moving into another team's home territory."²³⁸

The *San Francisco Seals* court's decision did not, however, "turn[] on a finding that denial of the Seals' proposed move to Vancouver had no anticompetitive effect." Rather, in a decision that is unusual because it represents a rare example of proper economic analysis under the antitrust laws, the *San Francisco Seals* court based its decision on a finding that the NHL was a single entity and

235. See 326 U.S. at 26 (Frankfurter, J., concurring); 326 U.S. at 31 (Roberts, J., dissenting); 326 U.S. at 50 (Murphy, J., dissenting).

236. 379 F. Supp. 966 (C.D. Cal. 1974).

237. The Los Angeles Rams.

238. 519 F. Supp. at 585.

thus the requisite plurality of actors for a section 1 violation was missing.²³⁹ The court found that the NHL teams were not economic competitors; rather, they were "acting together as one single business enterprise, competing against other similarly organized professional leagues."²⁴⁰ The only factual distinction between the *San Francisco Seals* case and the *Oakland Raiders* case is that the NHL Constitution precluded there being more than one team in one city,²⁴¹ while the NFL Constitution and By-Laws did not. However, to use that factual difference to distinguish the anti-competitive effect of the leagues' actions in the two cases makes a mockery of the section 1 violation that was found in the *Oakland Raiders* case. If this distinction were taken to its logical conclusion, the NFL would have fared better if it had precluded the possibility of any economic competition between teams by permitting only one team per city as the NHL did, rather than allowing competition by permitting more than one team in the same city if three-fourths of the teams agreed to that arrangement.²⁴² Such a holding would turn antitrust policy on its head by upholding a total ban on competition while outlawing only a partial restraint.²⁴³

The *Oakland Raiders* court saved its most lamentable misuse of precedent for its analysis of the Ninth Circuit's treatment of the intraenterprise conspiracy doctrine. The court stated:

The Ninth Circuit has taken a[n] . . . unreceptive view of single-entity claims, as demonstrated by *Knutson v. Daily Review, Inc.* The defendants there were two newspaper-publishing corporations, one a wholly-owned subsidiary of the other. The Ninth Circuit was reluctant to characterize these firms as a single entity for Sherman Act purposes, stating only (in dictum) that they were "[a]rguably" one enterprise. Yet not only were the two firms parent and subsidiary, but one individual had control of the parent, was president of both corporations, and published all of both companies' newspapers. Moreover, the firms shared many key personnel, their newspapers exhibited numerous common features, and the two companies did not compete. If all these features together were insufficient to establish a single enterprise, it is difficult to see how the NFL can constitute a single entity

239. 379 F. Supp. at 969-70.

240. 379 F. Supp. at 969.

241. See 379 F. Supp. at 967-68 (quoting relevant provisions of the NHL Constitution).

242. NFL CONST. AND BY-LAWS art. IV, § 4.3 (Supp. 1982).

243. In the preceding several sentences, the term "competition" has not been used as the word of art that it is intended to be under a consumer wealth maximization approach to the antitrust laws. Rather, it has been used as it was used by the court in the *Oakland Raiders* case, which assumed that because two NFL teams may both vie for the same fans' dollars, they are not part of one business entity for antitrust purposes.

when it possesses *none* of those features.²⁴⁴

How the *Oakland Raiders* court could state that the Ninth Circuit takes an "unreceptive view of single-entity claims" based upon *Knutson v. Daily Review, Inc.*²⁴⁵ is perplexing. While the *Knutson* court's statement that "[a]rguably on these facts the two corporate units were incapable of conspiracy as a matter of law"²⁴⁶ may have been merely dictum, the *Knutson* court followed that language with: "It is unnecessary for us to decide that question, however, because the same facts prevent successful attack on the district court's factual findings that there was no conspiracy."²⁴⁷ The presence of this second sentence is somewhat confusing. The *Knutson* court noted that one Sparks, who controlled both corporations, made all the decisions that led to the alleged conspiracy.²⁴⁸ However, the *Knutson* court also noted that there were "facts" (plural) that supported the conclusion that no conspiracy existed.²⁴⁹ Here, the *Knutson* court was apparently looking to all the facts and circumstances, rather than only to the fact that Sparks made all the decisions, in determining that a conspiracy did not exist. In effect, while not specifically saying so, the *Knutson* court applied the same test to determine whether a conspiracy existed as it would apply to determine whether a single entity was acting. This is a proper analysis of the problem, because the question of whether or not a conspiracy took place, like the question of whether or not a single entity exists, must often be answered by examining the economic realities of the situation.

Viewed in this light, *Knutson* supports an all-the-facts-and-circumstances approach to the single-entity issue. Contrary to the district court's statement in *Oakland Raiders*, the Ninth Circuit is considered to be in the forefront of adopting an all-the-facts-and-circumstances test for the single-entity issue, and *Knutson* is considered the leading case representing this approach.²⁵⁰ Even counsel for the Los Angeles Memorial Coliseum Commission, who argued in *Oakland Raiders* for the finding that the NFL teams are multiple entities for section 1 purposes, have recognized that the Ninth Circuit is a "leading exponent" of the view that "separate incorporation

244. 519 F. Supp. at 582-83 (emphasis in original) (brackets in original) (citation omitted) (footnote omitted).

245. 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

246. 548 F.2d at 803.

247. 548 F.2d at 803.

248. See 548 F.2d at 801.

249. 548 F.2d at 803.

250. See, e.g., Handler & Smart, *supra* note 61, at 38-39, 55-57; see also Note, *Conspiring Entities*, *supra* note 78, at 670.

. . . often is a mere technicality which should have little significance, or certainly not conclusive significance, in determining the reach of the antitrust laws."²⁵¹ They further acknowledged that *Knutson* is a leading case in this area and have struggled to limit its effect.²⁵² The *Oakland Raiders* court's contention that *Knutson* represents the Ninth Circuit's rejection of single-entity claims is therefore unsubstantiated and suggests that the opinion is improperly result-oriented.

If the *Oakland Raiders* court had properly viewed the NFL as a single entity, it could easily have determined that a decision to place two teams in the Oakland-San Francisco area and only one in the Los Angeles area was an internal decision that was not intended to restrict the output of football. That decision must therefore have been intended to promote the efficient operation of the League by placing teams in optimum locations. Even if the allocation of two teams in Oakland-San Francisco and only one in Los Angeles was not as optimal as the opposite allocation, the court should not have intervened. Rather, it should have allowed the NFL either to correct the misallocation or suffer the economic consequences.²⁵³

B. *The NASL Case*

The district court in the *NASL* case observed that previous cases had held the NFL to be a single entity when "joint league conduct neither implicates nor impinges upon competition between the member clubs."²⁵⁴ Because the NFL's proposed cross-ownership ban did not implicate or impinge upon competition among NFL teams, the district court found the single-entity defense to be available and dismissed the complaint.²⁵⁵ The district court did not believe that the NFL could be a single entity in cases involving player-mobility restraints because it believed that NFL teams compete against each

251. Blecher & Daniels, *supra* note 66, at 226.

252. *Id.* at 227-32.

253. Even if it were alleged that the Raiders were denied permission to move to Los Angeles not because of an intent to promote efficiencies, but rather out of a dislike for Raider owner Al Davis, that allegation should not give rise to a valid antitrust claim. While a dislike for Al Davis may have some effect on how certain owners would vote on the move, the consumer wealth maximization model presupposes that businessmen make decisions out of a desire to maximize profits, not out of a desire to satisfy some personal grudge. If decisions that are foolish from an efficiency standpoint are made because of personal grudges, market forces, rather than courts, should correct the decisions. See Part I, Sec. A *supra*.

254. *NASL*, 505 F. Supp. 659, 677 (S.D.N.Y. 1980), *revd.*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982).

255. 505 F. Supp. at 677, 689.

other for players.²⁵⁶ Also, it did not believe that the NFL could be a single entity in an *Oakland Raiders*-type case because two teams in one geographic area compete against each other for fans' dollars.²⁵⁷ The district court's position with respect to player-mobility-restraint cases and playing-site cases, such as the *Oakland Raiders* case, was erroneous. It most likely resulted from the NFL's tactical decision not to attack those cases.²⁵⁸ However, its conclusion with respect to the cross-ownership ban represented a move in the right direction.

The Second Circuit, in reversing the district court, disagreed with the district court's contention that all cases in which the NFL teams were found to be multiple entities involved competition between the teams. The Second Circuit stated:

Although many involved player relations or playing sites, which affect competition between member teams, at least one raised issues between leagues. In *Radovich v. National Football League*,^[259] . . . the issue was whether an NFL boycott of a player who had previously accepted employment with a competing pro-football league, the All America Conference, violated § 1 of the Sherman Act. The Court held in *Radovich* that it did, even though that boycott might not, in the words of the district court, "implicate [or] impinge[] upon competition between member clubs."²⁶⁰

This statement inaccurately represents the Supreme Court's holding in *Radovich*. *Radovich* alleged both section 1 and section 2 violations by the NFL, claiming "a conspiracy to monopolize and control organized professional football in the United States"²⁶¹ by blacklisting players who played for a competing league. In reality, *Radovich* alleged that the NFL teams conspired not only among themselves, but also with a third affiliated league to extend the coverage of the blacklist.²⁶² Not enough facts were presented in the *Radovich* opinion for an intelligent decision to be made as to whether this third league could constitute an entity separate from the NFL for section 1 purposes. However, the allegation of a conspiracy with this third league made it inappropriate for the Second Circuit to imply that *Radovich* found the NFL itself to be composed of multiple entities for section 1 purposes.

256. 505 F. Supp. at 677.

257. 505 F. Supp. at 677.

258. See notes 160-61 *supra* and accompanying text.

259. 352 U.S. 445 (1957).

260. *NASL*, 670 F.2d 1249, 1257 (2d Cir.) (quoting *NASL*, 505 F. Supp. at 677) (brackets in original) (footnote added), *cert. denied*, 103 S. Ct. 499 (1982).

261. 352 U.S. at 447.

262. See 352 U.S. at 448 (a Pacific Coast League team allegedly refused to hire *Radovich* as a player-coach after being advised of the NFL blacklisting of him).

Furthermore, *Radovich* was an appeal from a dismissal at the pleading stage, which was granted on the ground that football, like baseball, is immune from the antitrust laws. Thus, the only issue before the Court in *Radovich* was whether football is subject to the antitrust laws.²⁶³ Indeed, after holding that football is subject to the antitrust laws, the Court stated: "Of course, we express no opinion as to whether or not respondents have, in fact, violated the antitrust laws, leaving that determination to the trial court after all the facts are in."²⁶⁴ Earlier language in *Radovich* to the effect that the complaint made sufficient allegations to make out a claim of conspiracy²⁶⁵ cannot be taken as approval on the merits of a characterization of the NFL teams as multiple entities, especially in view of the allegation that the NFL conspired with a third league. Neither can the fact that the NFL claimed in its brief that it should be deemed a single entity²⁶⁶ give rise to a conclusion that the Supreme Court considered that issue on the merits. Because *Radovich* was decided at the pleading stage (unlike the *Oakland Raiders* and *NASL* opinions, which were written after full evidentiary hearings), the Court did not have before it a sufficient factual record to enable it to determine as a matter of law whether the NFL was a single entity. Therefore, the Second Circuit's reliance on *Radovich* was misplaced.

After improperly relying on *Radovich* to find that the NFL's teams constituted multiple entities, the Second Circuit devoted the remainder of its opinion to explaining why the cross-ownership ban constituted an unreasonable restraint of trade. First, the Second Circuit decided that the purpose of the cross-ownership ban was to damage the NASL by restricting its access to sports-ownership capital.²⁶⁷ Next, the court determined that sports-ownership capital was not fungible with all other capital and is in limited supply.²⁶⁸ The net result, in effect, was a conclusion that the NFL violated the Sherman Act by attempting to monopolize the sports-ownership-capital market. The problem with this conclusion is that attempting to monopolize a market is a violation of section 2 of the Sherman Act, not

263. 352 U.S. at 446-47.

264. 352 U.S. at 454.

265. 352 U.S. at 453.

266. Brief For Respondents at 53-56, *Radovich v. National Football League*, 352 U.S. 445 (1957).

267. 670 F.2d at 1257.

268. 670 F.2d at 1260. As Justice Rehnquist pointed out, in reaching these conclusions the Second Circuit usurped the role of the trial court by making factual determinations. See *NASL*, 103 S. Ct. 499, 500 (1982) (Rehnquist, J., dissenting from denial of certiorari).

a violation of section 1. Only a section 1 violation was alleged in the case. To prove a violation of section 2, a plaintiff must show that the defendant possessed monopoly power, but such market power need not be proved in a section 1 action.²⁶⁹ Presumably, the NASL did not allege a section 2 violation because it knew that it could not prove that the NFL possessed the market power needed to effectively restrict access to the sports-ownership capital market. Consequently, the Second Circuit, by improperly finding multiple actors, enabled the NASL to bring a successful section 2 action under the guise of section 1 when it was unable to prove all the elements required for a section 2 violation.

To fit the cross-ownership ban into the framework of section 1, the Second Circuit had to find that the ban unreasonably restrained trade. The Second Circuit acknowledged the NFL's contention "that the ban assures it of the undivided loyalty of its team owners in competing effectively against the NASL."²⁷⁰ Thus, the court recognized that the ban was in effect a covenant between NFL team owners not to compete with the NFL through ownership of a team in another sports league. However, the court continued as follows:

We do not question the importance of obtaining the loyalty of partners in promoting a common business venture, even if this may have some anticompetitive effect. But in the undisputed circumstances here the enormous financial success of the NFL league despite long-existing cross-ownership by some members of NASL teams demonstrates that there is no market necessity or threat of disloyalty by cross-owners which would justify the ban. Moreover, the NFL was required to come forward with proof that any legitimate purposes could not be achieved through less restrictive means. This it has failed to do.²⁷¹

The flaws in this statement are at least two-fold. First, the record does not justify the statement that the continued financial success of the NFL demonstrates that there is no need for the ban. Second, this statement implies that once a business is successful, it is illegal for it to try to operate even more efficiently or to try to correct any flaws in its system of operations.

The record suggests that Lamar Hunt, who owned both the NASL Dallas Tornados and the NFL Kansas City Chiefs, visited Philadelphia and Minnesota, where both NASL and NFL teams were located. While there, he attempted to arouse fan interest in the

269. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

270. 670 F.2d at 1261.

271. 670 F.2d at 1261.

NASL teams at the expense of fan interest in the NFL teams,²⁷² thereby acting to the detriment of the NFL as a whole. The record also suggests that Joe Robbie, who owned the NFL Miami Dolphins and whose wife owned the NASL Fort Lauderdale Strikers, "diverted resources of the NFL Miami Dolphins to the NASL Fort Lauderdale Strikers, thereby lessening or threatening to lessen the effectiveness of the Dolphins' contribution to the NFL."²⁷³ The record further describes other potential sources of conflict that the cross-ownership ban would have avoided.²⁷⁴

By striking down the cross-ownership ban, the *NASL* court in effect held that the NFL's financial success not only precluded it from acting to protect itself from a competitor's activities, but also required it to aid that competitor in its effort to compete. Such a holding is contrary to accepted antitrust policy and to the law in the Second Circuit.²⁷⁵ It forces the NFL to accept inefficient operations, and it protects small competitors rather than enhancing competition. Furthermore, the court stated: "[T]he NFL was required to come forward with proof that any legitimate purposes could not be achieved through less restrictive means."²⁷⁶ However, less restrictive alternatives may not have appeared to be as efficient to administer. In hindsight, one can always imagine an alternative that would have

272. NFL Defendants' Proposed Findings of Fact and Conclusions of Law at 50, *NASL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *rev'd*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 103 S. Ct. 499 (1982) (copy on file with the Michigan Law Review).

273. *Id.* at 74.

274. *Id.* at 69-75.

275. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) involved an antitrust action by Berkey, a producer of amateur cameras with a small share of the market, against Kodak, a company with monopoly power in the manufacture of both amateur cameras and film. *See* 603 F.2d at 269-70. Berkey did not produce film. *See* 603 F.2d at 267. Kodak simultaneously marketed a new model camera and a new high-quality film that fit only its new camera (the "110 system"). As a result, consumers desiring to use the new film could not use a competitor's camera until competing camera manufacturers (such as Berkey) developed cameras that could use the new Kodak film. *See* 603 F.2d at 276-79. The district court instructed the jury that if Kodak had monopoly power in cameras or film so that another camera manufacturer could not compete with Kodak in the camera market unless its products were similar to Kodak's, Kodak's failure to predisclose details of the new 110 system to competitors could constitute a violation of Sherman Act § 2. 603 F.2d at 281. The Second Circuit reversed, holding that Kodak did not have a duty to predisclose what it was developing. The court noted that "a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits," 603 F.2d at 281, and that "any success that it may achieve through 'the process of invention and innovation' is clearly tolerated by the antitrust laws." 603 F.2d at 281 (citation omitted). To require a monopolist to disclose its plan so that competitors could introduce similar competing products at the same time would stifle innovation. 603 F.2d at 281-82. *Berkey Photo* thus clearly stands for the proposition that a monopolist cannot be forced to aid its competitors simply because it has a monopoly. The *NASL* opinion, which in effect required the NFL to assist its competitor, the North American Soccer League, cannot be reconciled with *Berkey Photo*.

276. 670 F.2d at 1261.

been less restrictive than the one chosen. However, if that alternative appears less efficient to administer, imposing it upon a party may lead to inefficient results, which waste resources and encumber efforts to achieve the elusive goal of Pareto optimality.

Because the cross-ownership ban was a covenant to preclude partners in a partnership from competing against the partnership, it should have been upheld as a legitimate ancillary restraint. In the words of Judge (later Chief Justice) Taft: "Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, [are], of course, only ancillary to the main end of the union, and [are] to be encouraged."²⁷⁷

CONCLUSION

In recent years the Supreme Court has moved closer and closer to recognizing that consumer wealth maximization should be the sole goal underlying antitrust enforcement policy. Part of this movement involves the recognition that economic realities must be examined and considered in fashioning an objective standard for antitrust enforcement. Recognition of economic realities must preclude courts from finding multiple actors for purposes of Sherman Act § 1 simply because separately organized businesses may be acting in concert. Before finding multiple entities for purposes of section 1, a court should, at the very least, carefully examine all of the facts and circumstances surrounding the operation of the purported combination and challenged practice. A court should also examine the ultimate ramifications of any conclusions derived. The failure to engage in such examination in many sports law cases, and most particularly in the *Oakland Raiders* and *NASL* cases, has resulted in decisions that only thwart legitimate attempts by the NFL and other professional sports leagues to operate efficiently. These decisions are inconsistent with the emerging realization that consumer wealth maximization is the only proper goal of antitrust enforcement policy.

²⁷⁷. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 280 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).