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The NBA and the Single Entity Defense: A Better Case?

Michael A. McCann*

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* *Associate Professor of Law, Vermont Law School; Legal Analyst and SI.com Columnist, Sports Illustrated; Co-Founder, Project on Law and Mind Sciences at Harvard Law School; Distinguished Visiting Hall of Fame Professor of Law, Mississippi College School of Law.* *I am grateful to Christopher Lund, David Katz, Jeffrey Mogan, and Ryan Rodenberg for their outstanding comments. I also thank Patrick Malloy and Jonathan Hamlin for their excellent research assistance. This Article raises similar issues that I discuss in a companion piece, American Needle v. NFL: An Opportunity to Reshape Sports Law, 119 Yale L.J. 726 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1471515.*

I. INTRODUCTION

This Article explores the relationship between the National Basketball Association ("NBA"), its independently-owned teams, and associated corporate entities; including the Women's NBA ("WNBA"), NBA Properties, NBA Developmental League ("D-League"), NBA China, and single entity analysis under section 1 of the Sherman Act.[1] Section 1 chiefly aims to prevent competitors from combining their economic power in ways that unduly impair competition or harm consumers, be it in terms of raised prices, diminished quality, or limited choices. Single entities are exempt from section 1 scrutiny because they are considered "one," rather than competitors, and thus their collaboration does not implicate anti-competitive concerns. Although single entity status has traditionally been limited to parents and their wholly owned subsidiaries, recent decisions suggest that other business arrangements may enjoy single entity status.

In *American Needle v. NFL*,[2] for which the Court heard oral arguments on January 13, 2010, the Supreme Court will decide whether the National Football League ("NFL"), its teams, and associated corporate entities, constitute a single entity. Other leagues, including the NBA, may be impacted by the Court's decision, which is expected by the summer of 2010. If the NBA gained single entity status, it could potentially execute exclusive contracts with video game companies and apparel companies, restrain players' salaries and employment autonomy, and impose heightened age restrictions on amateur players who seek employment in the NBA, all without concern for section 1 scrutiny.

In a recent feature in the *Yale Law Journal*, I discourage the Court from recognizing the NFL as a single entity but recommend that Congress consider targeted, sports league-related exemptions from section 1.[3] In this Article, I survey whether the NBA's globalized business agenda and the league's exposure to competition from foreign professional basketball leagues *necessitate* that NBA teams act in unison and with a "shared consciousness."[4] The necessity of cooperation, at least for certain international endeavors, may distinguish NBA teams from teams in the NFL and possibly those in the two other "Big Four" professional sports leagues—Major League Baseball ("MLB") and the National Hockey League ("NHL")[5]—which remain more anchored to domestic operations. To the extent

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[1] 15 U.S.C. § 1 (2006). Section 1 provides, in relevant part, that "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." *Id.*

[2] 174 L. Ed. 2d 575 (2009).

[3] *See* Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726 (2010) [hereinafter McCann, *An Opportunity to Reshape Sports Law*].

[4] "Shared consciousness," in the context of professional sports leagues, refers to a symbiotic arrangement between a league and its teams. The arrangement exists because it maximizes business interests and promotes the league's sustainability. *Id.* at 751.

[5] N. Am. Soccer v. Nat'l Football League, 670 F.2d 1249, 1253 (2d Cir. 1982) (classifying the NFL, NBA, MLB, and NHL as the "major" professional sports leagues). As a point of context, Major League Baseball already enjoys a limited exemption from section 1, but the

Congress considers legislative exemptions for professional sports leagues, the experience of the NBA, a trailblazer in promoting a league product abroad, may lend insight on how antitrust law should regulate leagues in the years ahead.

II. AN OVERVIEW OF THE NBA AND ITS OPERATIONS

A. The NBA and Its Associated Leagues

The NBA began in 1949 as an unincorporated association of twelve privately owned teams.[6] As is often the case with nascent leagues, the NBA's early years were turbulent, with modest attendance and several teams folding soon after their formation.[7] The league stayed afloat in part because franchise owners ceded a great deal of authority to the league's first commissioner, Maurice Podoloff, an attorney with a proficiency in marketing and advertising,[8] and because those owners realized that their collective and individual success depended on unity.[9]

The league's fortunes would improve in the 1960s. Propelled by Bill Russell, Wilt Chamberlain, Bob Cousy, and other marketable stars, as well as a national television contract with ABC, the NBA became a nationally-relevant sports league.[10] In the following decades, other popular players, most notably Larry Bird, Magic Johnson, and Michael Jordan, would help the NBA become one of the "big four" professional leagues. Franchise values have soared in the last three decades: the average price of an NBA franchise increased from $12 million in 1983 to $114 million in 1993 to $200

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exemption does not extend to matters impacting players' employment conditions and may not extend to licensing. *See* McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 771–72.

[6] *See* Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 117 (2004).

[7] *See* GEORGE W. SCULLY, THE MARKET STRUCTURE FOR SPORTS 16–18 (1995); PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW LAW CAN MAKE SPORTS BETTER FOR FANS 236 (2000).

[8] *See* WALTER LAFEBER, MICHAEL JORDAN AND THE NEW GLOBAL CAPITALISM 40 (2002).

[9] *See* Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 28–29 (2009); *see also* PAUL D. STAUDOHAR, PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS 103 (1996) (noting that Podoloff receives credit for "holding the league together in the difficult early years").

[10] *See* WILLIAM JOSEPH BAKER, SPORTS IN THE WESTERN WORLD 317 (1988).

million in 1999 and to $367 million in 2009.[11] The NBA is also considered the most successful U.S. sports league overseas in attracting fans and their money.[12]

David Stern, who has served as NBA commissioner since 1984, deserves considerable credit for the league's success. Widely regarded as a savvy businessperson, Stern has generated significant fan interest in the NBA's product and has earned the trust of NBA owners.[13] Indeed, in generating $3.2 billion a year in revenue,[14] the NBA is undoubtedly the world's leading basketball league.[15] To be sure, Stern's leadership style—described by some as "dictatorial" or "autocratic"—has received criticism,[16] but his leadership has resulted in a highly successful league.

In recent years, the NBA has expanded its business operations to include new basketball leagues that, though distinct, remain under the control of Stern and the NBA. The WNBA is perhaps most illustrative. Founded in 1996 as a subsidiary of the NBA, the WNBA currently features twelve teams, half of which are owned by NBA teams, with the other half owned by persons who lack equity in NBA teams.[17] As a result, the WNBA is a partially owned, rather than wholly owned, subsidiary of the NBA. The NBA devised the WNBA with the stated purpose of embodying a

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[11] *See* DANIEL R. MARBURGER, STEE-RIKE FOUR!: WHAT'S WRONG WITH THE BUSINESS OF BASEBALL? 99 (1997) (noting average value of NBA franchises in 1983 and 1993); Jeffrey E. Garten, *The NBA Needs to do Some Globetrotting*, BUS. WK., July 19, 1999, at 19 (noting average value of NBA franchises in 1999); Kurt Badenhausen, *The Business of Basketball*, FORBES.COM, Dec. 9, 2009, http://www.forbes.com/2009/12/09/nba-basketball-valuations-business-sports-basketball-values-09-intro.html (noting average value of NBA franchises in 2009).

[12] *See* Richard Sandomir, *NFL Pulls Plug on its Own League in Europe*, N.Y. TIMES, June 30, 2007, at D1.

[13] *See* Jimmy Smith, *Silver Salute*, TIMES-PICAYUNE, Feb. 1, 2009, at Sports 1; *see also*, THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 297 (2000) (discussing how Stern has understood and exploited the globalization of commerce); BERNARD JAMES MULLIN ET AL., SPORTS MARKETING 2 (2007) (describing "brilliant" marketing ideas of Stern).

[14] *See Sports Industry Overview*, PLUNKETT RESEARCH, http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx (last visited Jan. 26, 2010) (comparing favorably NBA revenue to revenue generated by four major sports leagues).

[15] *See* Harlem Wizards Entm't Basketball, Inc. v. NBA Props., 952 F. Supp. 1084, 1086 (D.N.J. 1997) (describing the NBA as "the world's preeminent professional basketball league"); Hall v. Nat'l Basketball Ass'n, 651 F. Supp. 335, 336 (D. Kan. 1987) ("The NBA and its member teams comprise the premier professional basketball league in the United States.").

[16] *See, e.g.*, Dan Patrick, *Just My Type*, SPORTS ILLUSTRATED, June 23, 2008, at 28 (quoting Ralph Nader, who calls Stern "autocratic"); King Kaufman, *Sports Daily*, SALON.COM, May 16, 2007, http://www.salon.com/sports/col/kaufman/2007/05/16/wednesday/index.html (describing Stern as a "dictator"); *see also* Sekou Smith, *NBA's Savior or Dictator?*, INDIANAPOLIS STAR, Dec. 5, 2004, at 4C (examining the competing arguments concerning Stern's leadership style).

[17] *See* Ben Collins, *Trying to Ensure a Bright Future*, BOSTON GLOBE, June 6, 2009, at 1; *WNBA Enterprises, LLC*, BUS. WK., http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=28093080 (last visited Jan. 26, 2010); Mark Bechtel et. al, *For the Record*, SPORTS ILLUSTRATED, Nov. 30, 2009, at 22 (noting that Sacramento Monarchs folded in November 2009, reducing the number of WNBA teams from thirteen to twelve).

completely centralized entity, with league ownership of teams and with WNBA players subject to rules unilaterally imposed by the WNBA.[18] In 2002, however, WNBA players chose to unionize and, as mentioned above, the league now has individualized ownership groups.[19] The WNBA and NBA nonetheless remain closely connected, with league offices housed in the same building in New York City and with frequent collaboration on marketing and sponsorship arrangements.[20]

The NBA's recent investment in minor league basketball is also indicative of an expanding league. In 2001, the NBA created the D-League in order to provide a minor league for NBA teams and their players.[21] Though thirteen of the sixteen D-League teams are independently owned,[22] the NBA by and large controls D-League operations, and most NBA teams share D-League teams for purposes of player development.[23]

NBA China is a similar extension of the NBA's business model, which is based on approximately 10% of league revenues being generated outside the U.S.[24] Formed in 2008, NBA China is a partially owned subsidiary of the NBA, with minority interests held by ESPN and several financial institutions.[25] The NBA and its teams

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[18] *See* LISA PIKE MASTERALEXIS ET AL., PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT 208 (2008); GLENN M. WONG, THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS 78 (2008); Edward Mathias, Comment, *Big League Perestrokia? The Implications of* Fraser v. Major League Soccer, 148 U. PA. L. REV. 203, 221–22 n.107 (1999).

[19] *See* Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y 1, 9 (2008) (discussing unionization of WNBA players); Lacie L. Kaiser, *The Flight from Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 1, 11 (2005) (discussing WNBA movement away from a single entity structure).

[20] *See* WONG, *supra* note 18, at 78.

[21] In addition to developing players, the D-League is also designed to provide coaches, trainers, and other officials with experience in professional basketball. *See* Barry Lewis, *Tulsa Adds New Professional Basketball Franchise*, TULSA WORLD, Mar. 22, 2005, at B1.

[22] *See* Ron Chimelis, *Armor's Milligan Out*, REPUBLICAN, Dec. 10, 2009, at B01 (noting that only three D-League teams are owned by NBA teams).

[23] *See* Mike Baldwin, *Owning 66ers Benefits Thunder*, OKLAHOMAN, Nov. 22, 2009, at 6B; Steve Carp, *Fan Turnout Strong for Summer League*, LAS VEGAS REV.-J., July 20, 2009, at 1C. Although the NBA dictates the D-League's policies and procedures, thirteen of the sixteen D-League teams are owned by local owners, with only three D-League teams owned by NBA teams. *See* Mike Snider, *Snide Remarks*, NBA.COM, Mar. 10, 2009, at http://www.nba.com/dleague/idaho/Stampede_Blog.html.

[24] *See* Mark Leftly, *Basketball Takes a Shot Across The Pond*, INDEP., Oct. 11, 2009, at 82.

[25] *NBA Announces Formation of NBA China*, Jan. 14, 2008, NBA.COM, http://www.nba.com/news/nba_china_080114.html; *see also* FRANK P. JOZSA, JR., GLOBAL SPORTS: CULTURES, MARKETS AND ORGANIZATIONS 92 (2008) (discussing how NBA China evaluates, initiates, and controls the NBA's image in China); *Sports Leagues Go Global*, METROPOLITAN CORP. COUNS., Feb. 2008, at 6 (providing comments by Jon Oram, a partner at Proskauer Rose and attorney for the NBA, on ownership and management structure of NBA China and NBA's investment in China); Adam Thompson & Alan Paul, *NBA Uses Local Allure to Push Planned League in China*, WALL ST. J., Jan. 11, 2008, at B1 (providing additional detail on NBA China).

have quickly, and considerably, invested in marketing NBA-sponsored basketball to Chinese consumers. From 2004 to 2009, the NBA opened offices in Beijing, Shanghai, Taiwan, and Hong Kong, and the number of full-time NBA employees based in China increased from three to more than 145.[26] Also, working alongside the Chinese government and sports complex developers, the NBA expects to build up to twelve NBA-style arenas across China.[27]

China reflects a sensible locale for league expansion, as it is the NBA's largest market outside of the United States, contributing approximately 30% of the NBA's international income.[28] The NBA expects that NBA China will generate significant revenue and that it, along with an increasing presence of international players in the NBA,[29] will serve as a trend-setter in the NBA's global ambitions.[30]

B. The NBA and Its Relationship with the NBPA

Since the formation of the league, NBA players have been aware of their contributions to the league's financial success. They have also been aware that when compared to individual teams, the league, and players in general, star NBA players tend to generate disproportionate revenue for the NBA.[31] Naturally, NBA players have demanded compensation for their contributions. To advance those demands, NBA players formed a union, the National Basketball Players' Association (NBPA), in 1954.[32] The NBPA serves as the exclusive bargaining representative of all NBA

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[26] *See* John Reid, *China is Becoming a New Hoops Frontier*, TIMES-PICAYUNE, Sept. 20, 2009, at Sports 1.

[27] *See* David Barboza, *China Offers Fertile Ground for Branding*, INT'L HERALD TRIB., Dec. 8, 2009, at 23. While China contributes 30% of the income received by the NBA through international sources, only 10% of the NBA's total revenue derives from international sources. *See* Leftly, *supra* note 24 (noting that 10% of total NBA revenue derives from international sources).

[28] *See* Samantha Marshall, *NBA's Big Plans Hinge on Beijing*, CRAIN'S N.Y. BUS., July 7, 2008, at 3.

[29] *See* FRIEDMAN, *supra* note 13, at 297 (discussing the NBA's use of global commerce to expand its product); GIORGIO GANDOLFI, NBA COACHES PLAYBOOK: TECHNIQUES, TACTICS, AND TEACHING POINTS 135 (2008) (noting that nearly 20% of NBA players were born outside of the U.S.); Benjamin Hochman, *NBA Teams Continue to Look Outside U.S.*, TIMES-PICAYUNE, June 21, 2004, at Sports 2 (discussing increase in percentage of international players in the NBA).

[30] Michael Lee, *The NBA in China: Opening a Super Market*, WASH. POST, Oct. 18, 2007, at A1.

[31] To illustrate, such legendary stars as Michael Jordan, Larry Bird, and LeBron James have been shown to significantly increase ticket sales, including for away games. *See* ANDREW ZIMBALIST, THE ECONOMICS OF SPORT 569 (2001). Also consider that during the 1990s, items associated with the Chicago Bulls and Michael Jordan accounted for nearly half of NBA Properties' revenue. *Id.* at 575. Star NBA players are thus considered irreplaceable or extremely difficult to replace. *See* SCOTT ROSNER & KENNETH L. SHROPSHIRE, THE BUSINESS OF SPORTS 204 (2004).

[32] *See* Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs That Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 131 (2006).

players and negotiates a bevy of employment related conditions, including the league's salary structure, rules of conduct, and procedures for discipline.[33]

Negotiation between the NBA and NBPA is crucial for the league's success and for the league's capacity to avoid antitrust rebuke. Namely, by collectively bargaining rules with the NBPA, the NBA ensures that those rules are exempt from section 1 of the Sherman Act. Section 1 bars collaborations by competitors—in this context, NBA teams—that unduly harm competition and consumers.[34] The exemption from section 1 derives from the non-statutory labor exemption, which was borne from several Supreme Court decisions[35] and dictates that if a bargained rule concerns a mandatory subject of bargaining (most notably, players' salaries and working conditions)[36] and primarily affects the owners and players (as opposed to third parties, like media), it is exempt from section 1 scrutiny.[37] Rules unilaterally imposed by the NBA, in contrast, are subject to section 1 scrutiny, which has invalidated a number of unilaterally-imposed NBA rules, perhaps most notably in the context of age eligibility restrictions.[38]

The relationship between the NBA and NBPA has seen its highs and lows. Its nadir occurred in 1998, when the two bargaining units were unable to agree on revisions to the structure of players' salaries.[39] The lack of agreement prompted the

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[33] *See* Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528, 2004 U.S. Dist. LEXIS 26244 (S.D.N.Y. Jan. 3, 2005) (describing the NBPA as the "exclusive bargaining representative of all NBA players"). For background on the types of rules bargained for by the NBPA, *see* NBPA.com, About the NBPA, http://www.nbpa.com/about_nbpa.php (last visited, Jan. 27, 2010).

[34] Sherman Act, 15 U.S.C. § 1 (2006) (providing 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."). For professional sports, section 1 scrutiny normally involves rule of reason, which entails a weighing of pro- and anti-competitive effects. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 235–38 (1996) (explaining that it would be difficult and illogical to exclude all "competition-restricting agreements" from collective bargaining); *see also* Five Smiths, Inc. v. Nat'l Football League Players Ass'n, 788 F. Supp. 1042, 1045 (D. Minn. 1992) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) for discussion on rule of reason).

[35] *See* Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689 (1965); United Mine Workers v. Pennington, 381 U.S. 657, 664–65 (1965).

[36] *See* Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 392–93 (S.D.N.Y. 2004).

[37] *See* Mackey v. Nat'l Football League, 543 F.2d 606, 623 (8th Cir. 1976).

[38] Denver Rockets v. All-Pro Mgmt., 325 F. Supp. 1049, 1062 (C.D. Cal. 1971). For a discussion of Denver Rockets, *see* Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in* Clarett v. NFL, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 103, 109–11 (2005). A collectively-bargained rule, however, is exempt from section 1 analysis. *See, e.g.*, Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (holding that while a salary cap would normally violate section 1 because of its anti-competitive effects, it is exempt from section 1 analysis if collectively-bargained).

[39] For a helpful overview of the NBA lockout, *see* Bertrand-Marc Allen, *"Embedded Contract Unionism" in Play—Examining the Intersection of Individual and Collective Contracting in the National*

NBA to lock out the players.[40] The lockout lasted from July 1998 to January 1999, when the NBPA acquiesced to most of the NBA's demands.[41] Popularity in the NBA suffered as a result of the lockout.[42] Similar fallout could be experienced next year. Although there remains considerable time for negotiations with the NBPA, the NBA has until December 15, 2010 to decide to extend the current collective bargaining agreement into the 2011–12 season.[43] For a variety of reasons, the league will probably not extend the CBA, meaning the NBA could lockout the players in 2011.[44]

A more constructive era in the relationship between the NBA and NBPA occurred during the early 1980s. At the time, the NBA was experiencing financial woes caused in part by player payroll disparities among wealthier and less affluent clubs.[45] In order to mollify these disparities, NBA owners sought, and obtained through collective bargaining, a cap on team payrolls ("salary cap").[46] The 1983 collective bargaining agreement included such a cap, which restricted the aggregate salaries paid by each NBA team to its players.[47] The salary cap has remained a feature of subsequent collective bargaining agreements and is generally considered to have promoted competitiveness and parity.[48] The NBPA has acceded to a cap in part

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Basketball Association, 35 CONN. L. REV. 1, 6–15 (2002); *see also* Phil Taylor & Jackie MacMullan, *To the Victor Belongs the Spoils*, SPORTS ILLUSTRATED, Jan. 18, 1999, at 48 (describing NBA Commissioner David Stern as "w[inning] a landmark victory" and obtaining most of his demands).

[40] *See* Allen, *supra* note 39, at 10.

[41] *Id.* at 11.

[42] *See* James B. Perrine, *Media Leagues: Australia Suggests New Professional Sports Leagues for the Twenty-First Century*, 12 MARQ. SPORTS L. REV. 703, 750 (2002) (discussing impact of lockout on viewership of NBA games).

[43] *See* Chris Colston, *Marathon Season Takes Toll*, USA TODAY, Apr. 30, 2009, at 1C.

[44] *Id.*; *see also* Frank Hughes, *NBA Expected to Take Hard Line in First Proposal to Union for New CBA*, SI.com, Jan. 29, 2010, http://sportsillustrated.cnn.com/2010/writers/frank_hughes/01/29/labor.strife/index.html?eref=sihp (detailing demands of the NBA, which expects major economic concessions from the NBPA in the next CBA). As a technical matter, the current collective bargaining agreement contains no strike/no lockout provisions, meaning a lockout could not occur until the agreement expires. *See* Nat'l Basketball Ass'n Collective Bargaining Agreement, art. XXX, § 1–2, *available at* http://www.nbpa.org/sites/default/files/ARTICLE%20XXX.pdf

[45] *See* Fran Blinebury, *Channel Surfing Won't be Enough*, HOUS. CHRON., Apr. 16, 1994, Sports, at 1.

[46] *See* Alan M. Levine, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 289 (1995) (discussing how the NBA was on the "brink of financial ruin").

[47] *See* Bappa Mukherji, *The New NBA Collective Bargaining Agreement: The Changing Role of Agents in Professional Basketball*, 2 VAND. J. ENT. L. & PRAC. 96, 97 (2000).

[48] *See* Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1994) (noting continued presence of the salary cap in CBAs between the NBA and NBPA); Tim Brown, *Still a Dynasty, or Dead Ringers?*, L.A. TIMES, Dec. 10, 2002, at Sports 1 (noting that the NBA's salary cap has enjoyed some success in promoting a more competitive product).

because the NBA guarantees that players receive a percentage of the NBA's "gross revenues," which include gate receipts, local and national television and radio revenue and preseason and postseason revenue.[49]

The presence of substitute professional opportunities for male basketball players has impacted the relationship between the two bargaining units. To illustrate, the NBPA enjoyed considerable bargaining power during the late 1960s, when the American Basketball Association, a now defunct rival of the NBA, pursued NBA players. The pursuit led to a more competitive market for player employment and more bargaining power for the NBPA.[50]

As recently discussed by Professor Marc Edelman, a burgeoning international market for men's basketball might yield similar bargaining enhancements for NBA players.[51] Indeed, over the last several years, there has been an increase in international basketball opportunities offering compensation comparable to that of the NBA.[52] Several U.S. players have even selected contracts to play on European teams instead of NBA teams.[53] In recent years the NBA has lost between 9% and 15% of its players to foreign teams, according to Edelman.[54] Unrestrained by salary caps, international teams may soon pursue the NBA's very best players with offers that, in terms of financial compensation, far exceed what NBA teams can offer under the league's salary cap.[55]

C. The Collaboration and Competition of the NBA

In negotiating with the NBPA, and more generally in its operations, the NBA considers the sometimes collaborative, but sometimes competing, interests of NBA owners and their franchises. To be sure, NBA owners must agree on certain rules and procedures in order to operate a functional sports league. Game rules are an

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[49] *See* Alan Greenberg, *NBA Closed Until Dec.1*, HARTFORD COURANT, Oct. 29, 1998, at C1.

[50] *See* Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. MIAMI ENT. & SPORTS L. REV. 165, 176 (1993); *see also* Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137, 149 (2008) (discussing how presence of ABA promoted bargaining leverage for NBA players).

[51] *See* Marc Edelman, *Does the NBA Still Have "Market Power?" Exploring the Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L.J. (forthcoming 2010). Given that European basketball leagues are not restricted by salary caps, some commentators have mused that European teams will eventually present star NBA star players with employment offers that more than double their potential earnings in the NBA. *See, e.g.*, Marc J. Spears, *Europe Can Reach for Stars: Top NBA Talent May Be Lured Over*, BOSTON GLOBE, Aug. 10, 2008, at C6 (discussing possible employment offers for Kobe Bryant and LeBron James).

[52] *See, e.g.,* Pete Thamel, *A Top Prospect Picks Europe Over High School and College*, N.Y. TIMES, Apr. 23, 2009, at B14.

[53] Sekou Smith, *Childress Headed Back to Greece*, ATLANTA J.-CONST., July 15, 2009, at 1C (mentioning Josh Childress and Jannero Pargo choosing to play in Europe).

[54] *See* Edelman, *supra* note 51.

[55] *See* Spears, *supra* note 51.

obvious example of necessary collaboration; schedules and types of permissible equipment are others.[56]

Owners also agree on operational devices that, while not "necessary" for NBA basketball, nonetheless advance the league's collective interests. For instance, NBA owners agree on a salary cap and an entry draft as means of promoting parity, even though some teams would benefit from the capacity to spend more on players' salaries or to sign any amateur player.[57]

They also choose to equally own and employ a separate corporate entity, NBA Properties, for the exclusive licensing of member teams' intellectual property rights.[58] NBA Properties, which shares revenue evenly among the teams,[59] is clearly not essential for NBA basketball: NBA teams previously chose to license their own intellectual property, and could choose to do so again.[60] Nevertheless, because of

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[56] *Cf.* Michael S. Jacobs & Ralph K. Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 28 (1971) (reasoning that while individual owners may disagree about particular rules, owners collectively deem those rules necessary for generating league product). As a point of distinction, owners may lack collective accord on the necessity of regulating game *styles*. In Major League Baseball, for instance, Commissioner Bud Selig recently encouraged teams to accelerate the pace of games. Teams which encourage batters to take pitches—and thus wear out pitchers but also prolong games—are especially encouraged to reconsider their style of play. At least one of those teams, the New York Yankees, appears resistant to changing an approach which has generally proven successful. *See* Ben Walker, *Playoff Sked, Pace of Game Draw MLB Attention*, ASSOCIATED PRESS, Mar. 19, 2010, at http://nbcsports.msnbc.com/id/35955310/ns/sports-baseball/.

[57] Marc J. Yoskowitz, Note, *A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move into the Realm of Antitrust*, 1998 COLUM. BUS. L. REV. 579, 631 ("The salary cap does not allow the wealthier, larger market teams to create league-wide domination by offering exponentially higher salaries, more attractive locales in which to play, and greater endorsement opportunities").

[58] MARK CONRAD, THE BUSINESS OF SPORTS: A PRIMER FOR JOURNALISTS 268 (2006); *see also* Abib Tejan Conteh, *The Right of Publicity in Sports: Athletic and Economic Competition*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 136, 150 (2006) (noting that NBA Properties "is responsible for licensing all forms of fan memorabilia, including replica and authentic team jerseys and apparel, and other souvenirs, such as 'bobbleheads' and calendars."); Brief of Amici Curiae Nat'l Basketball Ass'n & Nat'l Basketball Ass'n Props. in Support of the Respondents, Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009) (No. 08-661), at 2–3 [hereinafter *NBA Amici Curiae Brief*] (noting that NBA Properties is equally owned by the thirty NBA teams).

[59] *See* ROSNER & SHROPSHIRE, *supra* note 31, at 185 (supplying additional background on NBA Properties' sharing of revenue).

[60] *See NBA Properties, Inc.*, BUS. WEEK, at http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4762333 (last visited Feb. 21, 2010) (noting that NBA Properties was founded in 1967—some twenty-seven years after the NBA was formed). NBA Properties enjoys its collective licensing power because each NBA team contractually grants NBA Properties the exclusive right to license most of its intellectual property. The intellectual property, therefore, belong to the teams and is only obtained by NBA Properties through the

their collaborative philosophy, NBA owners deem NBA Properties to be a more advantageous arrangement than individualized licensing ventures.

Similarly, unlike competitors, NBA franchises share certain forms of revenue, including revenue generated by national TV contracts and licensing contracts, without regard for individual teams' contributions.[61] They also embrace a democratic form of rule: the NBA utilizes a Board of Governors, which consists of one representative of each NBA franchise and which, pursuant to the NBA's Constitution, determines the league's business and policy decisions.[62] Furthermore, with various powers assented to by each NBA franchise, the NBA commissioner very much serves as a centralizing force over NBA teams.[63]

In other ways, however, NBA owners better resemble competitors. Each NBA game seemingly proves that, as NBA games appear to be genuinely competitive contests between teams that seek to defeat one another. Competition is also detectable in the off-season, when teams compete for free agents, to make trades, and to draft the most talented amateur players so as to improve themselves (as opposed to the league).[64]

In fairness, though, some have questioned the true competitiveness of NBA games and of the NBA in general. Consider allegations by disgraced former NBA referee Tim Donaghy, who recently completed a prison term for his mafia-induced role in fixing NBA games.[65] Though his allegations have not been corroborated with persuasive evidence,[66] and though his credibility is highly dubious, Donaghy charges that "top executives of the NBA sought to manipulate games using referees."[67]

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assent of those teams. Chicago Prof'l Sports Ltd. Partnership v. Nat'l Basketball Ass'n, 754 F. Supp. 1336, 1339 (N.D. Ill. 1991).

[61] ROBERT F. REILLY & ROBERT P. SCHWEIHS, HANDBOOK OF ADVANCED BUSINESS VALUATION 374 (1999).

[62] Fishman v. Estate of Wirtz, 807 F.2d 520, 526 (7th Cir. 1986).

[63] *See* Jeffrey Standen, *The Beauty of Bets: Wagers as Compensation for Professional Athletes*, 42 WILLAMETTE L. REV. 639, 649 n.43 (discussing powers of the NBA commissioner to regulate gambling activities).

[64] *E.g.*, DONALD H. BROWN, A BEST OF BASKETBALL STORY 105 (2007) (discussing competition among NBA teams for the employment services of Gilbert Arenas in the 2003 offseason).

[65] Phil Taylor, *Why is the NBA Getting a Pass in Donaghy, Referee Scandal?*, SI.COM, Dec. 9, 2009, http://sportsillustrated.cnn.com/2009/writers/phil_taylor/12/08/donaghy/index.html.

[66] While Donaghy's accusations have not been proven, some NBA players and commentators believe there is truth behind them. *See, e.g.*, Steve Bulpett, *Celtics Beat: Ref's Foul Language*, BOSTON HERALD, Dec. 9, 2009, at 64 (quoting Celtic Rasheed Wallace who claims that "now the truth is coming out"); Wallace Matthews, *Stern, Take Donaghy Seriously*, NEWSDAY, Dec. 8, 2009, at A71 (opining that Commissioner Stern would be mistaken to presume that Donaghy is necessarily lying).

[67] Letter from John F. Lauro to Carol Bagley Amnon, Judge, U.S. District Court E.D.N.Y., Re: U.S. v. Timothy Donaghy, June 10, 2008, *available at* http://assets.espn.go.com/media/pdf/080610/donaghy03.pdf; *see also* TIM DONAGHY, PERSONAL FOUL: A FIRST-PERSON ACCOUNT OF THE SCANDAL THAT ROCKED THE NBA (2009) (expounding upon the accusations).

Donaghy's depiction of the NBA would lead one to believe that the competitiveness of NBA games bears some familiarity to the competitiveness of professional wrestling matches, where the outcomes are pre-determined and much of the "contest" is scripted and choreographed.[68] Unlike in the professional wrestling context, however, where both wrestlers and wrestling fans understand the scripted elements of their sport, neither NBA players nor NBA fans would be aware of their "script." In theory, both could pursue legal actions against the NBA. Players could refer to obligations of good faith in collective bargaining[69] and to general contract law principles that make contracts, such as the NBA's Uniform Player Contract, voidable on grounds of fraud and misrepresentation.[70] Patrons of NBA games and merchandise, in turn, enjoy protection from false advertising and deception under consumer fraud statutes.[71]

A less damaging, and perhaps more observable, accusation implicating the competitiveness of NBA games concerns the "tanking" phenomenon, where NBA teams with poor records arguably have incentives to lose games in order to secure a better position in the NBA draft.[72] M.L. Carr, the former head coach, executive vice president, and director of basketball operations for the Boston Celtics, implied that the Celtics tanked games in the 1996–97 season hoping to draft Wake Forest

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[68] Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEX. REV. ENT. & SPORTS L. 281, 287 (2008) (discussing the feigned competitiveness of professional wrestling).

[69] *See* Thomas Brophy, Casenote, *Icing the Competition: The Nonstatutory Labor Exemption and the Conspiracy between the NHL and OHL in* NHLPA v. Plymouth Whalers Hockey Club, 14 VILL. SPORTS & ENT. L.J. 1, 31 (2007) (discussing argument by NHL players that NHL failed to bargain CBA in good faith).

[70] Jason R. Marshall, *Fired in the NBA! Terminating Vin Baker's Contract: A Case-Study in Collective Bargaining, Guaranteed Contracts, Arbitration, and Disability Claims in the NBA*, 12 SPORTS LAW. J. 1, 33 (2005) (discussing role of misrepresentation in an NBA player contract); *see also* Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1715 (2000) (discussing grounds for voidable contract). *But see* National Basketball Association Uniform Player Contract § 19 (releasing NBA and NBA teams from any and all claims by player during the term of his contract).

[71] *Cf.* Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609, 1625 (2002) (discussing how Major League Baseball and its franchises could commit fraud by advertising that fans can keep home run balls but then confiscating those balls under certain circumstances); Christopher T. Pickens, Comment, *Of Bookies and Brokers: Are Sports Futures Gambling or Investing, and Does it Even Matter?*, 14 GEO. MASON L. REV. 227, 267 (2006) (discussing illegality of point shaving, where teams alter the outcome of games in order to advance a party's betting interests).

[72] *See, e.g.*, Ian Thomsen, *NBA Looking to Prevent Tanking*, SI.COM, Oct. 28, 2009, http://sportsillustrated.cnn.com/2009/writers/ian_thomsen/10/28/tanking/index.html; Michael McCann, *The Pursuit of Crappyness: Are NBA Teams Tanking Games for Greg Oden and Kevin Durant?*, SPORTS LAW BLOG, Apr. 5, 2007, http://sports-law.blogspot.com/2007/04/pursuit-of-crappyness-nba-teams-tanking.html.

University star Tim Duncan with the first pick in the 1997 draft.[73] Still, the prevailing view is that NBA games are competitive contests between competing NBA teams. Moreover, even if tanking impacts some games, teams—eyeing better draft position—appear to act as selfish actors when engaged in tanking.[74] "Tanking" can thus be viewed as selfish and competitive behavior, with teams competing, rather than cooperating, to lose for their own self-interest.

There are less obvious ways in which NBA teams compete, or refrain from collaborating, and they illuminate why NBA owners approach league economic issues from different lenses. For instance, while NBA teams share national TV and licensing revenue, they do not share their local TV revenue or gate revenue;[75] in fact, teams only share approximately 25% of all revenue.[76] To illustrate the revenue significance of teams retaining gate receipts, consider that while the average ticket price to Los Angeles Lakers games is $93, the average ticket price for Memphis Grizzlies games is "just" $24.[77] Not surprisingly, the Lakers, with a net worth of $607 million,[78] are worth considerably more the Grizzlies, which are valued at $257 million.[79]

Moreover, though NBA owners have generally remained a cohesive group over the course of the league's history,[80] individual owners have, on occasion, sued or

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[73] Mark Cofman, *Celtics Dismiss Outspoken Carr*, BOSTON HERALD, Feb. 1, 2001, at 84 (describing the Celtics trying to lose games as part of an "orchestration").

[74] *See* McCann, *The Pursuit of Crappyness*, *supra* note 72 (noting that both the Boston Celtics and Milwaukee Bucks may have tried to lose a game they played against one another toward the end of the 2006–07 season).

[75] *See* Timothy R. Deckert, Casenotes: *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in* Chicago Professional Sports Limited Partnership v. National Basketball Association, 5 VILL. SPORTS & ENT. L.J. 73, 100 (1998) (noting that NBA teams keep 94% of gate receipts, with the remaining 6% allocated to the NBA, and also generally keep their local television revenue); ZIMBALIST, *supra* note 31, at 575; ROSNER & SHROPSHIRE, *supra* note 31, at 363 (describing how the sharing of revenue promotes financial stability in a league).

[76] *See* PROFESSIONAL SPORTS: THE CHALLENGES FACING THE FUTURE OF THE INDUSTRY: HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE 64 (1996) (quoting sports economist Andrew Zimbalist); Anthony Schoettle, *NBA Revenue-Sharing Plan Could Save Pacers*, INDIANAPOLIS BUS. J., June, 2, 2008, at 5 (a more recent source, also quoting sports economist Andrew Zimbalist).

[77] Andrew Ungvari, *Another NBA Lockout?: Where That Probably Isn't the Best Idea Happens*, BLEACHER REPORT, Aug. 6, 2009, http://www.bleacherreport.com/articles/231404-is-another-nba-lockout-inevitable.

[78] Kurt Badenhausen et al., *NBA Team Valuation: Los Angeles Lakers*, FORBES.COM, Dec. 9, 2009, http://www.forbes.com/lists/2009/32/basketball-values-09_Los-Angeles-Lakers_320250.html.

[79] Kurt Badenhausen et al., *NBA Team Valuation: Memphis Grizzlies*, FORBES.COM, Dec. 9, 2009, http://www.forbes.com/lists/2009/32/basketball-values-09_Memphis-Grizzlies_325603.html.

[80] *E.g.*, *Owners Make News on Revenue*, PHILADELPHIA INQUIRER, Nov. 26, 2006, at D06 (observing that "NBA owners, unlike their brethren in pro football and baseball, have been remarkably disciplined over the years in maintaining their silence on just about every issue.").

threatened to sue the league. This was most notably seen in *Chicago Professional Sports Ltd. Partnership. v. NBA*,[81] a litigation brought by the owners of the Chicago Bulls in response to the NBA's Board of Governors adopting resolutions that limited the autonomy of individual teams to enter into television contracts.[82] Less contentious, some owners of NBA teams which generate relatively limited amounts of unshared revenue (e.g., local broadcasting revenue; gate receipts; luxury box revenue) have complained that they are unfairly positioned when competing with more prosperous teams.[83] In addition, several NBA owners have approached their equity stakes in NBA franchises with idiosyncrasies, seeming more like advocates for their teams than devotees to league orders. Dallas Mavericks owner Mark Cuban, who has encountered frequent disagreements with the NBA and Commissioner Stern, is perhaps the paradigmatic example.[84] Owners also vary in their public persona and management style, with some taking a more hands-on, visibly competitive approach.[85]

In sum, there are areas of cooperation and competition evident throughout the NBA, a combination which has likely contributed to the league's success while also revealing the league as one comprised of sometimes unitary and sometimes divergent actors.

III. THE NBA AND ITS RELATIONSHIP TO FEDERAL ANTITRUST LAW

The business operations of the NBA, and the related interplay between collaboration and competition, bear on how federal antitrust law should regard the NBA.

A. The NBA as a Joint Venture

Courts have traditionally regarded the NBA and similar professional sports leagues as joint ventures,[86] which are associations of "two or more persons formed to

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[81] 95 F.3d 593, 593 (7th Cir. 1996).

[82] ROSNER & SHROPSHIRE, *supra* note 31, at 154–55; *see also infra* Part II.B.

[83] *Owners Make News on Revenue*, *supra* note 80.

[84] *See* BILL SIMMONS, THE BOOK OF BASKETBALL: THE NBA ACCORDING TO THE SPORTS GUY 164 (2009) (referencing imperfect relationship between Cuban and Stern).

[85] *See, e.g.*, JACK RAMSEY, DR. JACK'S LEADERSHIP LESSONS LEARNED FROM A LIFETIME IN BASKETBALL 25 (2000) (describing most NBA owners as "removed from the scene").

[86] *E.g.*, Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 673 (7th Cir. 1992) (reasoning that the court will "treat the NBA as a joint venture"); Levin v. Nat'l Basketball Ass'n, 385 F. Supp. 149, 150 (S.D.N.Y. 1974) (concluding that the NBA is a joint venture because the NBA's own constitution makes such a conclusion); Fishman v. Wirtz, No. 74-2814, 1981 U.S. Dist. LEXIS 9998 at *12 (N.D. Ill. 1981) (regarding the NBA Board of Governors as evidence of the NBA being a joint venture); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 673 (Ct. App. 1969) (concluding that the NBA is a joint venture because of its business operations); *cf.* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1251 (2d Cir. 1992) (characterizing the NFL as a joint venture); *cf.* Major League Baseball Props.,

carry out a single business enterprise for profit for which purpose they combine their property, money, effects, skill, and knowledge."[87] Leagues are viewed as joint ventures because a competitive, team-based sporting event necessarily requires multiple—and distinct—teams and some level of cooperation among those teams.[88]

Joint ventures are not unique to professional sports. They exist in fields as diverse as stock exchanges, credit card networks,[89] trade associations,[90] and so-called "independent practice associations" among physicians.[91] Joint ventures arise when competitors align in order to achieve certain business goals, and they normally involve resource pooling and risk sharing.[92]

Joint ventures are most likely subject to section 1 scrutiny.[93] The rationale is straightforward: joint ventures involve integration and risk sharing among distinct and competing entities.[94] Such cooperation can limit or reduce competition, an outcome which, on its surface, may frustrate the goals of section 1 and impede the prevention of collaborations that impair competition or harm consumers.[95] The normal type of section 1 scrutiny for joint ventures is rule of reason, which entails a weighing of pro- and anti-competitive effects of a particular collaboration.[96] Under rule of reason scrutiny, collaboration is deemed unlawful only if its anti-competitive effects are

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Inc. v. Salvino, Inc., 542 F.3d 290, 337–38 (2d Cir. 2008) (identifying Major League Baseball Properties as a joint venture).

[87] 46 AM. JUR. 2D *Joint Ventures* § 1 (2006) (supplying a commonly-accepted, though not exclusive, definition of joint ventures). *But see*, Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV., 157, 196–97 (1984) (noting that some antitrust scholars narrowly define joint ventures as temporary relationships). For a thoughtful discussion of professional sports leagues as joint ventures, *see* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 920–31 (1999).

[88] For a more complete discussion, *see* McCann, *Opportunity to Reshape Sports Law*, *supra* note 3, at 738.

[89] *See* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 IOWA L. REV. 1137, 1173 (2001).

[90] *See* Alvin F. Lindsay, III, Comment, *Tuning in to HDTV: Can Production Joint Ventures Improve America's High-Tech Picture?*, 44 U. MIAMI L. REV. 1159, 1168, n.49 (1990).

[91] *See* Micah Berman, Note, *The "Quality Health Care Coalition Act": Can Antitrust Law Improve Patient Care?*, 53 STAN. L. REV. 695, 706 (2000) (discussing how physicians integrate part of their practices, while otherwise remaining competitors, in independent practice associations); Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, *supra* note 89, at 1173.

[92] *See* Thomas A. Piraino, Jr. *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 725 (1991).

[93] *See* Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035, 1097 (2004).

[94] *See* Frederic J. Entin et al., *Hospital Collaboration: The Need for An Appropriate Antitrust Policy*, 29 WAKE FOREST L. REV. 107, 114 (1994); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257 (2d Cir. 1982).

[95] Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).

[96] *See* Gordon H. Copland & Pamela E. Hepp, *Government Antitrust Enforcement in the Health Care Markets: The Regulators Need an Update*, 99 W. VA. L. REV. 101, 106–07 (1996).

dominant.[97] To better characterize these labels, an anti-competitive effect would describe a deprivation of competition in the marketplace when otherwise competing entities act as a joint venture; a pro-competitive effect, in contrast, would describe the market efficiencies generated by the joint venture.[98]

Even though they evince cooperation among competitors, some types of collaboration among sports teams easily pass rule of reason analysis. Field dimensions and scoring methods, for instance, are viewed as predominantly pro-competitive.[99] These basic types of understandings are essential for there to be competitive games; if the Boston Celtics and New York Knicks disagreed on whether travelling with the basketball is allowed or disallowed, they would not be able to play each other, no matter how talented their rosters.[100]

Off-field restraints on competition, however, have normally been regarded as predominantly anti-competitive. To illustrate, in *Chicago Professional Sports*,[101] the Seventh Circuit considered an NBA rule that prevented NBA teams from broadcasting on a "superstation"—a local broadcast station that is nationally distributed by cable and satellite systems—games that were not part of a national TV contract. In the Seventh Circuit's view, the district court did not commit reversible error when it found that the NBA's attempt to prevent potential competition between games broadcast *by a team* on the superstation and games nationally broadcast *by the NBA* would pose a greater anti-competitive harm than pro-competitive benefit.[102]

B. The NBA's Aspirations for Single Entity Recognition: The Role of American Needle v. NFL

While courts have repeatedly classified the NBA as a joint venture,[103] the NBA hopes the Supreme Court's forthcoming decision in *American Needle* will provide a new playbook for antitrust litigation.[104] *American Needle* concerns whether the NFL

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[97] *Id.*

[98] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (discussing how courts regard anti-competitive effects); *see also* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (applying the rule of reason to various joint ventures).

[99] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101 (1984) ("'[Some] activities can only be carried out jointly. Perhaps the leading example is league sports.'") (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 278 (1978)).

[100] Literally, they *could* play each other, but their games would not be competitive contests.

[101] Chicago Prof'l Sports, Ltd. P'ship v. Nat'l Basketball Ass'n (*Bulls I*), 961 F.2d 667, 669 (7th Cir. 1992).

[102] *Id.* at 672–74. *But see* Molinas v. Nat'l Basketball Ass'n, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961) (court found that the NBA suspension of a player who bet on games in which he was playing passed rule of reason, since it was deemed both reasonable and necessary for a sports league that requires genuine competition).

[103] *See* cases cited *supra* note 86.

[104] The NBA has filed an amicus brief in support of the NFL. *See* NBA Amici Curiae Brief, *supra* note 58.

and its teams should be considered "one" entity for purposes of section 1 of the Sherman Act.[105] As one entity—a single entity—the NFL and its often competing teams could be considered distinct corporate entities that nonetheless share a "corporate consciousness." The expression "corporate consciousness" is a product of the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*,[106] where the Court held that parents and wholly owned subsidiaries cannot violate section 1 in their collaborations.[107] The Court reasoned that since a parent can, at any time, take control of a wholly owned subsidiary, the latter is akin to a division of the former—rather than an autonomous entity—and that therefore, any collaboration between the two does not warrant section 1 scrutiny.[108] Although some lower courts have extended single entity recognition to business entities with weaker relationships,[109] many have not.[110]

American Needle is on appeal from the Seventh Circuit, which held that the NFL and its teams are a single entity for purposes of licensing.[111] The Seventh Circuit reasoned that individual NFL franchises, by voluntarily choosing to bargain their licensing contracts through a separate and shared entity—NFL Properties—were cooperating in order to compete as a league against other entertainment providers.[112] As a consequence, their collaboration on licensing constituted behavior by a single entity, rather than by competitors. The Seventh Circuit declined to opine on the availability of the single entity defense outside of the context of licensing, though it did suggest that single entity issues in professional sports be determined "'one league at a time . . . [and] . . . one facet of a league at a time.'"[113] The Seventh Circuit also intimated that matters concerning labor, which are the subject of collective bargaining,[114] would be ill-suited for single entity recognition.[115]

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[105] *See generally*, McCann, *An Opportunity to Reshape Sports Law*, supra note 3; *see also* Michael McCann, *Why American Needle v. NFL is Most Important Case in Sports History*, SI.COM, Jan. 12, 2010, http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/americanneedlev.nfl/index.html.

[106] 467 U.S. 752 (1984).

[107] *Id.* at 777.

[108] *Id.* at 770–72.

[109] *See, e.g.*, Williams v. Nevada, 794 F. Supp. 1026, 1034 (D. Nev. 1992) (recognizing a single entity between a fast food franchisor and its separately owned franchisees).

[110] *See* Ryan P. Meyers, Comment*, Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability*, 68 U. CHI. L. REV. 1401, 1407–14 (2001) (noting various courts' applications of *Copperfield*).

[111] American Needle Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008), *cert. granted*, 174 L. Ed. 2d 575 (2009).

[112] *Id.* For additional discussion of the Seventh Circuit's opinion, *see* McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3.

[113] *American Needle*, 538 F.3d at 742 (quoting Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n *(Bulls II)*, 95 F.3d 593, 600 (7th Cir. 1996)).

[114] *See supra* Part I.B.

[115] *American Needle*, 538 F.3d at 741–42 ("[I]ndividuals seeking employment with any of the league's teams would view the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees. That being said, we have

The Seventh Circuit's logic in *American Needle* may be criticized on several grounds. Those grounds include the sometimes factionalized, far from unitary relationship among NFL owners, most notably detected when Dallas Cowboys owner Jerry Jones sued NFL Properties and his fellow owners under section 1.[116] Also, the collaboration among NFL teams for licensing is not necessary—NFL teams previously competed over apparel and merchandise sales.[117] Along those lines, though it would be audacious to predict the Supreme Court's decision based on their questions posed during the January 13, 2010 oral argument, several Justices seemed unconvinced by the NFL's reasoning and, by implication, the Seventh Circuit's reasoning.[118]

Until the Seventh Circuit's decision in *American Needle*, the single entity argument had failed repeatedly for professional sports leagues.[119] Teams with independent ownership, and which compete in numerous and self-interested ways, were viewed as materially different from a parent and wholly-owned subsidiary.[120] Such a deduction was even found in the context of Major League Soccer ("MLS"), which owned MLS franchises and furnished them with only limited autonomy.[121] In *Fraser v. Major League Soccer*,[122] the First Circuit categorized MLS as a "hybrid arrangement" between

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nevertheless embraced the possibility that a professional sports league could be considered a single entity under [*Copperweld*]." (internal citation omitted)).

[116] *See* Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust, No. 95-9426, 1996 WL 601705 (S.D.N.Y. Oct. 18, 1996); *see also* McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 759–61 (discussing section 1 litigation by Dallas Cowboys and its owner, Jerry Jones, against the NFL and NFL Properties).

[117] *See* McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 759.

[118] Both Chief Justice John Roberts and Justice Stephen Breyer, for instance, questioned the plausibility and sensibility of trying to distinguish when the NFL acts as a single entity and a joint venture, when restraints of trade that satisfy rule of reason would do so. *See* Official Transcript of American Needle v. NFL, No. 08-661, Jan. 13, 2010, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-661.pdf.

[119] *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257–58 (2d Cir. 1982); Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469–70 (6th Cir. 2005); and L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1387–90 (9th Cir. 1984);

[120] *See, e.g.,* L.A. Mem'l Coliseum Comm'n, 726 F.2d at 1390 (describing how in the NFL, "profits and losses are not shared, a feature common to partnerships or other 'single entities'").

[121] *See* Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 900–03 (2008) (describing Major League Soccer's original "league-based common property system"—which called for, *inter alia*, central ownership of the soccer teams by the league and the equal sharing of profits by the leagues' "investor-controllers"—and its subsequent abandonment).

[122] 284 F.3d 47 (1st Cir. 2002).

a single entity and joint venture, but one that was still subject to rule of reason scrutiny.[123]

If the Supreme Court chooses to characterize the NFL as a single entity, the NBA would certainly attempt to gain from the recognition.[124] For instance, if the Court were to endorse the Seventh Circuit's recognition of single entity status for purposes of NFL licensing, the NBA would be poised to argue that it receive comparable protection. After all, the NBA and NFL are similarly structured and their respective licensing entities—NBA Properties and NFL Properties—each negotiate licenses on behalf of all teams and each equally distribute the earnings among those teams.[125] NBA licensing for apparel and possibly other products, including video games, would thus be exempt from section 1, even if an exclusive licensing contract between the NBA and a licensed company raised prices or disappointed consumers.[126]

Though unlikely, the Court could alternatively find that the NFL constitutes a complete single entity in all facets of its business operation, meaning the NFL could unilaterally impose labor conditions on NFL players.[127] Given the NBA's difficult collective bargaining with the NBPA, the ability to unilaterally impose salary restraints and other employment restrictions would be of great attraction to the league.[128] It would also empower the NBA to impose a sought-after elevated age eligibility restriction,[129] the current version of which requires that an amateur player of U.S. origin be at least nineteen years old on December 31 of the year of the NBA draft and that at least one NBA season must have passed between when the player graduated from high school, or when he would have graduated from high school, and the NBA draft.[130] The Court could also reverse the Seventh Circuit, subjecting the NFL, and by implication similar leagues, to the traditional mode of analysis for joint venture behavior: rule of reason.

C. Does the NBA Have a Stronger Argument for Single Entity Recognition than the NFL?

As evidenced by their status as national sports leagues with independent team ownership, powerful commissioners, bargaining relationships with a players'

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[123] *Id.* at 58.

[124] The NBA's filing of an amicus brief in the case is suggestive of its interest in the outcome. *See* NBA Amicus Curiae Brief, *supra* note 58.

[125] *See* CONRAD, *supra* note 58, at 268; ROSNER & SHROPSHIRE, *supra* note 31, at 184–85.

[126] The potential danger of such exclusive video game contracts can be seen with the NFL's such contract with Electronic Arts, which has drawn criticism for its impact on prices and quality. *See* McCann, *Opportunity to Reshape Sports Law*, *supra* note 3, at 764–66.

[127] *See id.* at 766–68.

[128] *See supra* Part I.B.

[129] *See* Howard Beck, *From Preps to the Pinnacle of the N.B.A.*, N.Y. TIMES, May 28, 2009, at B15 (discussing NBA's desire to raise the age limit to twenty years of age, a desire opposed by the NBPA).

[130] *See* Nat'l Basketball Ass'n Collective Bargaining Agreement, art. X, § 1(b)(i), *available at* http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf.

association, and combinations of collaboration and competition in their business practices, the NFL and NBA are clearly similar. But they are dissimilar in ways which may suggest that the viability of the single entity defense for one may not determine that for the other.

Consider the extent of revenue sharing among the two leagues. NFL teams share approximately 90 percent of their revenues,[131] while NBA teams—which, unlike the NFL, do not divide revenue from local TV broadcasts or gate receipts—share only about 25 percent of their revenues.[132] The NFL's emphasis on sharing would likely require owners to "share consciousness" at a higher level than NBA owners who, from a domestically-oriented financial standpoint, appear more self-autonomous.

Other factors, however, posit the NBA more as a single entity. Take the level of cooperation required of team owners for the creation and development of subsidiary leagues. While NBA owners have closely collaborated on the WNBA, D-League, and NBA China, NFL owners have pursued subsidiary leagues with less interest and questionable esprit de corps. The respective success of the NFL and NBA in using subsidiary leagues to export their products is particularly illustrative of this point.

The NFL has encountered significant obstacles in generating sustained international interest in "American football." Most notably, from 1991 to 2007, the NFL owned and operated NFL Europe (also called World League of American Football, World League, and NFL Europa).[133] NFL Europe featured between six and 10 teams each season, with teams stationed in such cities as Barcelona, Amsterdam, and Berlin.[134] Although NFL Europe attracted viable fan bases in certain locations,[135] it reportedly lost $30 million a year.[136] A leading reason for its failure was the refusal of most NFL teams—and their owners—to follow NFL directives that teams use NFL Europe for player development.[137] Acting instead in self-interested and entirely rational ways—most NFL teams declined to send their promising and young, but not yet ready for the NFL, players to NFL Europe.[138] Teams surmised that those players would develop faster if they worked with NFL coaches and practiced against seasoned NFL players.[139] In lieu of sending those promising players to NFL Europe,

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131 Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U. CHI. LEGAL F. 245, 254 n.48 (2000).

132 *See supra* note 75 and accompanying text; *see also* Howard Beck, *Amid a Downturn, the N.B.A. Union Is Willing to Talk, Not Surrender*, N.Y. TIMES, Apr. 23 2009, at B16 (noting limitations of sharing among NBA teams).

133 *See* Sandomir, *supra* note 12.

134 *See id.*

135 *See* David Elfin, *NFL Bags European League*, WASH. TIMES, June 30, 2007, at C1 (noting that NFL Europe had "record attendance" in its final year).

136 *See* Bryan Burrwell, *Please, World, Let Americans be Indifferent to Pro Soccer*, ST. LOUIS POST-DISPATCH, July 17, 2009, at D1.

137 *See* Len Pasquarelli, *NFL Europa Failed to Produce Players, Profits*, ESPN.COM, June 29, 2007, http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=2920635.

138 *Id.*

139 *Id.*

teams usually sent marginal players, thereby providing European fans with inferior American football.[140]

The failure of NFL Europe has not dissuaded the NFL from seeking other ways of promoting its product abroad. Indeed, since 2007, the NFL has played both exhibition and regular season games abroad, including in Mexico City and London, and with sold out attendances and great fanfare.[141] There are skeptics, however, as to whether "American football" will ever catch on outside the United States, particularly if—as shown in the NFL Europe experiment—NFL owners do not act as "one" in facilitating the promotion of the game abroad.[142] In addition, the absence of top-level American football professional leagues in other countries means that NFL owners are not required to collaborate in responding to external competition for American football.[143] In short, the NFL does not resemble a single entity in the context of international endeavors; in fact, in some ways it resembles a coalition of the unwilling.

In contrast, and as discussed earlier in this Article, the NBA's international endeavors have proven far more successful.[144] The league's considerable investment in NBA China, coupled with its increasingly international business model and player demographics, also suggest the NBA and its teams will experience a mounting obligation to act as one. The NBA's pursuit of marketing abroad has already required sustained solidarity among NBA owners; to the extent international endeavors continue to encompass rising portions of NBA investments, NBA owners may in fact lose autonomy and be forced to defer to centralized league wishes.

Moreover, NBA teams now compete with international teams for U.S. and international players' services.[145] The presence of international competition with bona fide rival basketball leagues possesses legal significance. Although the First Circuit rejected MLS as a single entity in *Fraser*, it opined that the capacity of MLS players to secure comparable employment in international leagues advanced the MLS's single entity argument.[146] In that same vein, as basketball grows in popularity across the world, it stands to reason that superior alternatives to the NBA may emerge. If so, NBA owners may have no choice but to act as one in competing with those leagues. Such shared consciousness may necessitate that NBA teams pay

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[140] *Id.; see also* Neil D. Isaacs, *Anniversary Offering*, 25 J. SPORT LITERATURE 33 (2007) (discussing how NFL Europe players were vastly inferior to NFL players and likely had little chance of becoming NFL players); Mark Woods, *Is NFL Europe Set to Fumble?*, SCOT. ON SUNDAY, June 15, 2003, at 11 (providing local Scottish perspective of NFL Europe as a disappointing minor league enterprise).

[141] *See* Les Carpenter, *Bringing Pigskin to Land of Ping-Pong*, WASH. POST, Sept. 13, 2009, at A1.

[142] *See supra* notes 137–40 and accompanying text.

[143] Even in the domestic sphere, the NFL has no competition. The United Football League (UFL), which began play in the fall of 2009, is unlikely to emerge as a competitor to the NFL, as the UFL's employment offers and ambitions appear to be more consistent with that of a minor league, rather than a rival. *See* Doug Haller, *Upstart League Moves Forward*, ARIZ. REPUBLIC, June 17, 2009, at C7.

[144] *See supra* Part I.B.

[145] *Id.*

[146] Fraser v. Major League Soccer, 284 F.3d 47, 59, 63 (1st Cir. 2002).

players higher salaries or charge less in merchandise and apparel, among other possible outcomes.

To be sure, the cohesiveness demanded of the NBA in its international endeavors would help insulate the league under rule of reason scrutiny. Collaboration is more likely to be perceived as advancing competition if it is also perceived as necessary.[147] Therefore, in a section 1 challenge to NBA business dealings related to international endeavors, the NBA would likely draw strength from the necessity of collaboration.

The harder question is whether such collaboration should influence the characterization of the NBA and its teams as one entity or many entities aligned in a joint venture. In some respects, the difference may prove immaterial. If an NBA restraint of trade can easily pass rule of reason analysis, then an exemption from section 1 would likely benefit the NBA only by providing relief from litigation costs and costs associated with the possibility of section 1 litigation; the restraint would remain compatible with section 1 either way.[148]

Then again, exempting the NBA from section 1 scrutiny, such as through single entity recognition, could pose unintended, but foreseeable problems. Perhaps foremost, consider the constantly evolving relationship between leagues and their teams, be it in revised formulas for revenue sharing, centralization of licensing agreements, or one of many other transformations. If the NBA and its teams were exempt from section 1 for a particular purpose—such as for international endeavors—could entities still challenge the NBA and its teams under section 1 each time the relationship for that purpose changes? Would the exemption remain valid for certain changes but not others?

Along those lines, can leagues and their teams constitute a single entity for certain purposes at a given moment revert to separate entities at a later time? In *American Needle*, the NFL insists that it constitutes a single entity for sales of licensed apparel even though one of its owners, Jerry Jones, previously sued his fellow owners under a section 1 claim for the freedom to separately sell Cowboys' apparel.[149] Presumably, at the time Jones sued his fellow owners, the NFL and its teams were not a single entity for sales of licensed apparel. Single entity recognition therefore may not supply a professional sports league with continual protection from section 1 litigation.

On the other hand, the Seventh Circuit's opinion in *American Needle* asserts that voluntary collaboration for purposes of competing as a league can give rise to single entity recognition.[150] From that vantage point, the NBA's international endeavors would seem to furnish a strong case for such recognition, which the NBA, as shown in its amicus brief in *American Needle*, clearly seeks. After all, unlike with professional

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[147] *See, e.g.*, Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652–54 (5th Cir. 1977) (holding that under rule of reason analysis, necessary collaboration for registration rules are essential for survival of sports enterprises).

[148] Section 1 litigation can involve very high discovery costs. *See* Amber A. Pelot, Casenote, Bell Atlantic Corp. v. Twombly*: Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1387–88 (2008).

[149] *See supra* Part II.B.

[150] American Needle Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008), *cert. granted*, 174 L. Ed. 2d 575 (2009).

football and baseball, there appears to be global competition among professional basketball leagues for players and markets. Such competition may require the NBA to compete *as a league*, with the obligation of individual NBA owners to follow suit.

IV. CONCLUSION

The Supreme Court's decision in *American Needle* remains unknown at the time of this writing. Based on existing conceptions of single entity analysis, however, while the domestic operations of the NBA are clearly not more akin to a single entity than those of the NFL, the league's international operations—an increasingly significant revenue dynamic for the NBA—portray the NBA more like a single actor. As the NBA becomes a more globalized league, the significance of its international operations and relationship to federal antitrust law could prove intriguing. Indeed, the NBA's globalized business agenda and exposure to competition from international basketball leagues may necessitate that NBA teams act in harmony, at least for international business endeavors. The failure of NFL teams to do so in their NFL Europe endeavor seems to corroborate that point.

Furthermore, and as I argue elsewhere, regardless of how the Supreme Court decides *American Needle*, Congress could use the lawmaking process to tailor section 1 to promote the competitiveness of professional sports leagues.[151] Namely, Congress could consider targeted, sports-related exemptions from section 1 that recognize the evolving nature of U.S. professional sports and their global stakes. Through periodic legislative hearings, such exemptions could prove more durable and pliable than judicially-crafted exemptions, which may be subject to litigation each time a change in circumstances arises, thereby curtailing one of the exemptions' primary benefits: avoidance of section 1 litigation. For purposes of professional sports leagues, the NBA may present the best case for exempting leagues from section 1 scrutiny in matters related to international business.

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[151] *See* McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 779–81.