
ARE MAJOR LEAGUE BASEBALL AND THE NATIONAL HOCKEY LEAGUE VIOLATING AMERICAN ANTITRUST LAWS THROUGH THEIR BLACKOUT RESTRICTIONS?

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I. Introduction

Just about everyday, one can find an American sitting on his or her couch watching a Major League Baseball (“MLB”) game or a National Hockey League (“NHL”) game.¹ The MLB season runs from approximately April first to November first, including the post-season.² The NHL season runs from approximately October first to June fifteenth, including the postseason.³ Millions of consumers watch MLB and NHL games on a daily basis year round, yet consumers cannot always enjoy these games at home, on their personal

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¹ See Maury Brown, *MLB Contributes to See Postseason TV Ratings Increase up Over 2012*, FORBES (Oct. 7, 2013), archived at <http://perma.cc/LL3Z-LGP2> (discussing the increase in MLB’s postseason television ratings); see also Cam Tucker, *TV ratings continue to rise for 2013 Stanley Cup Final*, NBC SPORTS PROHOCKEYTALK (June 20, 2013), archived at <http://perma.cc/GZ3H-9XL3> (establishing the recent increase in NHL postseason television ratings).

² See *MLB announces 2013 regular season schedule*, MAJOR LEAGUE BASEBALL (Sep. 12, 2012) archived at <http://perma.cc/AD6H-YWW6> (announcing the 2013 MLB regular season schedule); see also *2013 MLB Postseason Schedule*, MLB.COM, archived at <http://perma.cc/5EFK-TDKE> (stating MLB’s 2013 playoff schedule including the date of the final game played in 2013).

³ See Brad Gardner, *Is the NHL’s Season Too Long?*, SB NATION, archived at <http://perma.cc/7Y32-92JV> (stating the 2010-2011 season start date and Stanley Cup Finals start date).

television or computer systems.⁴ This is in part due to the MLB, the NHL, and local broadcast companies' limitations on the broadcasting market of MLB and NHL games.⁵

In the pivotal antitrust case, *Standard Oil Company of New Jersey v. United States* ("Standard Oil"),⁶ Justice White, writing on behalf of the Supreme Court of the United States, implemented the "Rule of Reason" standard; which begs the question of whether or not the MLB and the NHL are straddling the antitrust line too closely.⁷ Recently, restrictions have been placed on MLB and NHL telecasts, which have limited consumers' options with regards to watching their local team, as well as watching an out of market team.⁸ Often, under antitrust law, if a restraint on trade is so plainly anti-competitive, a court will apply a Per Se analysis when questioned with an antitrust issue.⁹ However, a Per Se analysis based on the le-

⁴ See *Blackouts FAQ*, MLB.COM, archived at <http://perma.cc/JPP7-3UXN> (laying out the MLB blackout policy); see also *NHL Center Ice*, NHL.COM, archived at <http://perma.cc/3UQW-QDS8> (describing the NHL Center Ice blackout policy).

⁵ See *Laumann v. NHL*, 907 F. Supp. 2d 465, 473-75 (S.D. N.Y. 2012) (explaining a challenge of this anticompetitive process).

⁶ See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 61-62 (1911) (announcing the "Rule of Reason" in antitrust law to analyze Section 1 of the Sherman violation). *But see Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 337 (1982) (applying a Per Se analysis to determine whether a Section 1 of the Sherman Act violation occurred).

⁷ See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1379 (2009) (defining the Rule of Reason in antitrust law). The Rule of Reason encourages the court to take a factual inquiry into a restraint's overall effect on the market based on the industry, history, and rational behind the restraint. See *id.* (broadening the court's discretion when analyzing a restraint of trade).

⁸ See *Blackout FAQ*, *supra* note 4 (addressing blackout restrictions and limiting choices of consumers). Factoring consumer options is a very important component of analyzing whether a restraint on trade violates antitrust law. See *Macquarie Grp. Ltd. v. Pac. Corp. Grp.*, No. 08cv2113-IEG-WMC, 2009 WL 539928, at *8 (S.D. Cal. Mar. 2, 2009) (explaining the need for consumer options to generate a competitive market). Out of market teams are teams not located in the geographic location of the specified consumer. See Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices By Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 137 (2001) (defining an out of market team).

⁹ See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (noting that Per Se liability is adopted when the agreements are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." (quoting *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978))).

gality of these anticompetitive restrictions is not always applied by courts even if a horizontal price fix and output limitation is present.¹⁰

Are the MLB and NHL's blackout policy rules violating antitrust law by granting themselves and television networks exclusive rights to broadcast games, effectively limiting consumers' rights and diminishing competition? Part II of this Note discusses the history of antitrust law, including the general history of the Sherman Antitrust Act and the countervailing views on its application.¹¹ Part II will also examine how antitrust laws have been applied to the MLB and NHL, as well as give a brief history of sports broadcasting and government regulation of sports broadcasting.¹² Part III will address the current blackout policies invoked by the MLB and the NHL, as well as their purposes and effects.¹³ Part IV will analyze the current blackout policies of both the MLB and the NHL and how they fit into

¹⁰ See Stucke, *supra* note 7 (using a Per Se analysis to define a restraint as illegal without consideration of other factors). Horizontal price fixing and output limitations are considered to be plainly anticompetitive. See *Richards v. Nielson Freight Lines*, 602 F. Supp. 1224, 1232 n.13 (E.D. Cal. 1985) (noting that horizontal price fixing and output limitations are plainly anticompetitive. (citing *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 104 (1984))). While Per Se analysis is usually present in a restraint that is so plainly anticompetitive, there are exceptions. See *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100, 125 (1984) (rejecting the Per Se analysis despite a horizontal price fix and output limitation). A horizontal price fix is an agreement amongst sellers to not compete on price. See 1 JOHN J. MILES, HEALTH CARE AND ANTITRUST LAW §3.2 (2014) (defining horizontal price fixes). Generally, vertical territorial restraints by a manufacturer may also be ruled as anticompetitive and a violation of the Sherman Act if it violates the Rule of Reason. See *e.g.*, *Continental T.V. Inc. v. GTE Sylciana Inc.*, 433 U.S. 36, 71 (1977) (noting that the Rule of Reason applies to determining whether intrabrand competition violates the Sherman Act); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) (describing horizontal competitors); *First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.*, 612 F.2d 1164, 1168 (9th Cir. 1980) (applying the Rule of Reason in determining whether a vertical territorial restraint violated the Sherman Act); *Sheldon Pontiac v. Pontiac Motor Div., Gen. Motors Corp.*, 418 F. Supp. 1024, 1034 (D. N.J. 1976) (using both the Per Se analysis and the Rule of Reason to determine whether a vertical territorial restraint violated the Sherman Act)

¹¹ See *infra* Part II.A (discussing the complex debates in antitrust law between the Per Se Rule and the Rule of Reason).

¹² See *infra* Part II.B-D (discussing the MLB exemption from antitrust law and regulations of sports broadcasting).

¹³ See *infra* Part III (explaining the current blackout policies in place and the effects they have on consumers and potential competition).

modern antitrust law.¹⁴ Finally, Part V will conclude that the current MLB and NHL blackout policies violate antitrust law, as consumers and competition are being harmed.¹⁵

II. History

A. *Goals and Application of Antitrust Law*

Antitrust law is one of the most complex areas of law in the United States.¹⁶ The main goal of antitrust law is to increase competition amongst competitors through regulating the market, as opposed to a strict laissez-faire approach.¹⁷ The Sherman Act was enacted in 1890 and fundamentally formed statutory antitrust law in the United States.¹⁸ The Sherman Act was established for the purpose of protecting the public from the failures of an unfair, uncompetitive market.¹⁹ While Sections 1 and 2 of the Sherman Act appear relatively

¹⁴ See *infra* Part IV (analyzing how the MLB and NHL blackout policies should be interpreted through antitrust law).

¹⁵ See *infra* Part V (concluding that the MLB and NHL's blackout policies should be banned based on antitrust law).

¹⁶ See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1185-86 (2008) (explaining how antitrust laws have become increasingly complex in the laws' interpretations).

¹⁷ See Monique M. Sadarangani, *Patent Tying and Antitrust Regulation-Moving Forward After Illinois Tool*, 13 J. HIGH TECH L. 613, 614 (2013) (assessing the central focus of antitrust law). Laissez-faire is the regulation of the market by the market itself through checks and balances of the industry as opposed to governmental regulations. See David R. Stras, *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. 695, 700 n.23 (2009) (defining the theory of laissez faire regulation and distinguishing it from governmental regulation).

¹⁸ See 15 U.S.C. § 1 (2012) (banning contracts, combinations, and conspiracies that restrain trade); see also 15 U.S.C. § 2 (illegalizing monopolizing, attempting to monopolize, and conspiring to monopolize). A Section 2 violation requires proof that an entity has a monopoly in a specific geographic and product market, as well as a willful acquisition or maintenance of that monopoly. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (establishing the Grinnell Test for a Section 2 violation).

¹⁹ See *Spectrum Sports v. McQuillan*, 506 U.S. 447, 458 (1993) (stating the purpose of the Sherman Act is to protect competition and consumers); see also Laura Alexander, *Monopoly and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1628 (2007) (explaining that the purpose of the Sherman Act is to prevent consumer harm as opposed to promoting efficiency).

straightforward in context, there has been a continuous legal debate since the Supreme Court's decision in *United States v. Trans-Missouri Freight Association* ("Trans-Missouri")²⁰, on how to approach legality under the Sherman Act.²¹ In *Trans-Missouri*, Justice Peckham inadvertently established one of the major theories of anti-trust interpretation, the Per Se Rule.²² The Per Se Rule interprets a contract, combination, or conspiracy in restraint of trade as illegal under Section 1 of the Sherman Act, without analyzing whether the contract, combination, or conspiracy is potentially reasonable.²³ The other form of analysis under antitrust law is known as the Rule of Reason, which was established in *Standard Oil*.²⁴ Unlike the Per Se Rule, the Rule of Reason gives courts discretion to analyze the reasonableness of the alleged restraint, as well as the restraint's impact on competition.²⁵ Generally, a court will apply the Rule of Reason,

²⁰ See *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 312 (1897) (applying Section 1 of the Sherman Act).

²¹ See Edward Brunet, *Streamlining Antitrust Litigation By 'Facial Examination' of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction*, 60 WASH. L. REV. 1, 1 (1984) (examining the different approaches of analyzing the Sherman Act). Courts vary amongst the analysis to approach an antitrust case depending on the specific facts of the case. See *id.* (outlining the several approaches courts take in analyzing an antitrust case). While Section 1 and Section 2 of the Sherman Act are two distinct violations, an entity may violate both sections with the same act or string of acts. See *United States v. Microsoft*, 253 F.3d 34, 45 (D.C. Cir. 2001), *rev'd* 373 F.3d 1199 (D. D.C. 2004) (trying Microsoft under Section 1 and Section 2 of the Sherman Act).

²² See William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 3 n.10 (1995) (enlightening the origins of the Per Se analysis); see also Stucke, *supra* note 7 (defining the Per Se analysis).

²³ See 1 JOHN J. MILES, *HEALTH CARE AND ANTITRUST LAW*. § 2A:12 (2013) (explaining that the Per Se Rule concludes that agreements are unreasonable restraints without a further factual analysis).

²⁴ See *Standard Oil*, 221 U.S. at 62 (establishing the Rule of Reason through Chief Justice White's opinion); see also Tom C. Hodge, *Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101*, 3 WM. & MARY BUS. L. REV. 59, 117-118 (2012) (stating the origins of the Rule of Reason test under antitrust analysis).

²⁵ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (discussing the focus of the Rule of Reason analysis). Courts will look to the restraint itself, such as maintaining high entry barriers, and the effect they have on the market. See Reem Heakal, *Economics Basics: Monopolies, Oligopolies, and Perfect Competition*, INVESTOPEDIA, archived at <http://perma.cc/8CYD-ZH9U> (examining

unless the restraint is blatantly anticompetitive in nature, such as a price fix or tying agreement.²⁶

Another form of restraint, tying agreements can be problematic in its analysis, especially in determining whether two distinct products exist, or whether the products are integrated into one product.²⁷ Courts typically apply one of two approaches in this analysis: the Jefferson Parish approach or the Integration approach, as Michael Woodrow De Vries denotes them.²⁸ While these tests are in fact distinctive, both tests attempt to balance the interests of maintaining competition and encouraging innovation.²⁹ Courts may base their decision with regards to a tying agreement on the overall efficiency that it serves, using a Rule of Reason analysis.³⁰

the negative effects of high entry barriers placed on the market by monopolies and oligopolies will have).

²⁶ See Thomas A. Piraino, Jr., *Reconciling the Per Se Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 686 (1991) (explaining that the Rule of Reason is usually applied in antitrust cases); see also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940) (ruling that a price fix agreement is illegal Per Se under the Sherman Act); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 14 (1958) (applying that a tying agreement is illegal under the Sherman Act). A tying agreement is an agreement by a party to sell a product only if the buyer also purchases a different product. See *id.* at 5 (defining a tying agreement under the Sherman Act). For a violation to be conducted under a tying agreement, the plaintiff must show the following: “1) there are two separate products, 2) the seller has required the buyer to purchase the tied product in order to obtain the tying product, 3) the seller has ‘appreciable economic power in the tying product,’ ... and 4) the tying arrangement affects a substantial amount of commerce in the market for the tied product.” ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 379 (5th ed. 2004) (stating a prima facie case a plaintiff must prove for a Per Se analysis of a tying agreement).

²⁷ See Michael Woodrow De Vries, *United States v. Microsoft*, 14 BERKELEY TECH L.J. 303, 310-14 (1999) (comparing and contrasting two different approaches in analyzing whether two distinct products are present for antitrust analysis).

²⁸ See *id.* (discussing the two approaches to analyzing whether products are separate products for antitrust purposes). The Jefferson Parish approach ultimately depends on whether or not “consumer demand exists so that the products may efficiently be offered separately to consumers...” *Id.* at 312. The Integration approach analyzes products based on “whether the product bundle operates better when combined by the producer instead of by the consumer.” *Id.* at 313-14.

²⁹ See *id.* at 314 (reiterating the purposes of both the Jefferson Parish approach and the Integration approach for tying agreement analysis).

³⁰ See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24-25 (1979) (holding that blanket licensing agreements were legal under the rule of reason

While the Per Se Rule and the Rule of Reason are conflicting theories of applying various antitrust laws, courts have applied the theories respectively to serve the objectives and purposes of antitrust regulation.³¹ The purposes of antitrust statutes, both federal and state, are widely contemplated, but conclusively they include: preserving, protecting, promoting, and encouraging competition.³² Courts must always focus on Congress's intention in passing the Sherman Act, which was to protect the consumers and competition, as opposed to competitors themselves.³³ Focusing on the purposes of antitrust law is essential when analyzing whether an agreement or restraint is a violation of an antitrust law because the goal of every business is to outperform its competitors.³⁴ Therefore most, if not all, business agreements are ultimately intended to "restrain competition" for the respective business's benefit, but not all business agreements can violate antitrust law or there would be no private industries in existence.³⁵ Due to the magnitude of restraining agreements, there continues to be an endless battle of antitrust law in the courts over the last century.³⁶

A conspiracy to restrain trade is actionable under Section 1 of the Sherman Act.³⁷ While mere conscious parallelism may be a fac-

based on the efficiency that they provided and the fact that it was a new product that made it difficult to rule anticompetitive).

³¹ See *Spectrum Sports*, 506 U.S. at 458 (explaining the purpose and objectives of modernized antitrust law).

³² See JOHN BOURDEAU ET AL., 54A AM. JUR. 2D MONOPOLIES AND RESTRAINTS OF TRADE § 779 (2013) (discussing the purposes and goals of federal and state antitrust statutes).

³³ See *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 931 (1st Cir. 1984) (discussing Congress's intent to protect consumers in passing the Sherman Act); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (holding that the legislature's intent was to protect competition, not competitors). A competitive environment gives consumers more options, thus preserving the importance of protecting consumers. See *Macquarie Grp. Ltd.*, 2009 WL 539928, at *8 (explaining that lack of consumer options leads to an anticompetitive effect).

³⁴ See M.J. McAteer, *Outperform the Competition*, VIRGINIA BUSINESS (Feb. 4, 2014), archived at <http://perma.cc/5Y8X-6DJF> (noting that a firm's focus is to outperform its competition).

³⁵ See *id.* (discussing that a business's goal is to beat its competition).

³⁶ See *Crane*, *supra* note 16, at 1185-86 (discussing the constant struggle of applying the Sherman Act and other antitrust statutes).

³⁷ See 15 U.S.C. § 1 (banning conspiracies to restrain trade).

tor for a court to find a conspiracy violation under Section 1 of the Sherman Act, alone, it may not satisfy a violation.³⁸ Courts require plus factors to accompany conscious parallelism for a plaintiff to prove a conspiracy violation under Section 1 of the Sherman Act.³⁹ Plus factors may include: contradiction to own self-interest, proof of uniform price where price uniformity is unlikely without an agreement, prior antitrust violations, direct communications with competitors, and product standardization.⁴⁰ However, even if plus factors accompany conscious parallelism, if a defendant is able to offer a procompetitive justification for their apparent noncompetitive actions, then the court will not apply an inference of a conspiracy.⁴¹

Section 2 of the Sherman Act strictly regulates the process of monopolizing, attempts to monopolize, and conspiring to monopolize.⁴² The Supreme Court has adopted a specific method to handle these cases that was established in *United States v. Grinnell Corporation* (“Grinnell”).⁴³ Under the Grinnell Test, the plaintiff must show:

³⁸ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 n.7 (2007) (holding that parallel conduct and conscious parallelism are not alone enough to satisfy a conspiracy violation under Section 1 of the Sherman Act). Conscious parallelism has been defined as “proof that competitors have taken similar action in circumstances where each is aware of the other’s conduct but there is no direct evidence of communication between them.” See John P. Drohan, *Tailoring More Efficient Summary Judgment Standards in Antitrust Conspiracy Actions*, 54 BROOK. L. REV. 347, 349 (1988) ((defining conscious parallelism) citing Malina, *The Antitrust Jurisprudence of the Second Circuit*, 37 REC. A.B. CITY N.Y. 436, 450 (1982)).

³⁹ See, e.g., *Holiday Grocery Co. v. Phillip Morris Inc.*, 231 F. Supp. 2d 1253, 1268 (N.D. Ga. 2002) (holding that plaintiffs must prove plus factors in addition to conscious parallelism); see also *Williamson Oil Co., Inc. v. Phillip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (explaining that plaintiffs alleging price fixing conspiracy must show plus factors along with conscious parallelism); *City of Tuscaloosa v. Harcos Chemicals, Inc.*, 158 F.3d 548, 571 (11th Cir. 1998) (reasoning that plus factors must accompany conscious parallelism because conscious parallelism alone does not establish a meeting of the minds for a conspiracy).

⁴⁰ See GELLHORN, *supra* note 26, at 275 (listing several examples of plus factors that courts will consider when analyzing an alleged conspiracy).

⁴¹ See *Seagood Trading Corp. v. Jerricho, Inc.*, 924 F.2d 1555, 1574 (11th Cir. 1991) (ruling that procompetitive justifications exemplified by a defendant will negate an inference of conspiracy under Section 1 of the Sherman Act).

⁴² See 15 U.S.C. § 2 (2004) (criminalizing monopolization, attempting to monopolize, and conspiring to monopolize).

⁴³ See *Grinnell*, 384 U.S. at 570-71 (establishing the Grinnell Test for analyzing cases under Section 2 of the Sherman Act).

1) possession of a monopoly in a relevant product and geographic market, and a 2) willful acquisition or maintenance of that monopoly for the court to find a Section 2 violation per monopolization.⁴⁴ However, a firm may create a monopoly if it does so “as a consequence of a superior product, business acumen, or historic accident.”⁴⁵ While the Grinnell Test appears moderately black and white, even the Supreme Court has misunderstood the precise analysis of the test.⁴⁶

Antitrust law has continued to develop and has been complicated through new industries and restrictive measures that courts deemed necessary to preserve these respective industries.⁴⁷ Courts must look closely and be able to distinguish and balance the necessities of the governing body or industry, with the necessity of the restraint being applied by that governing body or industry.⁴⁸ Nevertheless, the continued acknowledgment of consumer rights must constantly be the central component when analyzing potential anti-

⁴⁴ See Grinnell, 384 U.S. at 570-71 (indicating the standard test for determining a monopolization claim).

⁴⁵ See Grinnell, 384 U.S. at 571 (creating an exemption from the monopoly power violation of Section 2 of the Sherman Act).

⁴⁶ See Melissa Fallon, Note, *Antitrust Implications of Casino Mergers: The Gamble of Defining a Relevant Market*, 57 HASTINGS L.J. 235, 245 (2005) (discussing the criticism of the Supreme Court’s decision in *Aspen Skiing Co. v. Aspen Highlands Corp.*); see also *Aspen Skiing Co. v. Aspen Highlands Corp.*, 472 U.S. 585, 600-01 (1985) (holding that a firm with monopoly power may not get rid of pro-competitive agreements in order to maintain monopoly without entering into a detailed analysis of the relevant geographic market).

⁴⁷ See *Broad. Music*, 441 U.S. at 9 (denying a Per Se analysis for a price fix because a new industry unfamiliar with the court system was to be analyzed with respect to a potential anticompetitive restraint). *But see* *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 114-15 (holding that while the NCAA was a necessary organization to the industry of college sports, the restraint of banning individual schools from negotiating their own media deals was an unnecessary restraint to market the product).

⁴⁸ See *NCAA*, 468 U.S. at 114-15 (distinguishing between the necessity for the NCAA as a governing body of college athletics, and the restraint the NCAA imposed on individual schools from negotiating their television deals). The court in *NCAA* reasoned that because some universities had a better product than other universities, that individual universities should be able to profit on their product and not be subjected to a horizontal restriction imposed by the governing body. *See id.* (holding that the importance of profiting on a superior product was more important than securing an equal market based on the industry standards).

trust violations.⁴⁹

B. Antitrust Application in Sports

Perhaps the biggest hurdle consumers would face in an action of this nature against the MLB would be outstanding the MLB's anti-trust exemption.⁵⁰ The MLB was first granted an exemption from federal antitrust laws in *Federal Baseball Club Inc. v. National League of Professional Baseball Clubs* ("Federal Baseball Club").⁵¹ While MLB's exemption was formed in *Federal Baseball Club*, the Supreme Court did not intend to create a complete exemption from antitrust laws for baseball, it merely stated baseball was not a form of interstate commerce and therefore could not be subjected to the Sherman Act, a federal statute.⁵² Despite expressions of disapproval from courts that felt forced to uphold the exemption, the exemption has never been overturned.⁵³ Recently, the exemption has been chal-

⁴⁹ See *id.* at 107 (acknowledging that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979))).

⁵⁰ See Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 251-54 (2012) (discussing the MLB's exemption and its impact on the ownership restrictions and management practices).

⁵¹ See *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922) (holding the Sherman Act did not extend to Major League Baseball because a baseball game is not trade or commerce and therefore does not fulfill the Commerce Clause requirement). Congress passed the Sherman Act under the Commerce Clause, therefore to be subject to the Sherman Act, one must be engaging in interstate commerce. See also Lawrence Silver & Mark E. Field, *The Route to the Summit: Jurisprudence Under the Sherman Act*, 4 DEPAUL BUS. L.J. 429, 451 (1992) (explaining that Congress was able to pass the Sherman Act under the power of the Commerce Clause).

⁵² See STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION* 139 (2013) (discussing the interpretation of the Supreme Court in *Federal Baseball Club*). In enacting the Sherman Act in 1890, Congress relied on the Commerce Clause for its authority to pass. See Silver et al., *supra* note 51, at 451-52 (explaining that Congressional power to enact the Sherman Act was devised from the Commerce Clause).

⁵³ See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (holding that the MLB antitrust exemption still applies because it is Congress's job to rid the MLB antitrust exemption and they have not done so, therefore assuming Congress's intent for the MLB to be exempt from the Sherman Act); *but see id.* at 357 (Burton, J., dissenting) (arguing that the MLB engages in interstate commerce and

lenged, but not overturned; yet a rule has been established that may give consumers a loophole to the exemption, the “integral part of the sport” exception.⁵⁴ While no court has overturned *Federal Baseball Club* and hold that the MLB has violated a federal antitrust law, courts have appeared to try and rewrite the rule to not explicitly outlaw the MLB from federal antitrust laws in the future, but limit the exemption to be enforced if the conduct alleged is “integral to the sport.”⁵⁵

While the MLB antitrust exemption has never been fully overturned by the Supreme Court, no other professional sport may use this exemption.⁵⁶ Despite the exemption’s limited applicability to the MLB, succeeding in antitrust suits against professional sports

thus the exemption should be lifted). It has been held that the courts should not overturn the MLB antitrust exemption and it is the legislature’s duty to do so. *See Flood v. Kuhn*, 407 U.S. 258, 285 (1972) (holding that despite MLB engaging in interstate commerce, it is Congress’s job to lift the antitrust exemption granted to MLB); *but see id.* at 286-88 (Douglas, J., dissenting) (arguing that Congress’s inaction should be interpreted as an intent for MLB to not be exempted from antitrust law and that if this was a matter of first impression, the court would find that MLB should not be subject to an antitrust exemption).

⁵⁴ *See, e.g., City of San Jose v. Office of the Comm’r of Baseball*, No. C-13-02787 RMW, 2013 WL 5609346, at *11 (N.D. Cal. Oct. 11, 2013) (upholding the MLB antitrust exemption because the interference with a baseball club’s relocation is “integral” to the business of baseball); *Henderson Broad. Corp. v. Houston Sports Assoc.*, 541 F. Supp. 263, 265 (S.D. Tex. 1982) (interpreting the Supreme Court’s rulings on MLB’s antitrust exemption to only include the aspects of baseball which are “integral to the sport and not related activities which merely enhance its commercial success.”); *Postema v. Nat’l League of Prof’l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) (stating, “the court must therefore determine whether baseball’s employment relations with its umpires are ‘central enough to baseball to be encompassed in the baseball exemption’”), *rev’d on other grounds by Postema v. Nat’l League of Prof’l Baseball Clubs*, 998 F.2d 60 (2nd Cir. 1993) (holding that right to a trial by jury and recovery of damages under the Civil Rights Act of 1991 do not apply retroactively).

⁵⁵ *See supra* note 54 (listing examples of modern courts trying to tweak the MLB antitrust exemption).

⁵⁶ *See Grow, supra* note 50, at 224-25 (acknowledging that the NFL, NBA, and NHL are subject to antitrust law); *see also United States v. Shubert*, 348 U.S. 222, 228 (1955) (expressing that the rule established in *Federal Baseball* was only meant to deal with baseball specifically and no other sport or industry); *United States v. Int’l Boxing Club of N.Y.*, 348 U.S. 236, 244 (1955) (holding that the baseball antitrust exemption will not be construed broadly to encompass other sports such as boxing).

leagues has been proven difficult.⁵⁷ Arguably the most influential Supreme Court decision regarding the intersection of professional sports and antitrust law came in *American Needle v. National Football League* (“American Needle”).⁵⁸ The Supreme Court in *American Needle* ultimately held that while National Football League (“NFL”) teams all have a common goal of advancing the NFL product, they are legally separate entities for licensing purposes and are thus subject to the Sherman Act and other antitrust laws involving horizontal restraints.⁵⁹ *American Needle* put professional sports leagues on notice that they must be careful in their business decisions, as they are not legally one organization, but they are multiple horizontal entities that may not engage in trade restraints that violate the Sherman Act or another antitrust statute.⁶⁰

C. Sports Broadcasting

Following World War II, American sports broadcasting took off in the 1940’s, giving Americans a diversion and a getaway from

⁵⁷ See *Madison Square Garden, L.P. v. Nat’l Hockey League*, 270 Fed. App’x. 56, 59 (2nd Cir. 2008) (holding that the NHL’s ban on individual websites by individual teams has procompetitive benefits and thus survived the Rule of Reason). Because sports markets, affects, and necessities are difficult to define, analyzing antitrust suits against professional sports leagues continues to be a difficult task for courts. See Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 752 (1987) (discussing the difficulties courts are subjected to when analyzing a Sherman Act Section 2 analysis of sports leagues).

⁵⁸ See *Am. Needle v. Nat’l Football League*, 560 U.S. 183, 204 (2010) (holding that the NFL is a group of “separate entities” that are subject to antitrust law).

⁵⁹ See *id.* at 203 (concluding that the NFL should be analyzed under the Rule of Reason because restraints on competition is necessary for the industry). However, the court also held that the analysis may not need a full analysis if the restraints are so anticompetitive and thus should be applied in the “twinkling of an eye.” See *id.* (applying a quick-look analysis to the NCAA’s alleged antitrust violation. (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984))).

⁶⁰ See Marc Edelman, *Upon Further Review: Will the NFL’s Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat’l Football League*, 16 STAN. J.L. BUS. & FIN. 183, 186 n.4 (2011) (quoting *American Needle*’s holding that NFL teams are separate entities that should be acting competitively and not as one).

the war.⁶¹ Since the 1940's, sports broadcasting has developed into a multi-million dollar industry, funded through American consumers' strong desire to watch their favorite team and sport.⁶² Broadcasting companies such as Columbia Broadcasting System ("CBS"), National Broadcasting Company ("NBC"), American Broadcasting Company ("ABC"), and others are able to prosper from advertisers who shop for the best value based on price and quality of the televised program.⁶³ Therefore, consumers play a major role in funding the multi-million dollar industry known as sports broadcasting.

D. The Sports Broadcasting Act

In 1961, Congress passed what came to be known as the "Sports Broadcasting Act of 1961."⁶⁴ This Act was extremely controversial as it permitted major professional sport leagues to sign agreements with specific broadcasting providers as one entity, allowing lesser revenue-maximizing teams to still gain "pooled" revenues from the higher grossing teams.⁶⁵ The Sports Broadcasting Act of 1961 empowered Congress to override the disapproval of the anti-competitive nature of a league wide contract, seemingly contradictory to the Supreme Court's analysis in the future case, *American Nee-*

⁶¹ See William Browning, *The History of Sports Television Broadcasting*, YAHOO SPORTS (Sept. 3, 2010), archived at <http://perma.cc/Q7JV-J4BG> (describing the pivotal turn of sports broadcasting in America for the benefit of American consumers).

⁶² See Ivy Ross Rivello, Note, *Sports Broadcasting in an Era of Technology: Superstations, Pay-Per-View, and Antitrust Implications*, 47 DRAKE L. REV. 177, 179-80 (1998) (analyzing the evolution of sports broadcasting from its initiation to a multi-billion dollar industry).

⁶³ See *id.* at 180 (discussing how revenue is created for television stations to continue producing professional sports' games).

⁶⁴ See 15 U.S.C. §§1291-1295 (2012) (allowing major professional sports leagues to "pool" their broadcasting revenues and exempting them from antitrust suits for broadcasting agreements).

⁶⁵ See Lacie L. Kaiser, *Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act for all Professional Sport Leagues*, 54 DEPAUL L. REV. 1237, 1237-38 (2005) (discussing the process of NFL teams pooling their revenues based on a league wide broadcasting contract).

dle.⁶⁶ Congress intended to legalize a specific horizontal restraint on competition by passing the Sports Broadcasting Act, as it allowed teams to act as a single entity.⁶⁷ However, to counter Congress's power, the Supreme Court has interpreted the Sports Broadcasting Act to be read narrowly, holding that broadcasts that do not explicitly fall within the act are still subject to antitrust law.⁶⁸ In addition, broadcasting rights between an individual team and a broadcasting station are not covered by the Sports Broadcasting Act of 1961, as the Act does not include a horizontal restraint amongst competitors, such as a league wide agreement the NFL currently possesses.⁶⁹

⁶⁶ See *Am. Needle*, 560 U.S. at 204 (holding that sports leagues should not be viewed as a single entity when making business decisions because the teams are actually separate entities competing against one another). The Sports Broadcasting Act of 1961 grants professional sport leagues the power to act as one when negotiating broadcasting rights, as opposed to mandating teams to act as separate entities in a competitive market, as held in *American Needle*. See 15 U.S.C. §§1291-1295 (granting sports' leagues the right to act as one when negotiating broadcasting deals); see also *Am. Needle*, 560 U.S. at 204 (holding that NFL teams must act as separate entities when negotiating licensing deals).

⁶⁷ See Kaiser, *supra* note 65 at 1239 (analyzing Congress's decision to uphold horizontally pooled broadcasting rights by professional sport leagues). The allowance of "pooling" revenue amongst sports' teams in the same league was not meant to minimize the market of broadcasting rights amongst broadcasting companies, but rather protect leagues who are acting in their best self-interest. See Kaiser, *supra* note 65 at 1239 (discussing Congress's intentions when enacting the Sports Broadcasting Act of 1961).

⁶⁸ See e.g., *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 303 (3rd Cir. 1999) (holding that an agreement amongst NFL teams to sell broadcasting rights to satellite distributors was not "sponsored telecasting" and was therefore not subject to the Sports Broadcasting Act of 1961); *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 808 F. Supp. 646, 649-50 (D.N.D.Ill. 1992) (holding that broadcasting of NBA games by cable television programming service did not fall within the Sports Broadcasting Act of 1961). Thus, courts continue to analyze the Sports Broadcasting Act of 1961 very narrowly due to the high horizontal restraints granted under the act. See Rivello, *supra* note 62 at 178 (explaining that the Supreme Court has interpreted the Sports Broadcasting Act very narrowly).

⁶⁹ See Rivello, *supra* note 62, at 198 (stating that a transfer of broadcasting rights by an individual team is not covered by the Sports Broadcasting Act); see also Kurt Badenhausen, *The NFL Signs TV Deals Worth \$27 Billion*, FORBES, archived at <http://perma.cc/R744-JEUS> (announcing the contract agreed upon by the NFL and CBS, Fox, and NBC to telecast its games for nine years). This seemingly anticompetitive contract would not have been lawful had Congress not passed the Sports Broadcasting Act due to its horizontal restraint. See Kaiser, *supra* note 65, at 1239 and accompanying text (discussing the horizontal restraint Congress legalized un-

III. Facts and Premise

A. MLB Blackout Policy

There are three legally conceivable manners in which a consumer may watch an MLB game at his or her home: 1) through their local cable provider, 2) through MLB.tv, or 3) through MLB Extra Innings.⁷⁰ Each individual MLB team has contracted with a regional sports network (“RSN”) to televise their games in the local geographical area.⁷¹ Since the league has prohibited most games from being nationally televised, the only method for a consumer to watch their local team play is by watching games provided by their local RSN.⁷² Unless a nonlocal game is nationally televised, if a consumer wishes to watch a nonlocal team play, the consumer may only do so through MLB.tv or MLB Extra Innings.⁷³

MLB.tv is an Internet package owned and operated by the MLB to give consumers the opportunity to watch nonlocal teams, or “out of market” games.⁷⁴ A consumer may purchase MLB.tv from the MLB, which includes all of “out of market” games.⁷⁵ However, the consumer is not given the opportunity to buy only a handful of games from MLB.tv, but must buy every single “out of market” game for the remainder of the season.⁷⁶ MLB.tv blackouts all games in which a consumer would be able to watch through their respective

der the Sports Broadcasting Act); *see also* 15 U.S.C. §§1291-1295 (codifying the law of professional sports broadcasting with respect to antitrust law).

⁷⁰ *See* Laumann, 907 F. Supp. 2d at 473-75 (explaining the three methods a consumer of the MLB may watch an MLB game through multimedia).

⁷¹ *See id.* at 471 (discussing the contractual agreements between individual MLB teams and local RSNs).

⁷² *See id.* at 474-75 (explaining that only a small percentage of games are available to watch on television involving a local team that is not telecasted through an RSN).

⁷³ *See id.* at 475 (concluding that consumers may only watch “out of market” games through the Internet or a package owned by the MLB).

⁷⁴ *See id.* (announcing the purpose of MLB.tv).

⁷⁵ *See id.* (explaining that a consumer may not purchase an MLB.tv package of one team or a select number of teams, but must purchase MLB.tv including all teams).

⁷⁶ *See* Laumann, 907 F. Supp. 2d at 489 (describing the process of purchasing “out of market” games to involve all “out of market games”).

RSN.⁷⁷ By blacking the local games on MLB.tv, consumers are limited to purchasing a multichannel video programming distributors (“MVPD”) that carries the respective RSN broadcasting their local team, as opposed to a package provided by the MLB.⁷⁸

The second option a consumer has to watch an “out of market” game is to purchase MLB Extra Innings.⁷⁹ MLB Extra Innings is provided by MVPD through contractual agreements with the MLB.⁸⁰ Like MLB.tv, MLB Extra Innings is blacked out for consumers trying to watch their local team.⁸¹ Hence, depending on a particular consumer’s geographic location and game preference, consumers’ choices are limited to either paying a local cable provider, such as a MVPD, for the RSN that provides their local game, or paying the MLB for an internet package or a television package that includes all “out of market” games.⁸²

B. NHL Blackout Policy

The NHL blackout policies are very similar to the MLB’s blackout policies.⁸³ NHL consumers may watch a game through: 1) their local RSN, 2) NHL Gamecenter Live, or 3) NHL Center Ice.⁸⁴ NHL Gamecenter Live is the equivalent of MLB.tv in that it allows

⁷⁷ See *Blackouts FAQ*, *supra* note 4 (establishing the limited opportunities consumers have to watch a certain team).

⁷⁸ See *Blackouts FAQ*, *supra* note 4 (explaining the blackout procedures followed by MLB.com); see also *Laumann*, 907 F. Supp. 2d at 475 (establishing the limitations imposed on consumers to watch their local team play).

⁷⁹ See *Laumann*, 907 F. Supp. 2d at 475 (discussing MLB Extra Innings as a means for consumers to access “out of market” baseball games).

⁸⁰ See *id.* (discussing the exclusive contractual agreements between MVPDs and the MLB with regards to televising “out of market” games to consumers). MVPDs include but are not limited to, Comcast, Bright House, and Time Warner. See *MSOS, INDEMAND*, archived at <http://perma.cc/NW5X-MDLS> (listing the MVPDs that provide MLB and NHL game packages).

⁸¹ See *Blackout FAQ*, *supra* note 4 (explaining the blackout policy of MLB Extra Innings).

⁸² See *supra* notes 70-81 and accompanying text (discussing the limitation on consumer choice with regards to watching MLB games and out of market games); see also *Blackouts FAQ*, *supra* note 4 (reviewing the MLB’s blackout policy).

⁸³ See *Laumann*, 907 F. Supp. 2d at 473-75 (comparing the MLB blackout policies with the NHL’s blackout policies).

⁸⁴ See *id.* (discussing the various ways consumers may watch NHL games).

consumers to watch “out of market” games through a package owned and operated by the NHL.⁸⁵ Similar to MLB.tv, consumers may not pick and choose which games they want to buy, but must buy all “out of market” games.⁸⁶ In addition, the NHL also provides a package similar to MLB Extra Innings, known as NHL Center Ice.⁸⁷ NHL consumers are exposed to the same limitations and restrictions that MLB consumers are exposed to through the blackout restrictions agreed upon between the leagues, the RSNs and the MVPDs.⁸⁸

IV. Analysis

A. *Possible Sherman Act Claims*

The Sherman Act contains two sections in which it may be violated.⁸⁹ Section 1 of the Sherman Act reads, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with other foreign nations, is hereby declared to be illegal.”⁹⁰ Section 2 of the Sherman Act reads, “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...”⁹¹ Courts have interpreted the main difference between

⁸⁵ See *NHL Gamecenter Live Customer Support*, NHL.COM archived at <http://perma.cc/38C4-WZDN> (discussing the terms and conditions of NHL Gamecenter Live). NHL Gamecenter Live requires a bulk purchase of all NHL games, minus the local games that are blacked out for the benefit of the RSNs. See *id.* (establishing the conditions of purchasing NHL Gamecenter Live).

⁸⁶ See *Laumann*, *supra* note 5 at 475 (explaining that consumers may not pick and choose which “out of market” games they would like to buy).

⁸⁷ See *NHL Center Ice*, *supra* note 4 (discussing the terms and conditions of NHL Center Ice). NHL Center Ice also requires the bulk purchase of all “out of market” games, is operated through MVPDs, and provides blackout restrictions to local games. See *NHL Center Ice*, *supra* note 4 (noting further the restrictions imposed on consumers with regards to NHL Center Ice).

⁸⁸ See *supra* notes 70-81 and accompanying text (discussing the limitations exposed to consumers in terms of watching local and “out of market” games).

⁸⁹ See 15 U.S.C. §§ 1-2 (stating the two sections of the Sherman Act).

⁹⁰ See *id.* (banning contracts, combinations, and conspiracies in restraint of trade).

⁹¹ See *id.* (prohibiting monopolization, attempts to monopolize, and conspiring to monopolize).

Section 1 and Section 2 of the Sherman Act to be that Section 1 requires concerted action between multiple parties, whereas Section 2 requires a unilateral action.⁹² However, a firm or entity may be found to have violated both Sections 1 and 2 with the same actions or set of actions.⁹³

The actions of the NHL, MLB, the RSNs and the MVPDs would most likely constitute a Section 1 of the Sherman Act claim as they have created horizontal agreements amongst themselves.⁹⁴ On the surface, both the NHL and MLB are openly “restraining trade” of broadcasting professional baseball and hockey games in the United States.⁹⁵ A preliminary determination that must be made is to determine which product is allegedly being restrained.⁹⁶ Here, the product is not the games themselves, but rather the broadcasting of the games since the issue regards the economic harm associated with limited broadcasting options.⁹⁷

1. In Market Agreements

The agreements made between the leagues and the RSNs effectively reduce the production of the broadcasting of games, as there is only one way for a consumer to watch his or her local team play, through a local RSN.⁹⁸ Individual teams contract with RSNs to televise their games exclusively in the local geographical area, but the

⁹² See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766-68 (1984) (explaining the difference between Section 1 and Section 2 of the Sherman Act).

⁹³ See *Microsoft*, 253 F.3d at 45 (D.C. Cir. 2001) (alleging Microsoft violated both Sherman Act Sections 1 and 2).

⁹⁴ See *Laumann*, 907 F. Supp. 2d at 473-75 (analyzing the current contracts under which the MLB and its teams have with RSNs and MVPDs to televise their games and stream their games online); see also *supra* notes 83-88 and accompanying texts (discussing the current agreements the NHL has with respective television and Internet providers to broadcast games).

⁹⁵ See *Laumann*, 907 F. Supp. 2d at 487 (suggesting the agreement may plausibly account as a restraint of trade).

⁹⁶ See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 101-02 (1984) (discussing the importance of identifying the product when analyzing a case under the Sherman Act).

⁹⁷ See *Laumann*, 907 F. Supp. 2d at 480 (inferring the product to be the broadcasted game).

⁹⁸ See *supra* Part III (discussing the limited availability of watching a consumer to watch a game).

same RSNs do not televise the games outside of a certain designated territory.⁹⁹ Accordingly, a Boston Red Sox fan living in Boston, Massachusetts may only watch the Red Sox play if he or she purchases an MVPD that carries New England Sports Network (“NESN”), the RSN of the Boston geographic location for MLB games.¹⁰⁰ The same Red Sox fan may not watch the game through any other source because MLB Extra Innings and MLB.tv will black-out the Red Sox game in his or her geographic area.¹⁰¹

2. Out of Market Agreements

MVPDs may not air RSN’s broadcasting of NHL or MLB games outside of a team’s geographic region.¹⁰² Essentially, if that same Boston Red Sox fan moves to California, the only means he or she may continue to watch his or her favorite team play, would be to either purchase MLB Extra Innings or MLB.tv, as NESN will not be available to him in California, even if he or she uses the same MVPD.¹⁰³ Once again, this individual has an extremely limited opportunity to purchase the product the individual desires, the broadcasted Red Sox game.¹⁰⁴ Both MLB Extra Innings and MLB.tv are owned and operated by the MLB and therefore the MLB has exclusive control of a significant market product, the broadcasting of out of market professional baseball games.¹⁰⁵

⁹⁹ See *Laumann*, 907 F. Supp. 2d at 480 (describing the production availability of RSNs). Fox Sports owns several RSNs throughout the country, however each RSN is exclusively limited to a designated geographic area. See *Fox Sports Networks Regional Index List*, FOX SPORTS (Mar. 16, 2014, 12:30 PM), archived at <http://perma.cc/THM5-A6DA> (listing the various RSNs owned by Fox Sports divided by geographic region and listing the professional teams and collegiate institutions in which they have exclusive contracts with).

¹⁰⁰ See *supra* Part III (applying the in market policy of the MLB); see also *About NESN*, NESN, archived at <http://perma.cc/H9UY-JHF2> (informing that NESN is the regional sports network for the greater New England area).

¹⁰¹ See *supra* Part III (analyzing the limited availability for the product of a broadcasted professional baseball game to the MVPDs that provide the RSN).

¹⁰² See *supra* Part III (discussing the complete market power the leagues control over “out of market” games).

¹⁰³ See *supra* notes 74-82 and accompanying text (discussing the limited availability “out of market” consumers have to watch a specific team).

¹⁰⁴ See *supra* note 97 and accompanying text (stating the relevant product associated with the issue discussed).

¹⁰⁵ See *supra* notes 74-82 and accompanying text (establishing the monopoly the MLB and NHL have over “out of market” games). Professional sport leagues are

B. Liability

1. Liabilities of the MLB and NHL

Under *American Needle*, professional sport leagues are subject to antitrust laws, and may have to act as separate entities depending on the circumstance.¹⁰⁶ Teams that encompass the leagues may need to act within their own best interest and the league itself may not be looked upon as a single entity.¹⁰⁷ Therefore, teams amongst the MLB and the NHL must act separately with regards to broadcasting rights.¹⁰⁸ Despite the Supreme Court's ruling in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* ("NCAA") which stated that maintaining a competitive balance amongst teams is important, *NCAA* dealt with amateur sports which are designed to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports."¹⁰⁹ Because of the apparent nonmonetary purpose of the NCAA, the interest of a balanced regulation scheme imposed by the NCAA amongst schools

not allowed to act as one unless the reason is outweighed by the interest in maintaining a competitive balance amongst the teams. *See Am. Needle*, 560 U.S. at 204 (imposing a balancing test when analyzing whether a league can act as one or whether individual teams must act separately for antitrust purposes. (citing *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. at 117 (1984))).

¹⁰⁶ *See Am. Needle*, 560 U.S. at 185 (holding professional sports teams cannot col-
lude with regards to licensing agreements).

¹⁰⁷ *See id.* (establishing that NFL teams may not act a single entity for marketing
standpoints).

¹⁰⁸ *See id.* (holding that teams may not act as one to increase revenue with regards
to licensing agreements). *But see NCAA*, 468 U.S. at 117 (explaining that the inter-
est in maintaining a competitive balance amongst teams is important in antitrust
analysis).

¹⁰⁹ *See NCAA*, 468 U.S. at 121-22 (White, J., dissenting) (stating the NCAA policy
of differentiating between collegiate and professional sports); *see also* 2013-2014
NCAA Division 1 Manual, NCAA Const. art. 1.3.1 (2013), *archived at*
<http://perma.cc/4J29-X396> (discussing the basic purpose of the NCAA to be to dif-
ferentiate between collegiate and professional sports).

is more appropriate under the Sherman Act than a balanced regulation scheme over professional teams by a league.¹¹⁰

To be liable for monopolization under Section 2 of the Sherman Act, a defendant must have, 1) the possession of a monopoly power in a geographic and product market, and 2) the willful acquisition or maintenance of power to monopolize.¹¹¹ While the product market is easily determined here, broadcasted professional games of the relevant sport, the geographic market is more difficult to depict.¹¹² For a Section 2 of the Sherman Act claim against the MLB and the NHL to be made, the geographic market would be the “out of market” area, which is not necessarily definite and varies amongst each and every team.¹¹³ The fact that an MLB consumer may not legally watch an out of market game without purchasing either MLB Extra Innings or MLB.tv, indicates that the MLB has effectively created a complete monopoly over the geographic and product market of “out of market” professional baseball games as there is no other option for a consumer.¹¹⁴

The next step is to determine whether the MLB and NHL have willfully acquired or maintained the monopoly power as opposed to a “superior product, business acumen, or historic acci-

¹¹⁰ See *Am. Needle*, 560 U.S. at 185 (determining that professional teams have separate interests in improving the marketability of their individual brand, despite their additional interest of maintaining and advancing the brand of the league itself).

¹¹¹ See *Grinnell*, 384 U.S. at 570-71 (establishing the Grinnell Test of proving a Section 2 claim under the Sherman Act).

¹¹² See *Laumann*, 907 F. Supp. 2d at 487 (determining that the product market is broadcasted professional baseball and hockey games); *id.* at 480 (stating the relevant product market).

¹¹³ See *id.* at 475 (identifying “out of market” games as different for every geographical location).

¹¹⁴ See *supra* notes 74-82 and accompanying text (discussing the power the MLB has over “out of market” MLB games). The NHL has the same market power the MLB has with respect to “out of market” NHL games as an NHL consumer must either purchase NHL Gamecenter Live or NHL Center Ice in order to watch an “out of market” professional hockey games. See *supra* notes 83-88 and accompanying text (comparing the MLB blackout policies and the NHL blackout policies). The elimination of consumer choice is a restraint of trade, and when there is a complete lack of choice, a monopoly exists. See *Macquarie Grp. Ltd.*, 2009 WL 539928, at *8 (discussing that a lack of consumer choice restrains trade); see also Nicole Harrell Duke, *Hospital Mergers Versus Consumers: An Antitrust Analysis*, 30 U. BALT. L. REV. 75, 79 (2000) (stating that “monopolies completely eliminate choice”).

dent.”¹¹⁵ By not allowing any other provider to broadcast out of market professional baseball and hockey games, the MLB and NHL have clearly engaged in anticompetitive behavior.¹¹⁶ The MLB and NHL are not allowing teams to compete amongst the broadcasting of their games, but are instead acting as a single entity, limiting the output, and effectively increasing the price, a violation of *American Needle*.¹¹⁷ These agreements are plainly anticompetitive, as consumers are given limited alternatives to watch their specific team.¹¹⁸ By not allowing the MVPDs to air RSN’s broadcasting of NHL and MLB games outside of their geographic territory, the leagues are monopolizing the product of out of market games, thus violating Section 2 of the Sherman Act¹¹⁹.

The MLB and NHL teams have agreed to not compete in video presentation of professional games.¹²⁰ This alone may constitute a violation of Section 1 of the Sherman Act as a vertical territorial restraint.¹²¹ In the past, “vertical territorial restraints do not violate the Per Se Rule unless the restriction is resolutely enforced by the manufacturer.”¹²² Now however, if a manufacturer parts ways with the rights to a product, the manufacturer may not territorially restrict the

¹¹⁵ See *Grinnell*, 384 U.S. at 470-71 (establishing the second prong of the Grinnell Test). If a firm simply creates a superior product and a monopoly “by accident” the firm cannot be liable of “monopolizing” under Section 2 of the Sherman Act, unless it is accompanied by anticompetitive conduct. See *Verizon v. Trinko*, 540 U.S. 398, 407 (2004) (stating that mere possession of monopoly power is not unlawful unless it is accompanied with anticompetitive conduct).

¹¹⁶ See *supra* notes 70-81 and accompanying text (affirming that the only way a consumer may watch a MLB or NHL “out of market” game is by paying the MLB or NHL directly).

¹¹⁷ See *Am. Needle*, 560 U.S. at 185 (holding that a professional sports league may not act a single entity for purposes of antitrust law).

¹¹⁸ See *Laumann*, 907 F. Supp. at 472-76 (discussing the limited ability for a consumer to watch a specific game); see also *Macquarie Grp. Ltd.*, 2009 WL 539928, at *8 (detailing lack of consumer options as a form of anticompetitive behavior).

¹¹⁹ See *Laumann*, 907 F. Supp. at 473-75 (inferring that there is a monopoly to broadcast out of market games for NHL and MLB games).

¹²⁰ See *Laumann*, 907 F. Supp. at 473 (discussing the agreement amongst teams to not compete over broadcasting).

¹²¹ See *First Beverages.*, 612 F.2d at 1168 (noting that a vertical territorial restraint may violate the Sherman Act if it fails the Rule of Reason).

¹²² See *Sheldon Pontiac*, 418 F. Supp. at 1034 (stating the standard set for a violation of a vertical territorial restraint under Section 1 of the Sherman Act).

product unless it passes the Rule of Reason.¹²³ Here, the leagues sell the rights to broadcast games to RSNs who in turn sell them to MVPDs which cover many geographical territories.¹²⁴ While an MVPD such as Comcast may have the broadcasting rights of multiple RSNs, they are territorial restricted to only broadcast the RSNs in a specific geographic market, and thus RSNs and teams are not competing in the same geographical market.¹²⁵ Nevertheless, as established in *American Needle*, the leagues may not act as a single entity, thus the agreements between the leagues, MVPDs, and RSNs to not allow competition amongst RSNs in a geographic territory is not intrabrand competition, but interbrand competition that cannot be restricted under the Sherman Act.¹²⁶ Hence, the leagues are also violating Section 1 of the Sherman Act by agreeing with the MVPDs and RSNs to restrict the broadcasting of their games geographically¹²⁷.

The leagues may also be violating Section 1 of the Sherman Act under a different theory, the theory of a tying agreement.¹²⁸ The Sherman Act attempts to regulate tying agreements by analyzing the agreements' effect on competition.¹²⁹ As stated *supra*, for a violation of a tying agreement, the plaintiff must first establish that there are two distinct products.¹³⁰ This analysis is difficult in that it depends on the test applied in determining whether two separate products ex-

¹²³ See *Continental T.V.*, 433 U.S. at 71 (holding that under the Rule of Reason, promoting interbrand competition is more important than promoting intrabrand competition).

¹²⁴ See *supra* notes 70-88 and accompanying texts (discussing the process in which the broadcasting rights are transferred from the leagues to consumers).

¹²⁵ See *supra* notes 70-88 and accompanying texts (analyzing the geographical restrictions placed upon the MVPDs).

¹²⁶ See *Am. Needle*, 560 U.S. at 185 (establishing that a league is not one entity, but several entities that must act in competition with each other).

¹²⁷ See *Laumann*, 907 F.Supp. at 473-75 (discussing broadcasting restrictions and violations of Section 1 of the Sherman Act); see also 15 U.S.C. § 1 (defining the standard of what constitutes illegal trade by restraining commerce among parties).

¹²⁸ See *N. Pac. Ry. Co.*, 356 U.S. at 5 (defining a tying agreement and holding them to be illegal).

¹²⁹ See Sadarangani, *supra* note 17 at 619 (stating the purpose of the tying agreement under both the Sherman Act and the Clayton Act).

¹³⁰ See GELLHORN, *supra* note 26 at 379 (indicating tying agreements under Section 1 of the Sherman Act covers either goods or services and are evaluated under two standards).

ist.¹³¹ For “out of market” games, consumers are forced to buy one of the cable or Internet packages owned and operated by the NHL and MLB.¹³² Under the Jefferson Parish test, it would seem that consumer demand of certain “out of market” games would certainly make one “out of market” game distinct from another, establishing two separate products.¹³³ However, under the Integration approach, the result may be different as it is more efficient for the leagues to bundle all of their games into one package, as the leagues do not have to be obligated to offer different “out of market” packages for each team.¹³⁴ Because of the complex issue and the multiple tests that may be used by courts in determining separate products, a court would most likely have to analyze this issue heavily, basing its decision on efficiency purposes.¹³⁵

The other two components of the tying agreement test are relatively straightforward if it determined that two separate products exist.¹³⁶ The leagues lucidly are mandating consumers to purchase all “out of market” games for all teams, as opposed to a select number of teams at the consumers’ discretion.¹³⁷ The leagues also have com-

¹³¹ See De Vries, *supra* note 27 at 310-14 (explaining that the court “generally give the plaintiff the threshold burden of proving (1) that some customer actually want the items separated and (2) that separating them is physically and economically possible”).

¹³² See *supra* Part III (setting forth the manners in which consumers may watch an “out of market” game of either the NHL or MLB).

¹³³ See De Vries, *supra* note 27 at 310-12 (pointing out consumer demand and market structure as two factors of the Jefferson Parish test. There is certainly a different demand for watching one team play over another as consumers have different preferences based on their favorite team. See *supra* text accompanying notes 98-105 (offering examples of consumers who may be more inclined to watch one team over another).

¹³⁴ See De Vries, *supra* note 27 at 312-14 (discussing the Integration approach argued by Einer Elhauge in contrast with the Jefferson Parish Test).

¹³⁵ See *Broad. Music*, 441 U.S. at 24-25 (reasoning that a blanket licensing agreement was reasonable based on its efficiency in the market).

¹³⁶ See GELLHORN, *supra* note 26 at 379 (offering a test for analyzing a tying agreement violation under Section 1 of the Sherman Act).

¹³⁷ See *supra* Part III (discussing the stipulations imposed by the NHL and the MLB in purchasing one of their game packages); see also GELLHORN, *supra* note 26 at 379 (explaining that sellers must require consumers to purchase a tied product along with the tying product to be subject to a violation under Section 1 of the Sherman Act).

plete control over the tying product, certain “out of market” games.¹³⁸ Finally, by mandating that consumers purchase all “out of market” games as opposed to ones of their choosing, the tied product, other “out of market” games, are being sold more than they would if this stipulation was not present.¹³⁹ However, as stated *supra*, a court may base its decision on an efficiency rationale and rule that bundle of “out of market” games are efficient enough to be a reasonable restraint, and therefore legal in that it limits transactional costs.¹⁴⁰

2. Liability of RSNs

While the RSNs have not created any express agreements or contracts amongst each other, their actions may constitute a conspiracy to restrain trade, a violation of Section 1 of the Sherman Act¹⁴¹. Horizontal competitors can be found to have conspired to restrain trade even without an express agreement.¹⁴² The RSNs undoubtedly have knowledge of the leagues’ territorial restraints placed on broad-

¹³⁸ See *supra* text accompanying notes 111-114 (discussing the monopoly market power the NHL and the MLB have over all “out of market” games); see also GELLHORN, *supra* note 26 at 379 (imposing that the seller must have economic power in the tying product for a tying agreement violation under Section 1 of the Sherman Act).

¹³⁹ See *supra* Part III (analyzing the requirement consumers are subjected to of purchasing all “out of market” games); see also GELLHORN, *supra* note 26 at 379 (establishing market affect as the final component for a tying agreement violation under section 1 of the Sherman Act).

¹⁴⁰ See text accompanying note 30 (explaining the efficiency rationale for a tying agreement); see also *Broad. Media*, 441 U.S. at 35 n.30 (discussing the importance of transactional costs in terms of efficiency purposes for analysis of a Sherman Act violation).

¹⁴¹ See *Laumann*, 907 F.Supp. at 473-74 (discussing how RSNs, such as Comcast and Direct TV, may violate Section 1 of the Sherman Act by conspiring to restrict trade without having an express agreement or contract to access black out games); see also 15 U.S.C. § 1 (banning conspiracies to restrain trade).

¹⁴² See *Interstate Circuit, Inc.*, 306 U.S. at 227 (1939) (holding that horizontal competitors do not need to engage in an express agreement to be found liable of a conspiracy under Section 1 of the Sherman Act). Competitors who engage in vertical agreements with the same vertical firm can still be classified as conspiring to engage in a horizontal agreement if the agreements are based on the knowledge of the other agreements. See *id.* (crafting a separate form of a conspiracy violation under Section 1 of the Sherman Act).

casting, as all of the teams' contract with the RSNs.¹⁴³ The RSNs are not acting in their own self-interest because they are territorially restraining themselves, accompanied with the knowledge that their competitors will not impede their designated territory.¹⁴⁴ These agreements are not "mere conscious parallelism," but they have several plus factors, which are needed for a conspiracy violation of Section 1 of the Sherman Act.¹⁴⁵ By limiting their output, knowingly territorially restrain their goods, and conduct inconsistent with their own self-interest, the RSNs are consciously restraining trade in violation of Section 1 of the Sherman Act.¹⁴⁶ The RSNs are therefore entering implied agreements with each other to not impede on each other's product by not competing in the same geographic markets, thus hindering horizontal competition between RSNs.

3. Liability of MVPDs

Similar to the RSNs, there is no horizontal agreement between MVPDs, which are truly direct competitors.¹⁴⁷ However, the agreements and actions by the leagues and the RSNs have benefited MVPDs economically to the point that they are also at fault.¹⁴⁸ Through the ban on Internet broadcasting of local games, consumers

¹⁴³ See *Laumann*, 907 F.Supp. at 473-74 (discussing the contracts between MLB and NHL teams with local RSNs).

¹⁴⁴ See *Laumann*, 907 F.Supp. 2d at 486 (explaining the territorial restraints RSNs are subjecting themselves to through their agreements with the leagues and MVPDs).

¹⁴⁵ See 1 JOHN J. MILES, HEALTH CARE AND ANTITRUST LAW §2A:6 (2014) (reasoning that mere conscious parallelism is not enough to find a conspiracy violation); see also GELLHORN, *supra* note 26, at 274-75 (citing that prior courts have mandated plaintiffs who rely on parallel conduct to introduce additional facts to justify a conspiracy under Section 1 of the Sherman Act).

¹⁴⁶ See GELLHORN, *supra* note 26 at 274-275 (noting the plus factors that may be considered in addition to conscious parallelism); see also *Laumann*, 907 F.Supp. at 473-475 (discussing the actions of the RSNs in entering into and executing agreements with NHL and MLB teams).

¹⁴⁷ See *Laumann*, 907 F.Supp. at 487-488 (explaining what MVPDs consist of and their basic business purposes).

¹⁴⁸ See *id.* (discussing the function of MVPDs in the broadcasting agreements amongst the leagues). MVPDs control some of the RSNs and are the ones who are geographically separating the broadcasted games. See *id.* (explaining the power imposed on RSNs by MVPDs).

are obligated to purchase a cable package from one of the MVPDs to watch an in market game, directly benefiting all of the MVPDs.¹⁴⁹ While no explicit horizontal agreement exists amongst the MVPDs, they appear to have a mutual understanding of each other's vertical agreements to restrain trade, similar to the analysis under RSNs.¹⁵⁰ With knowledge of the agreements, the MVPDs are effectively colluding in restraint of trade by creating extremely high entry barriers for broadcasters of in market games.¹⁵¹ Accompanying the agreements, the effect of high entry barriers will continue to allow the RSNs and MVPDs raise their prices, eliminating outside competition and harming consumers.¹⁵² Thus, the MVPDs could be liable for their vertical agreements, which have severely restrained horizontal competition.

V. Conclusion

The MLB, NHL, and their broadcasting partners are straddling the line of both Section 1 and Section 2 of the Sherman Act very closely and they may in fact be violating both. Through the NHL and MLB's exclusive agreements with RSNs and MVPDs, they are eliminating competition amongst broadcasters and harming consumers. Consumers are forced to either purchase a cable package from an MVPD to watch their local team play, or buy a package from the MLB or NHL to watch an out of market game. Consumers are also unable to choose the out of market games they would like to purchase, but are instead bound to purchase all or none as a result of

¹⁴⁹ See *supra* Part III (explaining the methods in which consumers can watch an in market game).

¹⁵⁰ See *supra* Part IV.B.2. (discussing the liability imposed on RSNs).

¹⁵¹ See *supra* Part III (explaining that only one RSN may broadcast in market baseball games). This disallows other Internet providers from competing with MVPDs and deters future entry of Internet providers into the market because of the likelihood of failure based on the power of the current MVPDs. See Heakal, *supra* note 25 (discussing the lack of advancement of a market when high entry barriers are present).

¹⁵² See *supra* Part III (discussing the benefits that the RSNs and MVPDs will receive by the leagues' agreements and actions to not allow Internet providers broadcast in market games). High entry barriers harm consumers as they limit competition amongst should-be competitors and discourage innovation. See Heakal, *supra* note 25 (discussing the effects of high entry barriers on the market).

the potential tying agreements created by the MLB and the NHL. With the limited choices consumers are given and the high entry barriers that have been placed on competition amongst broadcasters, broadcasting of professional baseball and hockey games will soon be a product of unfair competition and injure their consumers.

With the development of antitrust law over the past century and the heightened value of the courts and the legislature to protect competition and consumers, the MLB, NHL, MVPDs, and RSNs appear to be getting away multiple antitrust violations. While the harm towards consumers is clear, as demonstrated in this Note, the only plausible defense would be a need for efficiency. Due to the constant struggle over the efficiency argument and protecting competition, courts will surely be held with yet another complex antitrust issue once consumers make a stand against the economic power houses known as the MLB and the NHL.