

# Are You Ready for Some Football?: How Antitrust Laws Can Be Used to Break Up DirecTV’s Exclusive Right to Telecast NFL’s Sunday Ticket Package

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I. INTRODUCTION

Vince Lombardi, one of the National Football League’s (“NFL”) most famous and well-respected coaches, once said that “football is a game for mad men.”<sup>1</sup> For those that ascribe to Lombardi’s theory, Sunday is a day for both enjoyment and analysis. Sunday is the day when most of the NFL’s games are telecast on broadcast television. Football fans love rooting for their teams, cheering against division rivals, and viewing other games to see league-wide developments as they occur in real time. To provide fans with the opportunity to watch all games being played, instead of just the ones being locally broadcast, the NFL has granted to DirecTV the exclusive right to offer a package known as the Sunday Ticket. Sunday Ticket allows subscribers to view any NFL game occurring at that time. Although ingenious on the surface, underneath lies potential antitrust violations by NFL franchise owners. Sunday Ticket is only available to DirecTV subscribers at a high premium. The NFL is granted several antitrust privileges by Congress, as discussed below, but Sunday Ticket should not fall within these exemptions.

Part II of this Note offers a background on antitrust law and how the subject relates to the NFL. Part III provides a history of the NFL, its beginnings on television, and its current arrangements with broadcast and cable television, as well as with DirecTV. Finally, Part IV discusses the antitrust implications of Sunday Ticket and how the package’s exclusive arrangement with the NFL is hurting consumers.

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1. Michael Hiestand, *NFL Films’ Sabol had rocky start with Lombardi*, USA TODAY (Dec. 11, 2010, 12:23 PM), [http://www.usatoday.com/sports/columnist/hiestand-tv/2010-12-09-lombardi-hbo-sabol\\_N.htm](http://www.usatoday.com/sports/columnist/hiestand-tv/2010-12-09-lombardi-hbo-sabol_N.htm).

## II. ANTITRUST BACKGROUND

### A. *Antitrust and Section One of the Sherman Act*

Antitrust laws were created to ensure a marketplace that fosters and encourages competition.<sup>2</sup> The Sherman Antitrust Act<sup>3</sup> forms the basis for most antitrust litigation pursued by the United States government. The Sherman Act's main purpose is to "preserv[e] free and unfettered competition . . . ."<sup>4</sup> Of the many sections of the Sherman Act, Section One has plagued the NFL the most.<sup>5</sup>

Section One of the Sherman Antitrust Act ("Section One") states, "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>6</sup> This language was first analyzed in *Standard Oil Co. v. United States*.<sup>7</sup> Because the scope of Section One was so broad by its plain meaning, the Court was hesitant to accept the Government's argument that "the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language."<sup>8</sup> Since nearly every contract is a restraint of trade by its very existence, the Court formulated a new standard: an agreement is in violation of Section One if the "contracts or acts . . . were *unreasonably* restrictive of competitive conditions . . . ."<sup>9</sup> Section One's main purpose is to "prevent competitors from combining their economic power in ways that unduly impair competition or harm consumers, be it in terms of increased prices, diminished quality, limited choices, or impaired technological progress."<sup>10</sup>

### B. *Rule of Reason Analysis*

Horizontal restraints—"an agreement among competitors on the way in which they will compete with one another"—which results in any price fixing or output limitation are generally considered, as a matter of law,

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2. Wanda Jane Rogers, *Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1009 (1996).

3. 15 U.S.C. §§ 1–7 (2006).

4. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

5. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 735–36 (2010).

6. 15 U.S.C. § 1.

7. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

8. *Id.* at 63.

9. *Id.* at 58 (emphasis added).

10. McCann, *supra* note 5, at 735–36.

illegal per se.<sup>11</sup> A horizontal restraint per se ruling is used when “surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”<sup>12</sup> Courts will not conduct any type of economic analysis on these types of restraints and will, except for a few rare exceptions,<sup>13</sup> immediately rule them illegal.<sup>14</sup>

On the other hand, courts will use a “Rule of Reason” analysis for other forms of trade restraints.<sup>15</sup> Originally developed in *Standard Oil v. United States*, the Rule of Reason is used in cases where the restraint is not unreasonable per se.<sup>16</sup> Courts will balance the competitive (and anticompetitive) effects of the restraint to determine whether the agreement violates antitrust law.<sup>17</sup> The court will examine the anticompetitive effects versus the procompetitive justifications, including “the degree of collusion associated with the restraint as well as the restraint’s rationales, history, and impact on the relevant market.”<sup>18</sup> During the Rule of Reason analysis, both the plaintiff and the defendant carry the burden of proof at different times.<sup>19</sup> Initially, the plaintiff carries the burden of proving the defendant’s actions have an anticompetitive effect on competition.<sup>20</sup> If successful, the defendant then bears the burden of demonstrating the procompetitive justifications of its conduct.<sup>21</sup> If the defendant can do so, then the plaintiff must show a less restrictive alternative than what the defendant is currently doing while still achieving the defendant’s goal.<sup>22</sup> Only at that point will

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11. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99–100 (1984).

12. *Id.* at 103–04.

13. *See, e.g., id.* at 100–01.

14. Derek Taylor, *Splitting the Uprights: How the Seventh Circuit’s American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 143, 150 (2010) (citing *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 n.16 (1977)).

15. McCann, *supra* note 5, at 737.

16. “A conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.” Nat’l Collegiate Athletic Ass’n, 468 U.S. at 103 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 690 (1978)).

17. Taylor, *supra* note 14, at 150.

18. McCann, *supra* note 5, at 737.

19. Taylor, *supra* note 14, at 150.

20. *Id.*

21. *Id.*

22. *Id.*

the court finally do a balancing test, measuring both the anticompetitive and procompetitive effects.<sup>23</sup>

*C. The Single Entity Defense and its Application to the NFL*

In 1984, *Copperweld Corp. v. Independence Tube Corp.* established the single entity defense.<sup>24</sup> The Court ruled:

[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly-owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.<sup>25</sup>

The Court compared the relationship between a parent and subsidiary to “horses drawing a vehicle under the control of a single driver.”<sup>26</sup> In other words, it does not make sense to allege that a parent and its subsidiary are engaged in collusion or some other form of conspiracy since their economic interests are so united. Since that ruling, the NFL has made several efforts to be recognized as a single entity for the purpose of Section One claims.

The NFL is an unincorporated 501(c)(6) association (a tax-exempt, nonprofit association) of separately-owned and operated franchises (“teams”).<sup>27</sup> Each franchise is of a varying type (most are corporations, partnerships, or sole proprietorships),<sup>28</sup> and they all engage in competitions of football games against each other.<sup>29</sup> The NFL would not exist if not for its thirty-two teams. While there have been other forms of football competition over the years, the NFL, without a doubt, is the most popular football league in the country and in the world.<sup>30</sup>

The NFL has gone to court several times arguing that it is a single entity. However, the Court has only limited the single entity defense to parent and subsidiary relationships, and has yet to fully extend the defense to professional sports leagues.<sup>31</sup> In 1978, Oakland Raiders owner Al Davis

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23. *Id.*

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

25. *Id.* at 771.

26. *Id.*

27. McCann, *supra* note 5, at 730.

28. *Id.* The Green Bay Packers is the only publicly-held team.

29. McCann, *supra* note 5, at 730.

30. *Id.*

31. *Copperweld*, 467 U.S. at 767 (“We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.”).

wanted to move his team to Los Angeles.<sup>32</sup> However, Davis ran into trouble with Rule 4.3 of Article IV of the NFL Constitution, which required that any change of city by an NFL franchise to the home territory of another franchise had to be approved unanimously by all NFL franchise owners.<sup>33</sup> Since Los Angeles was then considered the home territory of the Los Angeles Rams, Davis had to get unanimous approval.<sup>34</sup>

In 1980, when the franchise relocation of the Raiders was put up for a vote, twenty-two teams voted against the move; Davis then sued the NFL alleging that Rule 4.3 is a violation of Section One.<sup>35</sup> The NFL used the single entity defense, but the Ninth Circuit was fearful that granting single-entity status to the NFL would immunize them from any Section One claims.<sup>36</sup> The Ninth Circuit noted that the NFL, because of its “unique structure,” is almost always precluded from being per se illegal and that any of its actions should be subject to the Rule of Reason.<sup>37</sup> Davis argued that Rule 4.3 is anticompetitive because it effectively allows a franchise to operate as a monopoly in its home territory and it forecloses the opportunity for another team to enter.<sup>38</sup> The NFL argued that Rule 4.3 was implemented to allow a franchise to prosper and aid the NFL in its “geographical scope.”<sup>39</sup> The Ninth Circuit found that there were no procompetitive benefits to Rule 4.3, and that the market, not franchise owners, should determine whether a territory can handle more than one franchise.<sup>40</sup> The court found that the “NFL clubs do compete with one another off the field as well as on,” and therefore the NFL is not entitled to single-entity status.<sup>41</sup>

Over the years, several other cases emerged confirming that the NFL cannot be considered a single entity for Section One immunity purposes.<sup>42</sup>

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32. *L.A. Memorial Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1385 (9th Cir. 1984).

33. *Id.* at 1384.

34. *Id.* at 1385.

35. *Id.*

36. *Id.* at 1388 (quoting *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982)) (“To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects.”).

37. *Id.* at 1392.

38. *Id.* at 1395.

39. *See id.* at 1395–96.

40. *See id.* at 1397.

41. *Id.* at 1390.

42. *See, e.g., Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (“NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1.”). *But cf.*

However, recently the NFL thought it finally achieved the single-entity status it had coveted for many years. Until 2001, the NFL allowed its teams to sell nonexclusive licensing rights to multiple apparel companies.<sup>43</sup> The process began to take a turn for the worse when the NFL realized that there was too much supply relative to the demand; the proliferation of licenses resulted in “too many products in too many stores, thereby creating an ‘inventory glut.’”<sup>44</sup> The NFL decided the best way to fix this over-licensing problem was to grant an exclusive license to a single company for all the teams’ apparel, which they awarded to Reebok in 2002 for \$250 million for a ten-year contract, with any profits from apparel being shared equally among all the teams.<sup>45</sup> American Needle, which had a nonexclusive license with the Saints to produce apparel bearing the Saints logos, sued under a Section One claim.<sup>46</sup> At the district level, the court found that in respect to the licensing of their intellectual property rights, the NFL and its teams “have so integrated their operations that they should be deemed to be a single entity. . . .”<sup>47</sup> On appeal, a three-judge panel on the Seventh Circuit unanimously affirmed.<sup>48</sup> Noting that each team “share[s] a vital economic interest in collectively promoting NFL football,” the Seventh Circuit ruled that “though the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity.”<sup>49</sup>

Finally finding a means to achieving the single-entity status it had desired for years, the NFL took the unconventional approach of appealing the Seventh Circuit’s decision (American Needle also appealed) even though it had prevailed at the lower levels, in hopes of being recognized as a single entity for *all* purposes and not just for this singular instance involving American Needle.<sup>50</sup> The Supreme Court reversed the Seventh

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Chi. Prof'l Sports, Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996) (suggesting that single entity status for a professional sports league is appropriate for certain facets such as “when selling broadcast rights to a network in competition with a thousand other producers of entertainment . . .”).

43. *Am. Needle, Inc. v. New Orleans La. Saints*, 385 F. Supp. 2d 687, 689 (N.D. Ill. 2005).

44. McCann, *supra* note 5, at 733 (quoting MARK YOST, *TAILGATING, SACKS, AND SALARY CAPS* 126–27 (2006)).

45. YOST, *supra* note 44, at 128.

46. *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007).

47. *Id.* at 943.

48. *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008).

49. *Id.* at 743.

50. See McCann, *supra* note 5, at 734. “American Needle filed a petition for a writ of certiorari, while the NFL’s request came in its brief in response to American Needle.” *Id.* at

Circuit's decision, noting even though revenue from apparel was shared equally among the teams, "[i]f the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel 'could evade the antitrust law simply by creating a "joint venture" to serve as the exclusive seller of their competing products.'"<sup>51</sup> The Court observed, "The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action."<sup>52</sup> The Court did acknowledge that some decisions by the NFL require an agreement among the thirty-two teams.<sup>53</sup> However, the Court seemed to limit these types of collective NFL decisions to those that are absolutely essential to the functioning of the league, such as rules of the game, scoring, and determinations of salary caps.<sup>54</sup>

### III. FOOTBALL ON TELEVISION

#### A. *The Origins of the NFL on Broadcast Television*

The NFL, which originally consisted of just ten teams, was founded in 1920 in a Canton, Ohio "Hupmobile"<sup>55</sup> showroom.<sup>56</sup> While the first several decades of the NFL brought about much success<sup>57</sup> and disappointment,<sup>58</sup> the league proved popular enough to warrant contracts with broadcast stations to air its games on television.<sup>59</sup> At first, during the early 1950s, each team contracted individually with local broadcast stations to telecast

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734 n.43.

51. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2215 (2010) (quoting *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring)).

52. *Id.* at 2212.

53. *Id.* at 2216 ("The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.").

54. *Id.*

55. Hupmobile was an automobile built by the Hupp Motor Company from 1909 to 1940.

56. *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1343 (2d Cir. 1988). The NFL was originally named the American Professional Football Association, until changing its name to the National Football League in 1922. *Id.*

57. By 1960, the NFL was comprised of twelve teams located in several large markets. *See id.* at 1343–44.

58. Former Commissioner Pete Rozelle noted that "41 franchises failed in the first 41 years of the League's existence." *Id.* at 1343 (quoting Transcript of Proceedings at 55, *United States v. Nat'l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961) (No. 12808)).

59. *See id.* at 1346; *see also* Ross C. Paolino, *Upon Further Review: How NFL Network is Violating the Sherman Act*, 16 *SPORTS LAW. J.* 1, 6–7 (2009).



their games. Afraid that over-competition for attention of each team was going to bankrupt several of the league's teams, the NFL added Article X to its by-laws, which prohibited a team to broadcast its game, through radio and television, into the market of another team, unless permission was granted by the home club.<sup>60</sup> Therefore, each team had a seventy-five mile radius to which it could broadcast the game without fear that another team would broadcast its game on a different station within the same market (e.g., The Detroit Lions had the exclusive right over a seventy-five mile radius to broadcast the team's game).<sup>61</sup> Although the NFL believed that Article X would assist in enhancing the popularity of the league, it also made the NFL subject to an antitrust lawsuit by the Department of Justice.<sup>62</sup>

In *NFL I*, Judge Grim noted that the NFL is "truly a unique business enterprise. . . ."<sup>63</sup> While NFL teams "[o]n the playing field . . . must compete as hard as they can all the time," it is also important that they "must not compete too well with each other in a business way."<sup>64</sup> Allowing a team to have a monopoly on local broadcasting rights within its home territory, the NFL argued, would be the only way to ensure that every team, including the less talented ones, would be able to build a strong fan base and generate revenue.<sup>65</sup> Otherwise, "the stronger teams would be likely to drive the weaker ones into financial failure," and "eventually the whole league, both the weaker and the stronger teams, would fail . . . ."<sup>66</sup> At the time, most revenue for an NFL team was generated through stadium ticket sales, and the NFL argued that Article X promoted stadium attendance.<sup>67</sup> While finding the outside blackout rule of Article X—that no team could broadcast its game into the territory of a team that was playing at home—to be a legal restraint of trade because "the telecast of outside games into home territories adversely affects the attendance at home games,"<sup>68</sup> Judge Grim found unpersuasive the NFL's argument that restricting the telecast of all outside games when the home team was playing an away game would result in greater stadium attendance for home games:

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60. *United States v. Nat'l Football League (NFL I)*, 116 F. Supp. 319, 321 (E.D. Pa. 1953), *superseded by statute*, Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732, *as recognized in* *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299 (1999).

61. *Id.*

62. *Id.*

63. *Id.* at 326.

64. *Id.* at 323.

65. *Id.* at 326.

66. *Id.* at 323.

67. *Id.* at 326–27.

68. *Id.* at 325.

It is obvious that on a day when the home team is playing an away game there is no gate attendance to be harmed back in its home area and the prohibition of outside telecasts within its home area cannot serve to protect gate attendance at the away game, which is played in the opponent's home territory.<sup>69</sup>

Even with *NFL I*'s restrictions, the NFL was still able to expand in popularity, eventually leading to a deal with the Columbia Broadcasting System ("CBS") in the mid 1950s to broadcast "certain NFL regular season games for \$1.8 million per year."<sup>70</sup> As stated above, during this period, broadcast rights to games were controlled by the individual teams.<sup>71</sup> The Cleveland Browns even organized its own network.<sup>72</sup> In 1961, Commissioner Rozelle began to fear that the teams in larger television markets had more money, which would eventually lead to destruction of the league's competitive balance.<sup>73</sup> Rozelle believed that in the long run, the "competitive imbalance . . . would diminish the overall attractiveness of the NFL's product."<sup>74</sup> Following suit of its main competitor, the American Football League ("AFL"),<sup>75</sup> the NFL decided to pool its broadcast rights together in the form of a multimillion dollar contract with CBS.<sup>76</sup> The NFL filed a petition to Judge Grim to determine whether his ruling in *NFL I* barred the NFL-CBS pooled-broadcast agreement.<sup>77</sup>

In *NFL II*, Judge Grim analyzed the portion of the NFL-CBS contract that allowed CBS to determine which games would be telecast in which areas.<sup>78</sup> Section V of the Final Judgment of *NFL I* enjoined the NFL from making any agreements among the teams that had "the purpose or effect of restricting the areas within which broadcasts or telecasts of games . . . may be made."<sup>79</sup> Because CBS had the power to determine where each game was being telecast, resulting in an agreement among all the teams of a restriction on NFL games, Judge Grim found that the NFL's contract with CBS was an unreasonable restraint of trade and therefore in violation of the

69. *Id.* at 326.

70. *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1346 (2d Cir. 1988).

71. *Id.*

72. Paolino, *supra* note 59, at 7.

73. *U.S. Football League*, 842 F.2d at 1346

74. *Id.* at 1346.

75. The AFL later merged with the NFL in 1966. *Id.* at 1344.

76. Paolino, *supra* note 59, at 7. Instead of each individual team selling its own broadcast rights, the NFL would sell every team's games as one package. *Id.* CBS would then determine where each game would be televised. *Id.*

77. *United States v. Nat'l Football League (NFL II)*, 196 F. Supp. 445, 446 (E.D. Pa. 1961).

78. *Id.* at 447.

79. *Id.*

holding in *NFL I*.<sup>80</sup> Judge Grim enjoined the NFL's contract with CBS, as well as any other type of similar contract that involved pooling revenues.

*B. The Sports Broadcasting Act of 1961*

In response to *NFL I* and *NFL II*, the NFL lobbied Congress for a special exemption from violations of the Sherman Act.<sup>81</sup> Soon after the ruling came down in *NFL II*, Congress enacted the Sports Broadcasting Act of 1961 ("SBA").<sup>82</sup> It states:

The antitrust laws, as defined in section 1 of the Act of October 15, 1914 [Section One of the Sherman Act] . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.<sup>83</sup>

In essence, it granted all the stated sports leagues an exemption from antitrust violations when entering into pooled-rights contracts.<sup>84</sup> Of importance is the phrase "sponsored telecasting," which courts have construed to mean that the SBA only applies to broadcast television and not to cable or satellite.<sup>85</sup>

The rest of the provisions of the SBA both expand and limit the television power of sports leagues. Section 1292 permits a blackout of a team's game only if that team is a home team playing at home on that day.<sup>86</sup> The NFL still utilizes this exception when all the tickets for a home game are not sold out.<sup>87</sup> Section 1293, which states that the SBA does not apply to the broadcast of professional football games on Friday nights or all

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80. *Id.* ("Clearly this provision restricts the individual clubs from determining 'the areas within which . . . telecasts of games . . . may be made . . . ' since defendants [NFL] have by their contract given to CBS the power to determine which games shall be telecast and where the games shall be televised.").

81. 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, 1245 (2005).

82. 15 U.S.C. §§ 1291–95 (2006).

83. *Id.* § 1291.

84. *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1347 (2nd Cir. 1988).

85. See discussion *infra* Part IV.A.

86. 15 U.S.C. § 1292.

87. For example, if the Chicago Bears are playing a home game but the tickets to Soldier Field (the Bears' stadium) are not sold out, the NFL reserves the right to black out the telecast of the game to the Chicago market that week.

day Saturday,<sup>88</sup> was enacted in order to protect the telecast of high school and college football games from having to compete against professional football games.<sup>89</sup> Section 1294 emphasizes that the antitrust immunity applies only to the rights granted in Section 1291, and it does not extend to any other “act, contract, agreement, rule, course of conduct, or other activity” by a professional sports league.<sup>90</sup>

### C. *Football on Television Today*

Using the exemptions granted to it from the SBA, the NFL made its first pooled-rights contract with CBS.<sup>91</sup> For the 1962 and 1963 seasons, CBS paid \$4.65 million to be the exclusive broadcaster of NFL games.<sup>92</sup> CBS once again outbid all the other networks with an offer of \$14.1 million for the right to broadcast the 1964 and 1965 seasons.<sup>93</sup> In 1964, the NFL’s chief competitor, the AFL, entered into a five-year contract with NBC for \$36 million.<sup>94</sup> In 1966, Congress amended the SBA to confer antitrust immunity on the NFL-AFL merger, but only on the condition that the NFL would have broadcast contracts with at least two networks.<sup>95</sup>

In 1969, ABC took one of the biggest gambles in broadcast history. Baseball was still more popular than football at the time, and Pete Rozelle was hoping to expand the popularity of the NFL by airing a primetime game on Monday nights.<sup>96</sup> During a period when there was more or less only three channels to watch, both NBC and CBS declined the opportunity to broadcast football on Mondays, fearing that women would not watch and men would tune in only if either their home team was playing or it was a tight game between two popular teams. ABC jumped at the opportunity, however, and turned football into a spectacle by creating *Monday Night Football*.<sup>97</sup> In its initial broadcast, *Monday Night Football* used nine cameras instead of the usual three or four, placed one of those cameras on a “souped-up golf cart” to speed along the sidelines, used handheld cameras

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88. 15 U.S.C. § 1293.

89. *U.S. Football League*, 842 F.2d at 1347. High school and college football games are played and telecast primarily on Friday nights and Saturdays, while most professional football games are telecast on Sundays. *Id.*

90. 15 U.S.C. § 1294.

91. *U.S. Football League*, 842 F.2d at 1347.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Kevin Cook, *The Biggest Gamble in Sports History*, PLAYBOY, Oct. 2010, at 92, 94.

97. *Id.*

to catch tight shots, put “[s]hotgun mikes” all over the field to catch the sounds and essence of the game, and displayed split-screen images and slow-motion replays.<sup>98</sup> ABC producer Roone Arledge lived up to his promise that he was “going to add show business to sports!”<sup>99</sup> The first game, a match between the New York Jets—led by quarterback and “first ever TV-era sex-symbol jock” Joe Namath—and the Cleveland Browns, garnered triple the amount of viewers of the previous year’s Monday night slate on ABC.<sup>100</sup> A third of all television viewers, including ten million women (who made up forty percent of the audience), tuned in to watch the game.<sup>101</sup> While Namath ended the game by throwing an interception returned for a touchdown by the Browns, the NFL did not fumble this huge opportunity. It was clear that football had entered the American zeitgeist and its popularity would only continue to grow, eventually surpassing baseball.<sup>102</sup>

Currently, the NFL has broadcast licenses with CBS, Fox, NBC, and ESPN. CBS pays \$622.5 million per year, Fox pays \$712.5 million per year, NBC pays \$600 million per year, and ESPN pays \$1.1 billion per year.<sup>103</sup> Both CBS and Fox get the right to telecast games on Sundays at 1 p.m. (EST) and 4:15 p.m. (EST). As part of the deals with CBS and Fox, the NFL attaches some requirements, which add some restrictions within the confines of Section 1292. For instance, the NFL requires that the stations broadcast the local team’s home game, but only if the home team is playing an away game or if the home team sold out its stadium attendance that week for a home game.<sup>104</sup> However, if a home team does not sell out all of its stadium’s tickets, the station must blackout the home team’s game and display another game instead.<sup>105</sup> NBC has the right to be the sole telecaster of a primetime game every Sunday night on a program known as *Sunday Night Football*. ESPN, which along with ABC, is owned by the Walt Disney Company, is the exclusive telecaster of a weekly primetime game every Monday night.<sup>106</sup> Because ESPN is a cable channel, and

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98. *Id.*

99. *Id.*

100. *Id.* at 94.

101. *Id.* at 106.

102. *Id.*

103. *NFL Media Rights Deals for '07 Season*, SPORTSBUSINESS DAILY (Sept. 6, 2007), available at <http://www.sportsbusinessdaily.com/article/114714>.

104. *NFL Blacks Out Game on KIRO 7*, KIRO TV (2011), <http://www.kirotv.com/station/17459704/detail.html> (last visited Nov. 13, 2011).

105. *See With Fewer Sellouts, NFL's Blackout Rule Under Fire*, TIME, (Sept. 10, 2009), available at <http://www.time.com/time/business/article/0,8599,1921401,00.html>. This policy is regularly referred to as the “Blackout Rule.”

106. Cook, *supra* note 96, at 112. Walt Disney Corp. determined that it would be more

therefore generates revenue not only from “sponsored telecasting,”<sup>107</sup> but also from cable subscriptions, there have been arguments that the NFL-ESPN contract does not fall within the antitrust exemption granted by the SBA.<sup>108</sup>

In 2003, the NFL developed its own channel, the NFL Network.<sup>109</sup> Besides displaying coverage of the NFL and highlights from the previous week, the NFL Network also telecasts high school and college football games, Arena Football League games, and Canadian Football League games.<sup>110</sup> The NFL Network has gained notoriety, because it has retained the right to air eight games (and potentially eventually sixteen games) over the course of the season on Thursday nights.<sup>111</sup> The NFL Network is in a major dispute with many cable providers, and as a result, most providers, including Bright House Networks, Cablevision, and Time Warner Cable, do not carry the NFL Network. Comcast placed the channel as part of a premium (and more expensive) sports package.<sup>112</sup> The NFL Network has come under fire from Congress because the games it telecasts on its network may be a violation of antitrust laws.<sup>113</sup> Not only is the NFL Network, like ESPN, a nonbroadcast channel, and therefore potentially in violation of the “sponsored telecasting” provision, but the channel is also available to a very limited number of households and it costs more than a basic cable package.<sup>114</sup>

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profitable for ABC to return back to regular programming (e.g., shows such as *Desperate Housewives*) and collect money from advertising, while telecasting *Monday Night Football* on the cable network ESPN and collecting revenue from cable subscriptions. *Id.*

107. 15 U.S.C § 1291 (2006).

108. For an excellent and in-depth discussion of the potential antitrust violation, see Stephen F. Ross, *An Analysis of Sports League Contracts with Cable Networks*, 39 Emory L.J. 463 (1990).

109. See Paolino, *supra* note 59, at 3.

110. *NFL Network Will air Canadian Football League Games in 2010*, NFL NETWORK (June 30, 2010, 9:25 PM), <http://www.nfl.com/news/story/09000d5d818ea178/article/nfl-network-will-air-canadian-football-league-games-in-2010>.

111. See *Report: New CBA Would Include 16-Game Thursday Night TV Package*, PROFOOTBALLTALK, <http://profootballtalk.nbcsports.com/2011/06/21/report-new-cba-would-include-16-game-thursday-night-tv-package/> (last visited Nov. 13, 2011).

112. *NFL, Comcast Settle NFL Network Carriage Dispute, Agree to 10-Year Deal*, NFL NETWORK (2009), <http://www.nfl.com/nflnetwork/story?id=09000d5d81065fa0&template=withoutvideo&confirm=true> (last visited Nov. 13, 2011). The cable providers believe that the NFL is requesting too high of a cost per month to be part of the basic cable package. For a more in-depth discussion of the dispute, see David Hutson, *Paying the Price for Sports TV: Preventing the Strategic Misuse of the FCC's Carriage Regulations*, 61 FED. COMM. L.J. 407 (2009).

113. Mike Reiss, *Kerry Presses on NFL Network*, BOS. GLOBE, (Dec. 6, 2007 7:04 PM), [http://www.boston.com/sports/football/patriots/reiss\\_pieces/2007/12/kerry\\_presses\\_t.html](http://www.boston.com/sports/football/patriots/reiss_pieces/2007/12/kerry_presses_t.html).

114. See R. Thomas Umstead, *NFL Network is Still Plugging Holes*, MULTICHANNEL NEWS (Nov. 19, 2006, 7:00 PM), [http://www.multichannel.com/article/86891NFL\\_](http://www.multichannel.com/article/86891NFL_)

Despite its somewhat convoluted history of blackouts and legal battles, it is clear that professional football is currently the most popular sport in the United States. The 2010 season's Super Bowl<sup>115</sup> between the Green Bay Packers and the Pittsburgh Steelers had an estimated 111 million viewers, the most watched program in television history.<sup>116</sup> Even the first NFL preseason game of the 2010–2011 season had more viewers than the average number of viewers who watched the 2009 World Series between the New York Yankees and Philadelphia Phillies, teams from two of the country's largest television markets.<sup>117</sup>

#### *D. DirecTV's Sunday Ticket Package*

DirecTV is a direct broadcast satellite service that transmits digital satellite television and audio to households in the United States, Latin America, and the Caribbean.<sup>118</sup> Over its sixteen years of existence, the satellite provider has accumulated about 18.4 million subscribers, second only to Comcast.<sup>119</sup> A DirecTV subscription in the United States, before any extra packages, costs between \$29.99 and \$88.99 per month, depending on the number of channels included and the additional charge of High-Definition (HD) channels and a Digital Video Recorder (DVR).<sup>120</sup>

The NFL Sunday Ticket is an out-of-market sports package<sup>121</sup> that carries all NFL games carried by Fox and CBS.<sup>122</sup> Therefore, a viewer can choose to watch any of the thirteen NFL afternoon games, instead of being restricted to the games being telecast by the local Fox and CBS affiliates.

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Network\_Is\_Still\_Plugging\_Holes.php.

115. The NFL's championship game.

116. Bill Carter, *Super Bowl Ratings Cap Record Year for N.F.L.*, *Media Decoder*, N.Y. TIMES (Feb. 7, 2011, 4:18 PM), <http://mediadecoder.blogs.nytimes.com/2011/02/07/super-bowl-ratings-cap-record-year-for-n-f-l/>.

117. Derek Crouse, *2010 NFL TV Ratings: The MLB Is Sliding Fast, NFL Is America's New Pastime*, BLEACHER REPORT (Sept. 15, 2010), <http://bleacherreport.com/articles/463256-2010-nfl-tv-ratings-the-mlb-ratings-sliding-fast-nfl-is-americas-new-pastime>.

118. See Mike Reynolds, *DirecTV Taps PepsiCo Exec as CEO*, MULTICHANNEL NEWS (Nov. 18, 2009, 2:33 PM), [http://www.multichannel.com/article/389724-DirecTV\\_Taps\\_PepsiCo\\_Exec\\_White\\_As\\_CEO.php](http://www.multichannel.com/article/389724-DirecTV_Taps_PepsiCo_Exec_White_As_CEO.php); *About Us: Company Profile*, DIRECTV, <http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=1400012> (last visited Nov. 13, 2011).

119. *Id.*

120. DIRECTV | ENGLISH PACKAGES, [http://www.directv.com/DTVAPP/new\\_customer/base\\_packages.jsp?footernavtype=-1&lpos=header](http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?footernavtype=-1&lpos=header) (last visited Nov. 13, 2011).

121. An out-of-market sports package is a form of subscription television service that broadcasts sporting events to areas that do not have the same broadcasts in its local market.

122. DIRECTV | SPORTS: NFL SUNDAY TICKET OVERVIEW, <http://www.directv.com/DTVAPP/content/sports/nfl?footernavtype=-1> (last visited Nov. 13, 2011).

This service appeals to fans who live outside the market of their favorite team, viewers who engage in fantasy football or gambling, and to those who enjoy watching and analyzing as much football as possible.<sup>123</sup> It should be noted, however, that the blackout rule still applies to Sunday Ticket subscribers.<sup>124</sup> Therefore, home games of a local market team will be blacked-out to a subscriber of Sunday Ticket who lives in that market if the stadium does not sell out.

Sunday Ticket launched in 1994, and since then it has had an exclusive contract with DirecTV to be the sole distributor of the service in the United States.<sup>125</sup> Currently, DirecTV has about two million subscribers signed up for Sunday Ticket, costing each one about \$300 per season.<sup>126</sup> In early 2009, DirecTV renewed its contract with the NFL to be the exclusive carrier of Sunday Ticket through the 2014 season for a cost of one billion per year.<sup>127</sup> Sunday Ticket is an extremely valuable package that cable companies would love to be a part of, whether or not they must share the package with any competing companies.<sup>128</sup> In 2002, when the NFL's first contract with DirecTV expired, several cable companies acting as a consortium offered \$400 million to \$500 million for the nonexclusive rights to carry Sunday Ticket.<sup>129</sup> The NFL rejected their bid and instead chose to renew with DirecTV, giving it a five-year exclusive rights deal to Sunday Ticket for about \$400 million per year.<sup>130</sup> The NFL claims that the cable companies' bid came in too late, while the cable companies believe that the NFL was never prepared to make a deal with them due to the

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123. *NFL Sunday Ticket*, SATELLITE TV BLOG (June 26, 2008, 11:52 AM), <http://www.dish-television.com/2008/06/26/direct-tv-nfl-sunday-ticket-package/>.

124. DIRECTV | NFL GAME AVAILABILITY (BLACKOUTS) GENERAL INFO, [http://support.directv.com/app/answers/detail/a\\_id/335/kw/blackout](http://support.directv.com/app/answers/detail/a_id/335/kw/blackout) (last visited Nov. 13, 2011).

125. Mike Reynolds, *NFL Scores with \$4 Billion DirecTV Sunday Ticket Extension*, MULTICHANNEL NEWS (Mar. 23, 2009, 7:08 PM), [http://www.multichannel.com/article/190542-NFL\\_Scores\\_With\\_4\\_Billion\\_DirecTV\\_Sunday\\_Ticket\\_Extension.php](http://www.multichannel.com/article/190542-NFL_Scores_With_4_Billion_DirecTV_Sunday_Ticket_Extension.php).

126. Mike Reynolds, *Sunday Ticket 'Part and Parcel' of DirecTV Brand: Chang*, MULTICHANNEL NEWS (Mar. 24, 2009, 12:22 PM), [http://www.multichannel.com/article/190605-Sunday\\_Ticket\\_Part\\_And\\_Parcel\\_Of\\_DirecTV\\_Brand\\_Chang.php](http://www.multichannel.com/article/190605-Sunday_Ticket_Part_And_Parcel_Of_DirecTV_Brand_Chang.php); see also HERITAGE CENTER, *1994, DirecTV is Born*, [http://history.gmheritagecenter.com/wiki/index.php/1994,\\_DirecTV\\_is\\_Born](http://history.gmheritagecenter.com/wiki/index.php/1994,_DirecTV_is_Born) (last visited Nov. 13, 2011).

127. *NFL Scores*, *supra* note 125.

128. Richard Sandomir, *Cable Plays Hardball with the N.F.L.*, N.Y. TIMES (Nov. 14, 2007), available at [http://www.nytimes.com/2007/11/14/sports/football/14sandomir.html?\\_r=2](http://www.nytimes.com/2007/11/14/sports/football/14sandomir.html?_r=2).

129. *Id.*

130. *Id.*



ongoing dispute regarding cable companies' carriage of the NFL Network.<sup>131</sup>

As part of the new deal, DirecTV secured the rights to make the package available to those who cannot receive satellite service, due to either living out of service-area or because an apartment landlord prohibits any satellite dishes.<sup>132</sup> This service, which is set to debut in 2012 nationwide, would make the Sunday Ticket available on-line via broadband to those who register and would cost the regular amount the Sunday Ticket costs plus an extra charge of \$100 (\$50 for residents of Manhattan).<sup>133</sup> The Sunday Ticket also includes a channel called Red Zone, which, besides DirecTV, has been made available only to Comcast and Dish Network.<sup>134</sup> The Red Zone offers live in-game looks at all games being played where a scoring opportunity is about to occur.<sup>135</sup> Recently, DirecTV has added a few other features to Sunday Ticket, including a statistics board to track fantasy players and a scoreboard of all the games.<sup>136</sup>

#### IV. ANALYSIS: WHY SUNDAY TICKET SHOULD BE FOUND TO VIOLATE ANTITRUST LAWS

The antitrust implications of Sunday Ticket have been a point of discussion not only among some in the legal community,<sup>137</sup> but also within Congress.<sup>138</sup> Former chairman of the Senate Judiciary Committee Senator Arlen Specter has threatened to introduce legislation that would limit many of the antitrust exemptions granted to the NFL, namely the SBA, if the NFL did not voluntarily remove the exclusivity agreement of Sunday Ticket with DirecTV.<sup>139</sup> While the exemptions remain in place, this still

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131. *Id.*

132. Todd Spangler, *DirecTV Moves to Take Manhattan with Broadband Sunday Ticket: Satellite Leader Hikes \$250 Package into Play with Marketing Support*, MULTICHANNEL NEWS (Aug. 28, 2009, 2:20 PM), [http://www.multichannel.com/article/338775-DirecTV\\_Moves\\_To\\_Take\\_Manhattan\\_With\\_Broadband\\_Sunday\\_Ticket.php](http://www.multichannel.com/article/338775-DirecTV_Moves_To_Take_Manhattan_With_Broadband_Sunday_Ticket.php).

133. *Id.*

134. *Id.*

135. Press Release, DirecTV, NFL Network Carriage Agreement Extended (Mar. 24, 2009), available at <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P5590122>.

136. DIRECTV | SPORTS: NFL SUNDAY TICKET OVERVIEW, <http://www.directv.com/DTVAPP/content/sports/nfl?footernavtype=-1> (last visited Nov. 13, 2011).

137. See, e.g., Bradley W. Crandall, *The DirecTV NFL Sunday Ticket: An Economic Plea for Antitrust Law Immunity*, 79 WASH. U. L.Q. 287 (2001).

138. See *NFL Notebook: Exclusive Sports Packages Questioned*, PITTSBURGH POST-GAZETTE, Dec. 8, 2006, at D-7, available at <http://news.google.com/newspapers?nid=11129&dat=20061208&id=s6QkAAAAIBAJ&sjid=HXIDAAAAIBAJ&pg=6792,3326695>.

139. See *id.* Senator Specter is a senator from Pennsylvania, which is the location of the

does not mean that the NFL is safe from further investigation of antitrust violations.

The exclusive licensing agreement the NFL has with DirecTV may or may not be illegal, but proving that it violates the Sherman Antitrust Act will be very difficult. Demonstrating that exclusive licenses and contracts violate antitrust laws is very difficult due to the fact that it is very easy for a defendant to show competitive benefits, such as reduced costs for the seller and guaranteed demand for the producer.<sup>140</sup> Instead, by using the SBA in connection with the Sherman Antitrust Act and previous holdings, Congress could force the NFL to make Sunday Ticket available to all carriers.

*A. Sunday Ticket Is Not Exempt Under the Sports Broadcasting Act*

One of the largest points of contention of the SBA, as well as the turning point for determining whether Sunday Ticket is in violation of SBA, is the meaning of the term “sponsored telecasting.”<sup>141</sup> As mentioned earlier, the SBA was enacted to facilitate the sale of packaged broadcast rights of NFL games.<sup>142</sup> At the time of the SBA’s enactment in 1961, the current model for television could not even have been imagined. Three networks, which were free to watch by anyone with a television set, primarily dominated the airwaves and the notion of paying for a subscription to watch hundreds of channels available to consumers through a cable or satellite system was a pipe dream. In 1998, the courts finally decided whether satellite services, namely DirecTV, fell within the protections of the SBA.<sup>143</sup>

In *Shaw v. Dallas Cowboys Football Club*, Charles Shaw, Bret D. Schwartz, and Steven Promislo brought a class action suit against several NFL teams and the NFL itself alleging that the joint agreement for Sunday Ticket with DirecTV is a violation of Section One.<sup>144</sup> The plaintiffs alleged that the agreement between the NFL and DirecTV “has restricted the options available to fans for viewing non-network broadcasts of NFL

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headquarters for Comcast. Because of this connection, some have questioned Senator Specter’s motives in regards to his attacks on the SBA. See, e.g., Dave Zirin, *The Ties that Bind: Specter’s Interest in Spygate Doesn’t Pass Smell Test*, SPORTS ILLUSTRATED (Feb. 27, 2008, 3:35 PM), [http://sportsillustrated.cnn.com/2008/writers/dave\\_zirin/02/27/spygate/](http://sportsillustrated.cnn.com/2008/writers/dave_zirin/02/27/spygate/).

140. Matthew K. Finkelstein & Colleen Lagan, “Not for You”; Only for Ticketmaster: Do Ticketmaster’s Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?, 10 ST. JOHN’S J.L. COMM. 403, 409–10 (1995).

141. 15 U.S.C. § 1291 (2006).

142. See discussion *supra* Part III.B.

143. *Shaw v. Dall. Cowboys Football Club*, No. 97-5184, 1998 U.S. Dist. LEXIS 9896 (E.D. Pa. 1998).

144. *Id.* at \*1.

games, thereby reducing competition and artificially raising prices.”<sup>145</sup> Furthermore, the plaintiffs stated that “sponsored telecasting” only pertains to services that receive revenue solely through sponsorships (advertising) and in no way is dependent on viewers paying a fee in order to watch the program.<sup>146</sup> The NFL argued, in attempting to dismiss the plaintiffs’ claim, that Sunday Ticket is exempted because it “is simply a sale of their residual rights in the games which were broadcast on ‘sponsored telecasts,’ and, so, the package is a sale of ‘part of the rights’ to the ‘sponsored telecasts.’”<sup>147</sup> In other words, because the NFL still owns a partial right to the games available on broadcast television, Sunday Ticket is “simply a vehicle for selling these retained rights.”<sup>148</sup>

Stating that any antitrust exemption must be construed narrowly, Judge Gawthorp found that the NFL’s sale of Sunday Ticket did not fall within the protections of the SBA.<sup>149</sup> Judge Gawthorp ruled that “sponsored telecasts” only refer to the “more traditional corporate-sponsored commercial context, rather than the pre-paid, commercial-free-package context.”<sup>150</sup> Even though the NFL games are originally telecast on broadcast television and the telecasts air (national) television ads, Judge Gawthorp feared exempting Sunday Ticket would allow the NFL to “circumvent the statutory confines . . . simply by always using earlier broadcasts with commercials.”<sup>151</sup> Judge Gawthorp also looked to the legislative history of the SBA. He noted that the SBA was enacted specifically to overturn *NFL II*’s ruling that prohibited the packaged sale of games to CBS.<sup>152</sup> Furthermore, when the SBA was being passed through Congress, Commissioner Rozelle was asked by the House of Representatives, “You understand . . . that this Bill covers only the free telecasting of professional sports contests, and does not cover pay T.V.?” to which Rozelle responded under oath, “Absolutely.”<sup>153</sup> The NFL recognized that the Sunday Ticket arrangement did not fall within the protections, but that did not necessarily mean that the league was in violation of Section One. Instead of finding out through trial, the NFL determined that the best

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145. *Id.* at \*3.

146. *Id.* at \*6.

147. *Id.* at \*7.

148. *Id.*

149. *Id.* at \*9.

150. *Id.*

151. *Id.*

152. *Id.* at \*10.

153. *Id.* at \*11 (citing *Telecasting of Professional Sports Contests: Hearing on H.R. 8757 Before the Antitrust Subcomm. of the H. Comm. on the Judiciary*, 87th Cong. 36 (1961) (statement of Pete Rozelle, Commissioner, National Football League)).

long-term strategy was to preserve power and settle. After the Court of Appeals affirmed that the plaintiffs could continue with their lawsuit against the NFL,<sup>154</sup> the NFL settled before the issue could be pressed further. As part of the settlement, DirecTV made available from 2001 to 2004 a “Single Sunday Package,” which allowed a DirecTV consumer to purchase a single week’s slate of games (for a reduced rate) instead of being forced to purchase the entire Sunday Ticket package.<sup>155</sup> Furthermore, the 1.8 million members of the class received \$7.5 million in cash to be divided evenly, in addition to attorneys’ fees and costs of administration.<sup>156</sup>

*B. The NFL as a Single Entity for the Sale of Television Rights*

The Supreme Court’s ruling in *American Needle* currently carries the greatest insight into the NFL’s status as a single entity. Unfortunately, the Court did not provide much clarity or insight into how it would treat the NFL in the future beyond its exclusive license with Reebok. One way to view the ruling is very narrowly. If *American Needle* is interpreted as only disallowing all the NFL teams coming together to grant an exclusive license to their intellectual property rights (i.e. team logos), then the Sunday Ticket deal would be permissible.

More likely, though, is that the Court gave some hints as to what is allowable and what is prohibited. In analyzing the Section One violation, the Court wrote that its decision is not based on “formalistic distinctions,” but instead on a “functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.”<sup>157</sup>

In determining whether the NFL can be treated as a single entity for the agreement with DirecTV, the NFL would have to show that its teams are not competitors within the television industry. On its face, it may seem that the teams are not in competition with one another; the more viewers that watch an NFL game, the greater the benefit for the NFL overall. However, in fact, if it were not for the pooling of the revenue from broadcast rights, there would be a lot of incentive for some teams to not contract with networks on their own and not share their profit with less valuable teams. Individual teams could sell the right to telecast their games

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154. *Shaw v. Dall. Cowboys Football Club*, 172 F.3d 299, 303 (3d Cir. 1999).

155. ATTENTION: PRESENT OR FORMER SUBSCRIBERS TO “NFL SUNDAY TICKET” (2001), <http://www.classactionlitigation.com/notices/cowboys.pdf>.

156. *Schwartz v. Dall. Cowboys Football Club*, 362 F. Supp. 2d 574, 575–76 (E.D. Pa. 2005).

157. Gregory J. Werden, *Initial Thoughts on the American Needle Decision*, THE ANTITRUST SOURCE 1, 1 (2010), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Aug10\\_Werden8\\_2f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug10_Werden8_2f.authcheckdam.pdf) (quoting *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2209 (2010)).

to various broadcasting, cable, or satellite outlets. Teams who are more successful would likely be compensated more highly than less successful teams for the right to broadcast their games. A team in a large market may even be able to create its own cable channel to telecast its games.<sup>158</sup> Furthermore, *NFL I* and *NFL II* already established that all the teams in the league cannot come together to form a joint contract for television purposes. Even if the practice of pooling revenue from television rights has been occurring now for over thirty years, the Court made clear that “a history of concerted activity does not immunize conduct from § 1 scrutiny.”<sup>159</sup> Instead, the Court said that the NFL will only be treated as a single entity for necessary purposes that require a “need to cooperate.”<sup>160</sup> Television rights do not fall within this need, and if it ever came to trial, a court would not likely say that the NFL is a single entity for television purposes.

### C. *Rule of Reason*

The final step in demonstrating that Sunday Ticket is in potential violation of Section One is determining that the agreement between the NFL and DirecTV does not pass the Rule of Reason. The Rule of Reason is very fact-intensive and it can be extremely difficult to predict its outcome.<sup>161</sup> The first step of the Rule of Reason is showing that the NFL's agreement with DirecTV has an anticompetitive effect. By keeping the agreement exclusive, there is a clear negative impact on competition. This is not to say that all exclusive licenses negatively affect competition, but one like the NFL's agreement with DirecTV serves no competitive purposes. There is no evidence to show that agreement was created to assure quality Sunday Ticket or to allow the NFL sufficient oversight or any other reasonable objective. Instead, it seems as if the agreement was created just to artificially raise the price of Sunday Ticket (and also potentially punish the cable companies for not carrying the NFL Network). By all the NFL teams colluding together to offer the package, they are preventing individual competition for a team to sell its own package.

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158. For example, the Yankees Entertainment and Sports (YES) Network is a cable channel originally partially owned and created by the New York Yankees and New Jersey Nets. The channel, available nationally on DirecTV and regionally on AT&T U-verse and Verizon FiOS, telecasts a variety of sporting events, with an emphasis on New York Yankees baseball games and New Jersey Nets basketball games. ABOUT THE YES NETWORK / CONTACT US, <http://web.yesnetwork.com/about/index.jsp> (last visited Nov. 13, 2011).

159. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2213 (2010).

160. *Id.* at 2206.

161. See generally Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 *GEO. MASON L. REV.* 827 (2009).

The NFL would then have to demonstrate the procompetitive justification of bundling all the NFL teams' games into a single package. One potential argument is that it allows the NFL to compete more efficiently with other similar packages offered by the NBA, NHL, and MLB. Furthermore, the NFL could argue that by offering the package as a bundle, it facilitates the process for consumers, who would likely want all the games.<sup>162</sup> There is a debate as to whether a court would accept these arguments as valid. However, if the argument is accepted, a potential plaintiff would have to show a less restrictive alternative while still achieving the NFL's goal, which is profit-maximization. The plaintiff has a number of options it could use to display a less restrictive alternative, such as letting teams contract individually with DirecTV and allowing consumers to determine which game they would choose to view, as opposed to forcing the consumer to buy the entire week's games.

*D. The Current Sunday Ticket Structure Hurts Consumers and Dissolution of the Exclusive Arrangement Can Help*

While the preceding sections were attacking Sunday Ticket for its antitrust implications based on the teams colluding together to restrain competition, the true objective is to make the package available to all carriers and end DirecTV's cartel-like hold over Sunday Ticket. By threatening the NFL with a charge of Section One violations, Congress would likely allow the NFL to continue its pooling-based method of Sunday Ticket as long as all consumers have access. The exclusive arrangement as currently set hurts consumers. First, the current subscribers of Sunday Ticket are seemingly paying an inflated price. Every few years, DirecTV is paying the NFL exponentially more money for the exclusive right to Sunday Ticket, and consumers are picking up the tab. While the free market dictates that consumers will only pay as much as a service or product is worth to them, this principle does not apply in this case. Sunday Ticket is only available through DirecTV and many NFL fans have no choice but to pay more than they think is fair. Even though other carriers have made offers that, when combined with the likely offers of other

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162. A similar argument was successful by the defendants in *Broadcast Music, Inc. v. Columbia System, Inc.* 441 U.S. 1 (1979). The defendants, licensors of bundled music publishing copyrights, argued that they were not in violation of antitrust laws because, in part, their service, bundling several copyrights together, "facilitate[d] dealings between copyright owners and those who desire to use their music." *Id.* at 10. However, that case is distinguishable from this issue. The owners of the music publishing copyrights were still able to "retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes." *Id.* at 11. On the other hand, no NFL owner could agree to individually license his or her team's own match on a weekly, or even seasonal, basis.

carriers, would be more than what DirecTV is currently paying, the NFL has balked for unknown reasons. Making Sunday Ticket nonexclusive would allow consumers a greater choice in choosing a carrier based on price.

Furthermore, DirecTV is not a high-quality product. Besides DirecTV's well-known inability to transmit signals during bad weather,<sup>163</sup> the company has also recently received a "D+" grade from the Better Business Bureau.<sup>164</sup> A large portion of DirecTV users subscribe merely because they are the only provider of Sunday Ticket; this disincentivizes DirecTV from making any adjustments to its quality since it knows it will always have a guaranteed subscriber base. By making Sunday Ticket available to all carriers, each carrier would have to raise its quality of product and service since each Sunday Ticket consumer would have a greater choice, as opposed to being forced to cope with DirecTV's deficiencies.

Finally, by allowing all carriers to be able to have access to Sunday Ticket, there would be greater innovation. Admittedly, DirecTV, as mentioned above, has added several amenities to Sunday Ticket, but competition from an opposing carrier would foster even greater innovation, not just by DirecTV but by all the carriers. Having each carrier compete for consumers would bring out the best ideas and further enhance the game-watching experience.

## V. CONCLUSION

Football has quickly become America's favorite sport. It is a game full of strategy, foresight, and intuition. The NFL would be wise to use these same attributes as it faces the upcoming future. Football is currently America's most popular sport, and people are clamoring every Sunday to watch as many games as possible. Instead of focusing on how to punish cable carriers, the NFL should be more concerned with making its games accessible to as many people as possible.

The NFL's exclusive arrangement with DirecTV seems to attach no benefits to anyone except DirecTV. In the end, only consumers are hurt, and they may not be willing to put up with it for much longer. All it takes is another angry customer to bring a suit similar to *Shaw* for the NFL to relinquish its stranglehold over Sunday Ticket. It would behoove the NFL

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163. Barnett, *Signal Loss Due to Rain or Snow*, DIRECTV RECEIVER TECHNICAL SUPPORT & TROUBLESHOOTING (Mar. 14, 2006, 1:12 AM), <http://forums.directv.com/pe/action/forums/displaythread?rootPostID=10135249>.

164. *BBB Business Review of DirecTV, Inc.*, BETTER BUSINESS BUREAU, <http://www.la.bbb.org/Business-Report/DirecTV-Inc-81000357> (last visited Nov. 13, 2011).

to voluntarily terminate the exclusive contract for publicity purposes, instead of being forced by Congress or a lawsuit.