

FROM *FEDERAL BASEBALL TO AMERICAN NEEDLE*: AN EMPIRICAL EXAMINATION  
OF THE TREATMENT OF PROFESSIONAL SPORT LEAGUES UNDER ANTITRUST  
LAW

by

CYNTRICE JURUSHA THOMAS

(Under the Direction of Thomas A. Baker, III)

ABSTRACT

The industry of professional sports has been somewhat of a predicament for courts to deal with under antitrust law. While Section One of the Sherman Antitrust Act makes it illegal for economic entities to combine, the unique nature of professional sport leagues requires member teams who would otherwise be economic competitors, to cooperate to some extent. The nature of an industry can influence how law is applied, and an empirical analysis of the characteristics of a particular industry can provide further guidance in the role of antitrust law. While scholars have argued for professional sport leagues to be treated as single entities, the Supreme Court ruled against the single entity status in *American Needle*. This has made leagues vulnerable to challenges under Section One. This exposure raises a question: because of the uniqueness of sport leagues, how has their conduct been analyzed under Section One of the Sherman Act? Content analysis was used to uncover patterns and trends that exist in judicial decisions concerning Section One challenges against professional sport leagues. These patterns and trends would assist both legal scholars and practitioners in better understanding the complexities of how courts resolve antitrust disputes. Data was collected from two coding schemes to measure the

frequency of elements of the rule of reason analysis and the characteristics most prevalent in cases where the court ruled in favor of a professional sport league. The data analysis revealed that courts consider procompetitive justifications most often. Also the most frequent conduct challenged under Section One concern player restraint, and sport leagues asserted an affirmative defense in a majority of the cases where the court ruled in their favor. The study was not meant to yield a predictive formula for judicial rulings, but it does reveal the factors addressed most often in antitrust cases involving professional sport leagues.

**INDEX WORDS:** professional sport leagues, antitrust law, Sherman Act, content analysis, rule of reason, empirical legal research

FROM *FEDERAL BASEBALL TO AMERICAN NEEDLE*: AN EMPIRICAL EXAMINATION  
OF THE TREATMENT OF PROFESSIONAL SPORT LEAGUES UNDER ANTITRUST  
LAW

by

CYNTRICE JURUSHA THOMAS

B.S., Florida State University, 2001

J.D., Tulane University, 2004

A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial

Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2012

© 2012

Cyntrice Jurusha Thomas

All Rights Reserved

FROM *FEDERAL BASEBALL* TO *AMERICAN NEEDLE*: AN EMPIRICAL EXAMINATION  
OF THE TREATMENT OF PROFESSIONAL SPORTS LEAGUES UNDER ANTITRUST  
LAW

by

CYNTRICE JURUSHA THOMAS

Major Professor: Thomas A. Baker, III

Committee: Kevin Byon  
Nathaniel Grow  
James Zhang

Electronic Version Approved:

Maureen Grasso  
Dean of the Graduate School  
The University of Georgia  
August 2012

## DEDICATION

I would like to dedicate my dissertation to my parents John and Lunell Thomas. They have provided constant and unconditional love and support through my entire academic career. My parents have always encouraged me to achieve my goals and taught me to never give up. I am blessed and grateful to have them in my life. I cannot thank them enough for all they have done for me.

## ACKNOWLEDGEMENTS

I would like to thank my advisors and my dissertation committee. Since coming to UGA, Dr. Baker has taken an interest in my education. He has pushed me to reach my potential and for that, I am thankful. I would also like to thank Dr. Kevin Byon for his continued support and guidance through my academic career at UGA. They have both provided encouragement and tough love, when needed. I am grateful to have them as mentors. I want to thank the other members of my committee. Prof. Nathaniel Grow has been very generous with his time and help. Dr. James Zhang provided me with invaluable experience and knowledge. I am thankful to all of the members of my committee for their dedication and guidance during my dissertation process.

I would also like to thank my family and friends. My parents have been so encouraging and supportive throughout my life. I have an awesome brother who has never doubted my abilities to achieve my goals, and I'm thankful to him and my sister-in law for their encouragement as well. I would also like to thank all of my friends who were always there to reassure me and comfort me when times were hard. Their confidence in me never wavered. I am thankful to all of them for their belief in me, and celebrating this accomplishment with them makes it even more gratifying.

## TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS .....	v
LIST OF TABLES .....	viii
LIST OF FIGURES .....	ix
CHAPTER	
1 INTRODUCTION .....	1
Purpose of Study .....	4
Overview .....	5
2 LITERATURE REVIEW .....	6
Antitrust Law: The Sherman Act .....	6
Antitrust Law in Sports .....	21
Empirical Studies in Antitrust Law .....	37
Empirical Legal Research .....	40
Content Analysis in Legal Research .....	50
Research Questions .....	55
3 METHODOLOGY .....	57
Population and Sample .....	57
Instrumentation and Data Collection .....	58
Data Analysis .....	59
4 RESULTS .....	60



Results from Coding Scheme 1.....	60
Results from Coding Scheme 2.....	65
Discussion.....	72
Limitations .....	76
5 CONCLUSION.....	79
Implications.....	81
REFERENCES .....	84
APPENDICES	
A Coding Scheme 1 .....	92
B Coding Scheme 2 .....	93

## LIST OF TABLES

	Page
Table 1: The Frequency of the Elements of the Rule of Reason Analysis in Antitrust Cases Involving Professional Sport Leagues .....	61
Table 2: Comparison of the Use of Elements in the Rule of Reason Analysis .....	64
Table 3: The Frequency of Selected Characteristics in Antitrust Cases Involving Professional Sport Leagues.....	66
Table 4: The Frequency of Affirmative Defenses with Each Type of Challenged Conduct in Cases Where the Court Ruled of Favor of the League .....	69
Table 5: The Frequency of Affirmative Defenses with Each Type of Challenged Conduct in Cases Where the Court Ruled of Favor of the Plaintiff .....	70
Table 6: The Frequency of Affirmative Defenses with Each Type of Plaintiff in Cases Where The Court Ruled of Favor of the League .....	71
Table 7: The Frequency of Affirmative Defenses with Each Type of Plaintiff in Cases Where The Court Ruled of Favor of the Plaintiff.....	72

LIST OF FIGURES

	Page
Figure 1: The Frequency of the Elements of the Rule of Reason Analysis .....	62

## **CHAPTER 1**

### **INTRODUCTION**

Professional sports have become a permanent staple in American culture. They are an invaluable part of life for consumers. Baseball has been regarded as America's pastime, and the NFL's Super Bowl has been the most watched television event year after year. Along with basketball and hockey, professional sports have given people something outside of their own personal lives to find enjoyment and pride in vicariously through their favorite teams (Mason, 1999). Fan interest never wanes for professional sports because they are considered the ultimate reality shows. Despite the records of the teams competing, the outcome is uncertain because of the leagues' insistence on maintaining a competitive balance among the teams; anything can happen (Zimbalist, 2002). However, fans do not get to see what goes on behind the scenes of a sporting event, nor do they always comprehend the complexities of professional sports (Ross, 1997). In recent years, some of these complexities have come to light.

The Supreme Court made a historical decision in *American Needle v. NFL* that could potentially change the way sport leagues approach antitrust law (*American Needle v. National Football League*, 2010). Just this past year, the collective bargaining agreements in the NFL and NBA expired and lock-outs followed that threatened the 2011-2012 seasons in both sports. While fans griped and complained about greedy athletes and stingy owners, sport enthusiasts, experts and attorneys were anxious to see how the collective bargaining strife would play out. Different theories and hypothetical outcomes were suggested daily and the threat of decertification and

antitrust suits loomed. The reality is that no one could really predict what would happen in the NFL and NBA if the breakdown in collective bargaining resulted in antitrust action.

Professional sports have been somewhat of a quagmire for courts under antitrust law. Just deciding how to interpret and apply the Sherman Antitrust Act has proven to be a difficult task. Section One of the Sherman Act makes it illegal for separate entities to combine or engage in concerted action that restrains trade, and courts have spent years developing methods to determine when conduct unreasonably restrains trade (Sherman Act, 1890). Professional sport leagues have made the task more difficult because of their unique nature and the necessary cooperation among economic competitors.

Courts have wrestled with the application of antitrust law to professional sports. The earliest Supreme Court case involving a professional sport league was *Federal Baseball v. National League* where the Court held that baseball was exempt from antitrust law because baseball was not interstate commerce (Federal Baseball, 1922). However, the Court declined to extend that same protection to other sports, and the courts have been quite inconsistent in the application of antitrust law ever since (Radovich, 1957; International Boxing Club, 1955). Professional sport leagues have tried to avoid antitrust scrutiny through antitrust exemptions and single entity status. While their assertions of these defenses have been quite consistent, courts' acceptance of them have not (American Needle v. National Football League, 2010; Chicago Professional Sports Ltd., 1996; Raiders I, 1984; NASL v. NFL, 1982).

In *American Needle v. NFL*, the Supreme Court held that the league was not a single enterprise protected from challenges under Section One (American Needle v. National Football League, 2010). That decision makes the NFL and other professional sport leagues more vulnerable to antitrust challenges. As a result, professional sport leagues and those who manage

them should have a thorough understanding of how the courts analyze their conduct under Section One. Yet, there is a lack of consistency among the federal courts when analyzing the conduct of professional sport leagues under Section One of the Sherman Act. As a result, it is difficult for sport leagues to adequately prepare and assess the merits of an antitrust suit challenging their conduct. The inquiry regarding antitrust cases involving professional sport leagues should include determining what characteristics of a lawsuit are considered most frequently in a Section One case and what step of the rule of reason analysis is the most prevalent in judicial decision-making. The traditional approach to legal research has been considered normative as it seeks to influence legal decisions and predict how legal decisions are made. There is a rhetorical aspect in traditional legal research with a goal to persuade the reader (Monsma, 2006). The use of empirical methods in legal research is more appropriate for achieving the purpose of this study because the goal of empirical research is to make inferences about things unknown based on the facts that are known (Monsma, 2006) .

Legal research is traditionally used for understanding and interpreting court decisions. It can be used to support an argument or persuade others to support one interpretation over another. Those involved in traditional legal research seek to illustrate what factors should matter most rather than revealing what factors actually do matter most. The rhetoric and persuasive arguments central to legal research are relevant, but to ascertain what courts do and how they apply the law, an empirical approach may be more suitable (Monsma, 2006). Empirical methods in legal research allow one to examine many cases at once to detect patterns in judicial decision-making. The use of empirical methods in legal research is relatively new, and as a result, many empirical legal studies have been focused on the relationship between a judge's political ideology and his or her judicial decision making (Edwards & Livermore, 2009). A more

comprehensive empirical study with a content analysis methodology can detect common characteristics and trends in judicial opinions (Hall & Wright, 2008).

The use of a content analysis as an empirical legal research methodology can allow scholars to analyze a large number of cases to reveal patterns and trends in judicial decisions (Hall & Wright, 2008). This methodology can provide an understanding of the reasoning behind judicial opinions, and it can also be used to predict outcomes based on factors addressed in judicial opinions. While many studies have employed empirical methods to provide a descriptive analysis of court judicial decisions, content analysis allows for a more in-depth look at judicial opinions to understand the factors most prevalent in judicial decision-making (Hall & Wright, 2008).

In areas such as antitrust law where its application has been uncertain and varied among the federal circuits, it becomes difficult to really determine what consistency, if any, exists. Through a content analysis, researchers can identify the patterns among the circuits and reveal the factors that influence judicial decisions. This is not only beneficial to the area of law and its continued development, but also to the parties of antitrust lawsuits who can gain an understanding of how the law is applied to their case (Levine, 2006).

### **Purpose of Study**

The overall purpose of this study was to conduct a content analysis to qualitatively identify the factors that courts consider in antitrust cases involving professional sport leagues. This study was designed to uncover the factors and characteristics most prevalent in antitrust cases challenging the conduct of professional sport leagues. Identifying these factors would provide leagues with a reference tool for ascertaining the merits of their defense and deciding whether to continue with a lawsuit or opt for a settlement and avoid the treble damages allowed

under the Sherman Act. It also provides an understanding of how factors and characteristics unique to the sport industry impact and influence judicial opinions that could inform the modification of league operations.

Through the use of content analysis, this study answers two questions: (a) What steps in the Rule of Reason analysis do courts consider most often in antitrust cases challenging the conduct of professional sport leagues under Section 1 of the Sherman Act?; and (b) What is the frequency of selected characteristics when courts rule in favor of a professional sport league in antitrust cases under Section 1 of the Sherman Act?

## **Overview**

Chapter 2 provides a background of the origins and judicial interpretations of the relevant antitrust law. This section discusses several theories regarding Congress' policy goals for the Sherman Act and how courts have interpreted of the Act. It also addresses the application of antitrust law to professional sport leagues and reviews the various characteristics of sport leagues that complicate the application of antitrust law. Additionally, the chapter introduces empirical legal research including its theoretical basis and the benefits of applying social science methods to legal research. This is followed by a discussion of content analysis, the methodology employed in this study. Chapter 3 outlines the methods and steps taken to conduct this study including the methods for determining the population, the instrument used for data collection, and the data analysis. A review of the results and a discussion of those results are included in Chapter 4 along with an explanation of the limitations of the results. Chapter 5 concludes with a discussion of the practical and theoretical implications of the study and the potential for future studies regarding the relationship between professional sport leagues and antitrust law.



## CHAPTER 2

### LITERATURE REVIEW

#### **Antitrust Law: The Sherman Act**

The Sherman Act, along with the Clayton Act and the Federal Trade Commission Act, address how business entities should operate and compete in the economic market (Kovacic, 2000). They all encompass the federal regulations regarding trusts, monopolies and business operations in the United States (Dickson & Wells, 2001). The most important, and perhaps most vague is the Sherman Act. Section One of the Act states that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with Foreign nations, is hereby illegal” (Sherman Act, 1890). Section Two says

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 misdemeanor, and on conviction thereof, shall be punished by the fine not exceeding...  
(Sherman Act, 1890)

For the purposes of this study the focus will be on Section One of the Sherman Act.

The Sherman Act itself does not lend much evidence as to Congress’ intent and purpose in passing the Act. As a result, courts have looked to the common law and congressional records as sources of interpretation for cases alleging violations of the Sherman Act. Scholars have attempted to glean meaning from the legislative history surrounding the passage of the Act. While there may be no clear cut, right or wrong interpretation of the statute, the courts have

embraced certain interpretations and goals of the Sherman Act that have governed how antitrust cases are analyzed and decided.

**Legislative Intent.** Article 1, Section 8 of the Constitution grants Congress the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes” (U.S. Const. Art.1 §8). With this power, Congress was able to create legislation to regulate interstate commerce and trade. Although the commerce clause was thought to be a narrow scope of power, Congress used its authority under Article 1, Section 8 to pass several pieces of legislation, including the Sherman Act (Bork, 1966).

A central goal suggested by scholars is that the purpose of the Sherman Act is the maximization of consumer welfare (Bork, 1966; Grauer, 1983). Judge Robert Bork, a leading proponent of this explanation, referred to legislative records to conclude that consumer welfare was the relevant value courts should focus on (Bork, 1966). Before the consumer welfare model is defined, it is important to explain how Judge Bork concluded that it was the main goal of the Sherman Act.

It is undeniable that other noneconomic values influenced judicial opinions, but Judge Bork maintained the maximization of consumer welfare as the only intended policy Congress wanted courts to apply (Bork, 1966). Evidence supporting the consumer welfare theory included the explicit language of the first bills proposed by Senator Sherman, Congress’ goal to promote and preserve efficiency, and the fact that although courts were given wide discretion, judges were limited to only considering consumer welfare because Congress never suggested that judges consider other objectives that conflict with that policy (Bork, 1966). Judge Bork also relied on the arguments and speeches Senator Sherman presented in the Senate. In his speeches, Senator Sherman spoke of his goal to make two categories of agreements illegal: (a) those that

inhibit free competition and (b) those that “advance the cost to the consumer” (Bork, 1966, p. 15). In addition to the debates surrounding the Sherman Act, the Clayton Act and the Federal Trade Commission Act, both of which succeeded the Sherman Act, reinforced the goal to protect consumer welfare (Bork, 1993).

The theory of consumer welfare maximization (also called the Pareto optimality) is that consumers want to purchase goods at the lowest possible price while producers want to maximize profits (Grauer, 1983). Those producers who are most efficient with their resources and sell their goods at the lowest possible price will maximize consumer welfare. Producers who are efficient should not be the focus of antitrust policy. It is those firms who want to gain power and restrict output in an effort to raise prices that should be the target of antitrust law (Grauer, 1983).

From an economic standpoint, the consumer welfare model emphasizes the relationship between costs to consumers and the savings for producers (Bork, 1993). The goal to maximize consumer welfare is achieved through maximizing allocative efficiencies with minimal effect on productive efficiencies (Hovenkamp, 1987). Bork took the position that Senator Sherman’s objective to promote efficiency and protect trade and competition was a way to benefit and maximize consumer welfare (Hazlett, 1992). However, these two goals are not completely compatible (Posner, 2001). While the two goals can work together to an extent, there is a trade-off when efficiency must be sacrificed for consumer welfare in the context of monopolies (Bork, 1993).

**Other Goals of the Sherman Act.** The goal of consumer welfare maximization has been a long accepted goal of the Sherman Act. Some suggest that history and congressional records reveal that concern for consumer welfare may not have been the only purpose of the Sherman

Act, if it was even a consideration at all. While several drafts of the bills include protection for consumers as a key element, it cannot be ignored that the final draft of the bill that became law has no mention of consumers (Grandy, 1993). It is true that consumer welfare was a perpetual issue in the Congressional debates regarding the bill but so was the intention to protect producers and promote full and free competition (Grandy, 1993). When the Sherman Act is considered within the context of other proposed legislation at that time, Sen. Sherman's intentions may have been less altruistic than Judge Bork would have liked to believe, as some thought that Sen. Sherman's motives were more political (Hazlett, 1992).

The initial debates surrounding the bill centered on the welfare of consumers and protection against price increases. However, concerns began to shift to ensuring and promoting "free and fair competition or trade" (Grandy, 1993, p. 363). Legislators, including Sen. Sherman, were more focused on protecting competition among producers in the United States. This goal of preserving free competition was also addressed separately, an indication that free competition and consumer welfare were not meant to complement each other (Grandy, 1993). This sentiment was reiterated in *U.S. v. Aluminum Co. of America* where Judge Learned Hand stated in the majority opinion that one of the goals expressed by Sherman was to "put an end to great aggregations of capital because of the helplessness of the individual before them" (Alcoa, 1945, p. 428).

Scholars have also argued that passage of the act was more political than economic (Grandy, 1993). Around the time the Sherman Act was proposed and debated, Congress was also contemplating higher tariffs through a bill proposed by Rep. McKinley (Dickson & Wells, 2001). Sen. Sherman, like Rep. McKinley, had a protectionist view of the United States economy and American producers. The McKinley Tariff was a restriction on output that was "bound to create

a clearly *more* objectionable interference with ‘free and full competition’” (Hazlett, 1992, p. 267). The tariff was contrary to the Sherman Act, but Sen. Sherman’s strong protectionist views were reflected in his speeches. His position in favor of high tariffs like the McKinley Tariff suggested that the Sherman Act was proposed as more of a “political compromise” for the tariff (Hazlett, 1992, p. 275). The McKinley Tariff was a pro-U.S. tax that would inhibit competition while the Sherman Act was meant to be a public policy measure that addressed the economic issues such as trusts and other types of combinations and agreements that controlled trade among the states (Hazlett, 1992). Under this theory, the Sherman Act was not expected to have any real or significant impact on the American economy which speaks to the perceived narrow scope of the commerce power. Similarly, others hypothesized that Sen. Sherman and other supporters of the McKinley Tariff did not expect the Sherman Act to be effective because of its vagueness (Dickson & Wells, 2001).

Thus, the question of the Sherman Act’s purpose and goal has been long debated among scholars (Grandy, 1993; Hazlett, 1992). Judicial opinions have alluded to both economic and public policy goals of the Act. There was ample evidence in the legislative history to support all theories. However, despite its apparent (and anticipated) vagueness, courts have used the Sherman Act to strike down agreements and activities that impede competition, unreasonably restrain trade, and are detrimental to consumer welfare (Standard Oil, 1911; Alcoa, 1945; Trenton Potteries, 1927).

**Judicial Interpretation.** The broad language of the Sherman Act has given courts wide discretion to determine what constitutes an unlawful agreement or an attempt to monopolize (Kovacic, 2000). In the years following passage of the Sherman Act, the Court found itself trying to determine how Congress intended it to be enforced. It began to give meaning to the vague

language of the act and distinguish activities and agreements that restrain competition from those that promote competition and economic growth (Kovacic, 2000). From the beginning, the Court's interpretations have been influenced by public interest and the relevant economic issues at that current time (Kovacic, 2000).

The early years following the passage of the Sherman Act saw the Court deciding how to properly interpret Sections One and Two of the statute. One of the first cases was *United States v. Trans-Missouri Freight Association*. The U.S. argued that the defendant railroads that combined to make the Trans-Missouri Freight Association agreed to set the prices for transporting and storing freight, thereby restricting competition (Trans-Missouri Freight, 1897). There, Justice Peckham took a literal interpretation of Section One of the statute, making all contracts in restraint of trade affecting interstate commerce illegal (Trans-Missouri Freight, 1897). However, this literal interpretation raised concerns that possibly the original intent of the act was disregarded (Posner, 2001).

*Addyston Pipe & Steel Company v. United States* followed a few years after *Trans-Missouri Freight*. In *Addyston Pipe*, the federal government alleged that several pipe and steel manufacturers agreed not to compete against one another and restrict output so they all could set reasonable prices for their goods (Addyston Pipe & Steel, 1899). The Sixth Circuit made a distinction between naked restraints, whose only purpose was to restrict output and raise prices, and ancillary restraints whose purpose was to increase output through hindering parties only as needed (Kovacic, 2000). In *Addyston Pipe & Steel*, the Supreme Court modified its interpretation of the Sherman Act. Justice Peckham once again wrote the majority opinion and affirmed the Sixth Circuit's holding that the agreement among the defendants did constitute a restraint on interstate commerce.

Justice Peckham stated that the relevant question was “whether the necessary effect of the combination is to restrain competition” (*Addyston Pipe & Steel*, 1899, p. 245). The effect of the agreement in this case was to “destroy competition and thus, advance price,” and therefore restrain trade in violation of Section One (*Addyston Pipe & Steel*, 1899, p. 245). The ruling in *Addyston* illustrated the Court’s opinion that Congress did not intend to make every contract or combination in restraint of trade illegal but only those whose purpose was to restrain or destroy competition (*Addyston Pipe & Steel*, 1899).

The Court continued to revise and refine its interpretation of the Sherman Act in *Standard Oil Co. of New Jersey v. United States* (1911). Several oil companies were accused of restraining trade by combining and forming a trust to limit output and fix the prices of oil and petroleum goods (*Standard Oil*, 1911). To determine if *Standard Oil* had violated the Sherman Act, Justice White looked to American and English common law as sources of meaning for the terms included in the Act. He recognized that in English law, a “contract in restraint of trade” was void if it prevented an individual from practicing his trade (*Standard Oil*, 1911, p. 51). On the other hand, “if the restraint was partial in its operation and was otherwise reasonable the contract was to be held valid” (*Standard Oil*, 1911, p. 51). At common law, agreements or activities that were “unreasonably restrictive of competitive conditions” and were “entered into or done with the intent to do wrong to the general public...tending to bring about the evils such as enhancement of prices, which were considered to be against public policy” were illegal (*Standard Oil*, 1911, p. 56). Justice White relied on this common law rule to provide a basis for the purpose and meaning of the Sherman Act concluding, that the unlawful “restraint of trade” language in Section One was not an absolute ban but only a ban on unreasonable restraints of trade (*Standard Oil*, 1911, p. 49). That unreasonableness must 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” (Northern Pacific, 1958, p. 690).

Justice White’s opinion in *Standard Oil* provided clarification of the Sherman Act that was absent in *Addyston Pipe & Steel*. As a matter of public policy, Congress did not intend for Section One to make all agreements and contracts in restraint of trade unlawful but only those that were unreasonable. Additionally, Section Two was not meant to make illegal the natural monopoly or monopolies obtained through superior skill, just the attempts to monopolize through unreasonable exclusionary conduct (Kovacic, 2000). The decision to limit the statute to only unreasonable contracts and conduct speaks to the overall purpose of the Sherman Act to promote competition and make illegal any conduct that poses an undue restraint on trade (Standard Oil, 1911).

*Standard Oil* introduced the standard of reasonableness and an early form of the rule of reason analysis to determine when an activity or agreement is illegal, but *United States v. Trenton Potteries* presented another perspective for determining violations of Section One of the Sherman Act. In *Trenton Potteries*, the Court addressed an agreement among several corporations to maintain uniform prices for their product. Justice Stone explained in the majority opinion that a price-fixing agreement is “the elimination of one form of competition” (Trenton Potteries, 1927, p. 397). Regardless of the reasonableness of the price, agreements like these are unlawful restraints on competition and no further inquiry or rule of reason analysis is necessary (Trenton Potteries, 1927). Although Justice Stone did not use the phrase ‘*per se illegal*’ to describe the price fixing agreement challenged in *Trenton Potteries*, he recognized that there are certain types of agreements that, themselves, are blatant undue restraints on competition and it is



not necessary to evaluate the reasonableness of the activity (Trenton Potteries, 1927). Price-fixing agreements not only restrain competition, but actually destroy competition (Trenton Potteries, 1927).

*Standard Oil* and *Trenton Potteries* provided an introduction into the court's analysis and categorization of activities under Section One as either *per se* illegal or subject to the rule of reason analysis. In these decisions, the Supreme Court broadly defined how conduct would be analyzed under Section One of the Sherman Act. The rule of reason, while not yet a clarified test, was used to determine whether activities and agreements challenged under Section One were unreasonable restraints on trade and competition. However, as shown in *Trenton Potteries*, there are some activities whose unreasonableness is apparent from the activity or agreement itself, and there is no need for further analysis. Having established this framework, the Court next had to determine which activities and agreements were *per se* illegal and which activities required analysis under the rule of reason.

The court's definition of which activities fell under the *per se* rule and the rule of reason happened to coincide with the Great Depression. During this period of economic downturn and subsequent recovery, President Roosevelt's New Deal brought a change in antitrust enforcement, focusing on enhancing and encouraging competition (Kovacic, 2000). As a result, the Court started to classify more conduct as *per se* illegal. It was apparent then that the Court's analysis and interpretation of the Sherman Act would be reflective of the country's current economic situation.

***Rule of Reason Analysis.*** Justice White stated in *Standard Oil* that the Sherman Act makes illegal conduct that unreasonably restrains trade, finding that "the standard of reason...was intended to be the measure used for the purpose of determining whether in a given

case a particular act had or had not brought about the wrong against which the statute provided” (Standard Oil, 1911, p. 60). Although the rule of reason was introduced in *Standard Oil*, the case did not actually lay out the steps included in the analysis. The rule of reason analysis was defined in *Chicago Board of Trade v. United States* where Justice Brandeis stated that “the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition” (Chicago Board of Trade, 1917, p. 238).

In *Chicago Board of Trade*, the Court considered a “Call” rule that dictated when members of the Board could purchase grain and when prices would be set (Chicago Board of Trade, 1917, p. 236). Justice Brandeis stated that the court must look at the nature or purpose of the restraint and its effect on competition to determine if it is unreasonable (Chicago Board of Trade, 1917). The analysis involves a balancing of factors including “(1) specific information about the business; (2) the history, nature, and effect of the restraint; (3) the applicable market power of both the manufacturer and the distributor; and (4) the reason for the restraints” (Winrow & Johnson, 2008, p. 62).

Under the rule of reason analysis, the plaintiff has the burden of showing that the alleged conduct has an adverse effect on competition in the relevant market (Jefferson Parish Hospital, 1984). In order for the plaintiff to meet this burden he must first allege an antitrust injury in order to establish standing to sue (Carrier, 2009). He then must define the relevant market which consists of two different types of markets: the product market and the geographic market (Zelek, Stern, & Dunfee, 1980). The product market comprises of those products or services that are “reasonably interchangeable” with the defendant’s product (Zelek, et al., 1980, p. 31). Defining the product market requires an analysis of a products’ cross-elasticity of demand, or the effect of

changes in the price of one product on the demand of another product (Zelek, et al., 1980). The geographic market consists of the geographic area of “effective competition” (Zelek, et al., 1980, p. 32).

The definition of a relevant market is very important in antitrust law because it provides a basis for determining the defendant’s position in that market and measuring his market power (Pitofsky, 1990). It also defines the market for measuring the alleged anticompetitive effect of the conduct. While it is important to define the relevant market for the purpose of showing anticompetitive effects, some circuits also require a plaintiff to show that the defendant has sufficient market power such that his conduct would have a substantial impact on the market (Patterson, 2000). However, in *NCAA v. Board of Regents*, the court stated that lack of proof of market power does not mean that an agreement will not have an adverse effect on the market (Board of Regents, 1984).

If the plaintiff does not succeed in proving an anticompetitive effect in the relevant market, the court’s analysis may end here. However, if there is a showing of the actual or potential anticompetitive effect of the restraint, then the defendant must show that there are procompetitive justifications for the restraint (*Clorox Co. v. Sterling Winthrop, Inc.*, 1997). To be procompetitive, conduct must either promote or regulate competition. While an offered reason for a restraint may not provide enough justification, it can provide insight about the intended effect of the restraint (Winrow & Johnson, 2008). The court then balances the proven anticompetitive effect with the procompetitive justifications offered by the defendant. If the offered procompetitive justifications outweigh the anticompetitive effect, then the analysis will end in some jurisdictions, as the plaintiff has failed to show that the conduct unreasonably

restrains trade. However, in most circuits, the current application of the rule of reason does not usually end there.

The Supreme Court has not endorsed a fourth prong in the rule of reason analysis, but many of the federal circuits have required that if the procompetitive justifications outweigh the anticompetitive effect, less restrictive alternatives should be explored (Feldman, 2009; Grewe, 2002). Less restrictive alternatives refer to other options that can achieve the same procompetitive justifications without having as detrimental an effect on the market (Feldman, 2009). Usually, proving that there are less restrictive alternatives is a burden the plaintiff bears (Grewe, 2002). However, because there is no universal standard for using the less restrictive alternative, different circuits use it in different ways (Feldman, 2009).

In an analysis of antitrust cases, Carrier found that of the 495 cases reviewed, less than 20 percent of them actually get beyond the first stage of the rule of reason analysis. In many cases, the plaintiff failed to show an anticompetitive effect in the relevant market (Carrier, 2009). The balancing that is required in a traditional rule of reason analysis only occurred in less than 5% of those cases (Carrier, 2009). The application of the rule of reason appears less of a balancing test and more of a decision based on who meets his burden of proof.

H1: Courts consider whether the plaintiff proved an anticompetitive effect most often in antitrust cases involving professional sport leagues.

***Per Se Illegal Activity.*** In order to prevail under the *per se* rule, a plaintiff must only show that the conduct occurred (Bork, 1993). In *Northern Pacific*, the Court stated that “there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable” (Northern Pacific, 1958, p. 5). The rationale behind the *per se* rule is that there are some activities whose inherent effects

are so anticompetitive that any analysis under the rule of reason is unnecessary (Bork, 1993). Activities that are *per se* illegal are those that severely limit or completely eliminate competition in a particular market (Topco Associates, 1972). There is no defense to conduct that is *per se* illegal (Topco Associates, 1972).

In the past, the courts have identified several types of agreements and restraints that fall under the *per se* rule. *Trenton Potteries* addressed price-fixing as one type of activity falling under the *per se* rule. Horizontal agreements among competitors allocating territories have also been deemed unlawful (Topco Associates, 1972). Other conduct that has at one time been considered *per se* illegal include group boycotts and refusals to deal, exclusive territories, horizontal restraints on output, and vertical price restrictions (Winrow & Johnson, 2008).

Over time, courts began to evaluate conduct usually considered *per se* illegal under the rule of reason. The court recognized and accepted that the nature of certain industries required a more in-depth analysis to uncover the actual effects of restraints. In *NCAA v. Board of Regents*, the NCAA had a plan that restricted the number of football games that could be televised each week and also limited the number of times a team could be on television in one season (Board of Regents, 1984). Several member institutions challenged the NCAA restrictions. Although this was clearly a restriction on output that is normally a *per se* violation, the Court used the rule of reason analysis to evaluate a horizontal agreement restraining the output of broadcasted games (Board of Regents, 1984).

The Supreme Court also recognized that the rule of reason would be a more appropriate tool in *Broadcast Music Inc. v. Columbia Broadcast System, Inc.* (BMI v. CBS, 1979). There, BMI issued blanket licenses for the use of copyrighted music (BMI v. CBS, 1979). The use of blanket licenses allegedly constituted price-fixing which is usually a *per se* violation of Section

One of the Sherman Act (*BMI v. CBS*, 1979). Rather than consider the conduct *per se* illegal, the Court acknowledged that “economic realities” of the blanket licenses offered by BMI may have had some effects that promoted efficiency and competition (*BMI v. CBS*, 1979, p. 14).

In a more recent decision, the Supreme Court reversed the long standing holding that vertical minimum price agreements were *per se* illegal. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007) presented an opportunity for the Court to reevaluate the categorization of vertical price restraints under the *per se* rule. Leegin had a resale price maintenance policy which stated that it would not sell to retailers who sold their products below the suggested retail price (*Leegin*, 2007). In *Leegin*, the court held that there are procompetitive justifications for vertical price restraints and as a result they should be decided under the rule of reason (*Leegin*, 2007).

The holdings in *Board of Regents*, *BMI* and *Leegin* illustrate the continued evolution of antitrust law. When conduct that was originally considered *per se* illegal is examined in the context of particular industries, it may actually have procompetitive justifications. The goal to maximize consumer welfare through economic efficiency has also influenced the courts to look to economics to evaluate restraints of trade (Gellhorn & Tatham, 1985). These considerations have led courts to prefer the rule of reason over the *per se* rule.

**Quick Look.** A third alternative for evaluating conduct under Section One of the Sherman Act is the quick look approach. It is considered the middle-ground between the *per se* rule and the rule of reason analysis. The quick look approach is considered an abbreviated or truncated rule of reason analysis because it does not involve an in-depth analysis to determine whether a restraint is unreasonable (*Board of Regents*, 1984). When there is a naked restraint on output or prices, an extended analysis is not necessary to prove anticompetitive effect or market power (*Board of Regents*, 1984). The plaintiff does not have to show harm, but there may be some

procompetitive benefits to the conduct. As a result the defendant still has an opportunity to prove that the restraint has procompetitive justifications.

The courts have used the quick look in two ways. First, in some cases, the courts have used the quick look approach as a preliminary analysis. If an antitrust suit involves a naked restraint on trade and the defendant's justifications are procompetitive, then the court will take a closer look into the restraint to determine if it is truly anticompetitive and unreasonable (Yancey, 1996). This was the approach taken in *United States v. Brown University*. The U.S. challenged an agreement among the Ivy Overlap Group to limit the amount of financial aid offered to students (Brown University, 1993). The district court applied the quick look approach and determined that the justifications offered by the Ivy Group Overlap were not economic in nature (Brown University, 1993). The Third Circuit disagreed with the lower court's conclusion and stated that "the nature of higher education and the asserted procompetitive justifications and pro-consumer features of the Overlap convince us that a full rule of reason analysis is in order here" (Brown University, 1993, p. 678).

In the second approach to quick look, the court may presume the anticompetitive effect of a restraint, but it will still look to "the nature of the restraint and its justifications to determine if the restraint has procompetitive effects (Yancey, 1996). In *Board of Regents* (1984), the Court acknowledged that the NCAA's restrictions on television contracts were restraints on trade. However, the Supreme Court noted that horizontal agreements, like the one at issue in *Board of Regents*, were necessary to produce the product and it considered the justifications offered by the NCAA to determine if there was a net procompetitive effect (Board of Regents, 1984).

The rule of reason analysis, the *per se* rule, and the quick look approach are all tools the courts have used to determine whether conduct violates Section One of the Sherman Act. Over

time the courts have gained experience and knowledge about different types of conduct to determine which method to apply. However, the uniqueness of the sport industry has made the application of antitrust law difficult for courts. The courts, first, had to determine whether antitrust law even applied and if so, which method of analysis would be appropriate.

### **Antitrust Law in Sports**

Section One of the Sherman Act makes it illegal for economic competitors to join together to unreasonably restrain trade. The very nature of professional sport leagues requires member teams who would otherwise be economic competitors to cooperate to some extent in order to generate a product. Some commentators have strongly suggested that because of the necessary cooperation, sport leagues should not be subjected to challenges under Section One. Others viewed leagues as more of a joint venture which is legal and acceptable but still subject to Section One to ensure that its activities do not unreasonably restrain trade.

Despite the insistence of some, the Supreme Court ruled that the necessary cooperation of professional football teams does not exempt them from challenges under Section One (*American Needle v. National Football League*, 2010). With the exception of baseball's antitrust exemption and the nonstatutory labor exemption, professional sport leagues are and have been quite susceptible to antitrust challenges. This exposure raises a question: Because of the uniqueness of sport leagues, how has their conduct been analyzed under Section One of the Sherman Act?

In one of the earlier cases challenging the conduct of professional sport leagues, the court closely followed the rule of reason analysis as described in *Chicago Board of Trade*. In *United States v. National Football League* (1953), the NFL's broadcast restrictions were alleged to be a violation of Section One of the Sherman Act. Even back then the district court realized that the business of professional sports was unique because clubs that are thought to be economic



competitors had to cooperate in order to generate a product for consumption (U.S. v. NFL, 1953). The rules challenged in *U.S. v. NFL* were clearly a restriction on the output of television broadcasts. However, the court said some of the rules were not a violation of the Sherman Act (U.S. v. NFL, 1953). The court held that because many of the teams in the NFL were not “financially successful,” rules were necessary to maintain a competitive balance (U.S. v. NFL, 1953, p. 323). From the outset, courts applying antitrust law to sport leagues have recognized their unique nature and the fact that they “ha(ve) problems which no other business has” (U.S. v. NFL, 1953, p. 323). Much of the conduct challenged involved boycotts, restraints on output and horizontal agreements, all of which would typically be considered *per se* illegal. The nature of professional sports, though, has led courts to evaluate this activity under the rule of reason.

In *Board of Regents*, the Court announced that because of the unique nature of sport leagues and the necessity for cooperation on horizontal restraints, the rule of reason is the appropriate analysis (Board of Regents, 1984). The application of the rule of reason to antitrust cases involving sport leagues was widely accepted and understood among the circuits. While the courts have shown uncertainty regarding the legality of conduct in professional sport leagues, there has been no question that the *per se* rule would not be the appropriate tool for analyzing that conduct. Even though the rule of reason is more lenient than the *per se* rule, leagues have nevertheless continuously tried to escape antitrust scrutiny through various exemptions from antitrust law.

**Affirmative Defenses.** Professional sport leagues have tried to evade antitrust scrutiny since the first case challenging the conduct of a professional sport league under Section One of the Sherman Act through the use of affirmative defenses. An affirmative defense is an “assertion of facts and arguments that, if true will defeat the plaintiff’s or prosecution’s claim even if all the

allegations in the complaint are true” (Garner & Black, 2004, p. 473). While baseball is the only league to enjoy a complete antitrust exemption other leagues have tried to escape antitrust law through the labor exemption, legislation, and the single entity defense with little success. Each defense has given professional sport leagues some protection from antitrust scrutiny, but only Major League Baseball has had an absolute exemption that over the years has become narrowly tailored through Congressional action.

***Baseball Exemption.*** Early in the history of the Sherman Act, when courts were still figuring out how it should be interpreted, the Supreme Court addressed its application to professional baseball. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball*, a former franchise in a rival league alleged that the American and National Leagues were attempting to monopolize professional baseball by driving the rival league out of business by persuading its teams to fold or purchase franchises in the National League, as well as preventing players from playing in the rival league (Federal Baseball, 1922). Justice Holmes affirmed the appellate court holding that the Sherman Act does not apply to baseball because it is not considered interstate commerce (Federal Baseball, 1922). Although teams traveled to different states to play one another, interstate travel was deemed to be “a mere incident, not the essential thing” to the exhibition of baseball games (Federal Baseball, 1922, p. 209). As a result of this holding, baseball has enjoyed an exemption from federal antitrust law.

In subsequent cases after *Federal Baseball*, the Court declined to extend this antitrust exemption to other sports. The Supreme Court upheld the antitrust exemption for baseball in *Toolson v. New York Yankees* stating that any removal of the antitrust exemption for baseball was a decision for Congress (Toolson, 1953). *U.S. v. International Boxing Club of New York* raised the question of whether boxing was governed by the Sherman Act. The defendants in

*International Boxing Club* engaged in promoting boxing events and selling television and broadcasting rights (International Boxing Club, 1955). The question posed to the Court was whether the promotion and sale of televised boxing events involved interstate commerce and, therefore, were subject to liability under Section One of the Sherman Act (International Boxing Club, 1955). There, Justice Warren stated that not only were the facts in *International Boxing Club* different from those in *Federal Baseball* and *Toolson*, but the ruling in *Federal Baseball* was not intended to extend to “other segments of the entertainment business, athletic or otherwise” (International Boxing Club, 1955, p. 242). Then, in *Radovich v. National Football League* (1957), the court declined to extend the antitrust exemption afforded to baseball to football. Once again, the court limited the antitrust exemption only to baseball and stated that any change in the coverage of the exemption was to be done through legislation, not by the court (Radovich, 1957).

The Court once again reconsidered baseball’s antitrust exemption in *Flood v. Kuhn* (1972). Curt Flood, a professional baseball player challenged MLB’s reserve system that restricted a player’s mobility among the league’s baseball teams (Flood v. Kuhn, 1972). Following its earlier rulings, the Court upheld the antitrust exemption despite Justice Blackmun acknowledging that the exemption was “an aberration” (Flood v. Kuhn, 1972, p. 282). Justice Blackmun reiterated the dicta of other cases stating that “if there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court”(Flood v. Kuhn, 1972, p. 285).

The decisions in *Toolson* (1953), *International Boxing* (1955), *Radovich* (1957), and *Flood v. Kuhn* (1972) illustrate the Court’s intent to limit the antitrust exemption only to baseball. The decisions also show how reluctant the Court was to repeal the exemption, instead

leaving it to Congress, who in 1998 passed the Curt Flood Act. The Curt Flood Act gave MLB players standing to bring antitrust suits against MLB for issues concerning their conditions of employment (Grow, 2009). While Congress did not otherwise explicitly repeal the antitrust exemption, the Curt Flood Act put baseball players on the same level as athletes in other sports by giving them an avenue for challenging player restraints.

The scope of baseball's antitrust exemption has been tested several times since *Flood v. Kuhn*. In *Piazza v. MLB* (1993), the plaintiffs' application to purchase and relocate a franchise was denied. When they alleged that the league's relocation rules violated Section One of the Sherman Act, the league asserted its antitrust exemption (*Piazza v. MLB*, 1993). The district court in *Piazza* held that the antitrust exemption did not apply because it only applied to the "reserve system" (*Piazza v. MLB*, 1993, p. 421). In *MLB v. Crist* (2003), the league once again claimed an antitrust exemption when its proposed contraction of two teams was challenged by the state of Florida. The Eleventh Circuit held that the exemption did apply, interpreting the prior precedent as exempting the "business of baseball" which includes decisions to contract teams (*MLB v. Crist*, 2003). The contradicting views of baseball's antitrust exemption illustrated how the circuits still do not have a common understanding of its limits.

***Labor Exemptions.*** The Clayton Act (1914), which includes provisions concerning antitrust law, allows employees and employers to come together and negotiate terms of employment. Section 6 of the Clayton Act takes human labor out of the realm of commerce, somewhat protecting it from antitrust law (Clayton Act, 1914). Congress had a goal of fostering a collective bargaining relationship between employee unions and employers. The Clayton Act, in addition to the Norris-LaGuardia Act and the Wagner Act, has been interpreted as providing a statutory exemption from antitrust law protecting union activity (Milton & Zifchak, 1981). These

activities include strikes, boycotts, and other weapons under labor law that unions may use in furtherance of obtaining favorable terms of employment (Lock, 1989). The statutory exemption allows unions to collectively bargain and engage in activity that could be challenged under the Sherman Act (Lock, 1989).

The other more relevant exemption stemming from the labor-management relationship is the nonstatutory labor exemption. This exemption “shields from antitrust scrutiny restraints on competition that are necessary to enable the collective bargaining process to function effectively” (Manfred, 1997, p. 456). Although it did not provide a definition of the nonstatutory exemption, the Supreme Court explained the circumstances when the exemption would apply in *Amalgamated Meat Cutters v. Jewel Tea* and *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100* (Treadwell, 1996). The nonstatutory labor exemption applies to parties in a collective bargaining relationship when they bargain in good faith about mandatory subjects of collective bargaining (Treadwell, 1996).

While the goal of the statutory exemption is to protect concerted union activity, the goal of the nonstatutory exemption is to protect the collective bargaining relationship as well as any collective bargaining agreement entered into by the union and the employer (Treadwell, 1996). The nonstatutory exemption has resulted in frequent litigation involving professional sports. Player restraints such as the reserve clause, drafts, and salaries, have been leading issues in antitrust suits concerning sport leagues. As a result, courts have had to address two main questions: (a) when does the nonstatutory exemption apply; and (a) when does the exemption end (Treadwell, 1996)?

In *Mackey v. National Football League* (1976), the Eighth Circuit answered the first question when it decided whether the exemption applied to the league’s unilateral

implementation of the Rozelle Rule. First, the court stated that the exemption protects both the union and the employer (Mackey, 1976). This is because the purpose of the exemption is to promote, and therefore protect, the collective bargaining relationship, and thus, any party to a collective bargaining agreement can assert the exemption (Mackey, 1976). Next, the court laid out the conditions that must exist for the exemption to apply. Citing the holdings in *Jewel Tea* and *Connell*, the court stated that the restraint must (a) “primarily” affect the parties to the collective bargaining agreement; (b) concern a mandatory subject of bargaining; and (c) be the result of good faith, arm’s length bargaining (Mackey, 1976, p. 614).

The Eighth Circuit would subsequently provide an answer to the second question concerning the nonstatutory exemption as well. In *Powell v. National Football League*, the league attempted to unilaterally implement terms of employment after the collective bargaining agreement had expired and the parties reached an impasse in their negotiations (Powell, 1989). The league believed that the nonstatutory exemption continued to apply, and the court had to determine exactly when the exemption ended (Powell, 1989). Judge Gibson stated that the acknowledged goal of the nonstatutory exemption was to protect the collective bargaining relationship and that even after impasse there are other options under labor law for both the union and management (Powell, 1989). Because labor law provides remedies for labor disputes, Judge Gibson concluded that the court should not intervene (Powell, 1989). With that reasoning, the Eighth Circuit held that the nonstatutory exemption extends past impasse and lasts for the duration of the collective bargaining relationship (Powell, 1989).

In *Brown v. Pro Football* (1996), the Supreme Court addressed a similar issue regarding the league’s unilateral implementation of the terms and salary for a Developmental Squad Program after the parties reached an impasse. Players claimed that the league’s unilateral action

violated the Sherman Act (*Brown v. Pro Football*, 1996). The Supreme Court, like the Eighth Circuit in *Powell*, held that if the parties reach an impasse during negotiations, the league can unilaterally implement its last offer (*Brown v. Pro Football*, 1996). The Court stated that allowing antitrust law to come into play at any point would jeopardize the collective bargaining relationship (*Brown v. Pro Football*, 1996). The Court stressed the importance of keeping the line between antitrust law and labor law clear and well-defined (*Brown v. Pro Football*, 1996). As long as there is a collective bargaining relationship, antitrust law should not intervene. This holding left players with only two options: either work with the league in the collective bargaining process using the tools available through labor law or decertify the union as a collective bargaining representative (Manfred, 1997).

Because of the collective bargaining relationship between professional sport leagues and players unions, labor law provides both parties with a nonstatutory exemption as protection from antitrust challenges. *Mackey*, *Powell*, and *Brown* have all laid out the boundaries of this exemption (*Brown v. Pro Football*, 1996; *Mackey*, 1976; *Powell*, 1989). In *Brown*, the Supreme Court announced that antitrust law should not interfere with the collective bargaining relationship (*Brown v. Pro Football*, 1996). Despite the hard line drawn between labor law and antitrust, player restraints, usually negotiated through collective bargaining, have still been challenged under antitrust laws.

H2: Player restraints are the conduct most frequently challenged in antitrust cases where leagues are successful.

The existence of a collective bargaining relationship has provided professional sport leagues with some protection from antitrust scrutiny. However, the exemption is not available for all antitrust challenges. It can only be used in challenges concerning issues of collective

bargaining and must meet the requirements in *Jewel Tea* and *Connell* and later, reiterated in *Mackey*. When the nonstatutory labor exemption has not been available to professional leagues, they have tried to assert a single entity defense. However, leagues have had more success with the nonstatutory exemption than other affirmative defenses.

***Single Entity Defense.*** A goal of Section One is to prevent economic competitors from joining together and making horizontal agreements to fix prices, restrict output or unnecessarily restrain trade in some other way. One of the main requirements for a violation of Section One of the Sherman Act is the existence of an agreement, combination or conspiracy among two or more economic actors. To avoid liability under Section One, actors can argue that they are acting as single entity incapable of conspiring with itself (Grow, 2006). An issue that has become quite prevalent in antitrust cases involving sport leagues is whether they are “capable of an unlawful agreement” under Section One (Goldman, 1989, p. 754).

With the goal of maximizing consumer welfare and promoting efficiency in mind, several commentators have suggested that sport leagues be considered single entities for antitrust purposes. These scholars assert that the defense should be considered from the prospective of consumer welfare maximization with the important determining factor being whether the product could be produced independently by one entity, and whether it promotes efficiency over joint action (Grauer, 1983). While the teams may be separately owned, cooperation is necessary not only to produce a sporting event but also to generate revenue (Roberts, 1986). The question of single entity status should not hinge one particular practice but rather:

It should rest on whether consumer welfare is generally enhanced over the long run (as opposed to in the particular case) by assuming that the organization’s internal



management decisions are adopted in furtherance of organizational efficiency (which in turn maximizes profits). (Roberts, 1986, p. 582)

This assertion comes with an assumption that any decisions that promote the enterprise will also promote consumer welfare (Goldman, 1989). Roberts does not consider that individual members of an enterprise may have their own economic interests. Although the single entity defense protects parties from liability under Section One, they may still violate Section Two of the Sherman Act, but allegations of Section Two violations are more difficult for plaintiffs to prove and easier to defend (Grow, 2006).

Courts have been rather fickle in their acceptance of the single entity defense asserted by professional sport leagues. *San Francisco Seals v. National Hockey League* (1974) was the first case where a court recognized a professional sport league as a single entity. The plaintiffs in *San Francisco Seals* wanted to exchange their NHL franchise team in San Francisco for a new team in Vancouver, B.C., but the league refused (*San Francisco Seals v. NHL*, 1974). As a result, the plaintiff filed an antitrust suit arguing that the refusal was a violation of Sections One and Two of the Sherman Act (*San Francisco Seals v. NHL*, 1974). In determining whether the plaintiff successfully showed that the league violated Section One, the district court held that the plaintiff “wishes to participate in this market, but not in competition with the defendants” (*San Francisco Seals v. NHL*, 1974, p. 969). Although the NHL did not assert a single entity defense, Judge Curtis stated that “the plaintiff and defendants are acting together as one single business enterprise, competing against other similarly organized professional leagues” (*San Francisco Seals v. NHL*, 1974, p. 969).

This recognition of a league as a single enterprise did not go beyond the district court’s ruling in *San Francisco Seals v. NHL*. In *North American Soccer League v. National Football*

*League*, the district court refused to accept the single entity argument (*NASL v. NFL*, 1980). The NASL challenged the NFL's rules on cross-ownership which limited the amount of capital available to invest in professional sports (*NASL v. NFL*, 1982). The NASL alleged that the rules restricting team owners from having any financial interest in other professional sport leagues violated Section One of the Sherman Act (*NASL v. NFL*, 1980). At the district court level, the NFL argued that it was a single entity within the relevant market, but the court agreed with the NASL that the league was made up of clubs that were "separate and distinct legal entities" (*NASL v. NFL*, 1980, p. 679). At the appellate court, Judge Mansfield began the majority opinion by stating that the NFL was "an unincorporated joint venture consisting of 28 individually owned separate professional football teams, each operated through a distinct corporation or partnership, which is engaged in...competitive football games between its member teams" (*NASL v. NFL*, 1982, p. 1251). The Second Circuit, like the district court, rejected the single entity defense, and using the rule of reason analysis found that the NFL rules on cross-ownership were unreasonable (*NASL v. NFL*, 1982).

Although the league's single entity defense was rejected in *NASL v. NFL*, it continued to assert the defense, this time before the Ninth Circuit in *L.A. Memorial Coliseum Commission v. National Football League* (1984). In that case, Al Davis, the owner of the Oakland Raiders, wanted to move his club to Los Angeles, but after he failed to obtain a unanimous vote of the team owners as required under Rule 4.3, the L.A. Memorial Coliseum Commission filed an antitrust suit alleging that rule was a restraint of trade in violation of Section One (*Raiders I*, 1984). The Ninth Circuit reiterated the lower court's reasons for rejecting the single entity argument: (a) accepting the defense would give the league immunity from antitrust liability under Section One; (b) the necessary cooperation to produce a product does not warrant single

entity classification; and (c) the defense does not apply because each team has a product with independent value (*Raiders I*, 1984). The Ninth Circuit also applied the subsequently discarded intra-enterprise conspiracy doctrine which stated that “common ownership does not preclude application of section 1” (Mendelsohn, 2003, p. 77).

In these cases addressing the single entity defense there was no consistent bright-line rule used to determine if it should apply. Soon after *Raiders I* (only a few months, in fact), the Supreme Court issued its ruling in *Copperweld v. Independence Tube Corp.* which not only rejected the intra-enterprise conspiracy doctrine but also held that a parent and wholly-owned subsidiary should be viewed as a single entity for purposes of Section One (Copperweld, 1984). In rejecting the intra-enterprise conspiracy doctrine, the court stated that just as a division within a corporation operates in the common economic interest of the corporation as a whole, so does a wholly-owned subsidiary (Copperweld, 1984). Justice Burger stated that as a result “a parent and wholly owned subsidiary have a complete unity of interest” (Copperweld, 1984, p. 771). Rather than looking at the form of the organizational structure, the focus should be on the economic reality of the situation (Copperweld, 1984).

Although leagues had raised the defense previously, the Supreme Court’s ruling in *Copperweld v. Independent Tube Corp.*, gave professional sport leagues support and renewed belief in the single entity defense. *Copperweld* spoke only to the relationship between a parent and its wholly owned subsidiary, but sport leagues saw the ruling as another opportunity to assert the single entity defense despite previous rejections. However, in both *McNeil v. National Football League* and *Sullivan v. National Football League*, the courts still rejected the single entity defense, and instead focused on the independent ownership of the NFL clubs and the ways they compete against one another off the field (Mendelsohn, 2003). Despite the league’s efforts

to expand the *Copperweld* ruling to include professional sport leagues, courts were cognizant of the differences between a league and the relationship between a parent and a wholly owned subsidiary. These holdings illustrate the courts' reluctance to grant the NFL any kind of immunity from liability under Section One.

It was not until *Chicago Professional Sports Limited Partnership and WGN v. National Basketball Association* (1996) that hope was once again restored in the single entity defense. In this case concerning broadcasting rights and league-imposed restrictions, the Chicago Bulls and WGN, a television superstation, wanted to televise more Chicago Bulls games, hoping to benefit from the success and popularity of the team (Chicago Professional Sports Ltd., 1996). The NBA had agreements with NBC and the superstations TBS and TNT which left a small number of games available for local broadcasting (Chicago Professional Sports Ltd., 1996). The plaintiff challenged these agreements and the league-imposed restrictions on locally broadcasting basketball games, and the NBA raised the single entity defense (Chicago Professional Sports Ltd., 1996). The district court rejected the defense citing the NBA's lack of a "complete unity of interest" as discussed *Copperweld* (Chicago Professional Sports Ltd., 1996, p. 597). The Seventh Circuit disagreed and stated that the NBA embodies characteristics of both a joint venture and a single firm (Chicago Professional Sports Ltd., 1996). The court wasn't prepared to grant the NBA complete single entity status, however, stating that "it is essential to investigate their organization and ask *Copperweld's* functional question one league at a time—and perhaps one facet of a league at a time" (Chicago Professional Sports Ltd., 1996, p. 600).

Finally, the NFL saw another opportunity to raise the single entity defense and this time with the support of the Seventh Circuit's holding in *Chicago Professional Sports Ltd.* In *American Needle v. National Football League* (2008), the league raised the defense in regards to

intellectual property licensing. There, an apparel manufacturer, American Needle, challenged the NFL's exclusive licensing agreement through NFLP (National Football League Properties) with Reebok (*American Needle v. National Football League*, 2010). Through NFLP, the member teams were able to collectively market and license their intellectual property. American Needle argued that the agreements among the NFL teams and Reebok violated Section One of the Sherman Act (*American Needle v. National Football League*, 2010). The league raised the single entity defense arguing that it had formed a single enterprise, the NFLP, to promote the member teams' brands and in turn, the NFL brand (*American Needle v. National Football League*, 2010). American Needle argued that for a league to be considered a single entity there must be "complete unity of interest" (*American Needle*, 2008, p. 743). The Seventh Circuit disagreed and said that although NFL teams may "have competing interests regarding the use of their intellectual property...those interests do not necessarily keep those teams from functioning as a single entity" (*American Needle*, 2008, p. 743). In finding that the league has "only one source of economic power [that] controls the promotion of NFL football," the Seventh Circuit ruled that the NFL was a single entity for the purpose of licensing (*American Needle*, 2008, p. 743).

Despite the varying applications of the single entity defense to professional sport leagues, the Supreme Court had yet to voice an opinion on the question of whether the NFL was a single entity until it granted certiorari in *American Needle* to finally provide an answer. The Court referred to its holding in *Copperweld* (1984) and reiterated that when determining single entity status the focus should not be on the form of the entity (*American Needle v. National Football League*, 2010). Rather, the Court should look at whether the joint conduct of the entities denies "the marketplace of independent centers of decisionmaking" (*Copperweld*, 1984, p. 770). The Supreme Court held that the NFL was not a single entity because although NFL teams' common

interest in promoting the brand and maximizing profits may show some unity of interest, each team still has “potentially competing interests” (*American Needle v. National Football League*, 2010, p. 2213).

***Sports Broadcasting Act of 1961.*** Early in the life of the National Football League, the United States challenged the league’s blackout rule prohibiting league teams from televising games within 75 miles of the home city of another franchise and other limitations on televised games (*U.S. v. NFL*, 1953). In *U.S. v. NFL* (1953), the United States argued that the rule was a restraint of trade and the district court agreed that it did constitute a restraint of trade. However, the district court looked at the nature of professional sport leagues to determine that certain components of the rule were not unreasonable (*U.S. v. NFL*, 1953). A few years later, the United States claimed that the league’s contract with CBS violated the judgment in the previous case. After the district court’s ruling in *U.S. v. NFL*, the league altered its contract with CBS by having member teams pool their broadcasting rights and sell them collectively to CBS (*NFL II*, 1961). After the district court found that the new contract violated the final order of *U.S. v. NFL*, the league then lobbied for Congress to pass the Sports Broadcasting Act allowing teams in a sport league to pool their broadcasting rights and sell them collectively without the threat of antitrust action (Goodman, 1995).

As a result of the NFL’s efforts, the four major professional sport leagues found some shelter from antitrust scrutiny in the Sports Broadcasting Act of 1961. Section 1291 of the Act provides an antitrust exemption for sport leagues for the broadcasts of sporting events.

Specifically, Section 1291 states that

The antitrust laws, as defined in section 1 of the 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. (SBA, 2012)

While the Sports Broadcasting Act does not provide complete protection from antitrust challenges, it does give professional sport leagues another source of limited protection from antitrust scrutiny. However, the limits of the Act's protection have been tested. In *Chicago Professional Sports Ltd v. NBA* (1991), the Chicago Bulls and WGN Superstation challenged the NBA restrictions on the number of games available for local broadcasting. The NBA asserted that their limitations were protected by the SBA (*Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 1991). The court rejected the NBA's assertion stating that the Act only protects "rights in sponsored telecasting that have been transferred or sold *by a league*" (*Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 1991, p. 1350). Because the league-imposed restrictions applied to broadcasting rights owned by the team, the SBA did not apply (*Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 1991). The courts also held that the SBA did not apply to "subscription television," nor did it apply to the satellite packages challenged in *Shaw v. Dallas Cowboys Football Club* (Kaiser, 2004, pp. 1249-1250). The courts' interpretation of the SBA limited the Act's protection of professional sport leagues' broadcasting rights.

Without the option of the single entity defense and given the limited natures of the nonstatutory labor exemption and the Sports Broadcasting Act, professional sport leagues are still vulnerable to antitrust challenges. When their conduct is challenged, they must endure the

rigor of the rule of reason analysis. Case precedent is not always beneficial because of the inconsistencies among the federal circuits. However, a thorough, empirical analysis of the judicial opinions can reveal the factors most important in decisions considering the antitrust status of professional sport leagues, as well as the step or steps in the rule of reason analysis that are most important to courts in these cases.

Since *Federal Baseball*, when the Supreme Court first established the business of baseball was not subject to the Sherman Act because it did not constitute interstate commerce, the other professional sport leagues have fought to get the same type of immunity from antitrust challenges (Federal Baseball, 1922; Radovich, 1957). Leagues have asserted the nonstatutory labor exemption and the single entity defense, in hopes of escaping antitrust liability under Section One. However, the circuits have had a mixed reception to these defenses.

H3: In all cases where the court ruled in favor of a professional sport league, the league asserted an affirmative defense.

### **Empirical Studies in Antitrust Law**

Some empirical legal research has applied descriptive analyses to analyze and compare legal statutes (Carroll, Connaughton, & Spengler, 2007). The more prevalent type of empirical legal research, though, has used the attitudinal model to analyze and predict whether judges rule based on their political ideology (Edwards & Livermore, 2009). Studies that have employed a coding analysis only code for subject matter and how judges rule, and are not concerned with how judges reach their decisions. In the well-known Supreme Court database created by Spaeth, Supreme Court cases are coded but the database ignores the “norms of law,” and does not consider how law and legal doctrine play a role in judicial decision-making (Shapiro, 2009, p. 482). While the use of descriptive analysis is beneficial in uncovering the elements of laws and



characteristics of cases, it does not look into the content of judicial opinions (Shapiro, 2009). The empirical studies that focus solely on political ideologies, disregard how judges apply the law to the facts of a case. Likewise, databases like Spaeth's completely ignore the law. These types of empirical legal research may provide an overall depiction of judicial ruling, but they do not seek to understand how judges apply the law.

Empirical studies that do focus on the content of judicial opinions are a small but growing niche, with even fewer such studies focusing on antitrust law. However, the inherent vagueness of antitrust law begs for empirical research to uncover the nuances and factual underpinnings of judicial decisions. One descriptive study about antitrust law provided a statistical analysis of antitrust enforcement on private parties (Posner, 1970). Judge Posner tracked the number of antitrust cases filed and the characteristics of those cases such as which enforcement agency filed the proceeding, the length of proceeding and other descriptive features of the cases (Posner, 1970). While Posner did not analyze the content of the cases filed, the study was an important start in the empirical analysis of antitrust cases. His extensive study tracked cases from 1890, when the Sherman Act was enacted, to 1969, right before the study was published (Posner, 1970). Through this study he was able to detect a pattern of antitrust enforcement against private parties.

The limitations of the study are significant. The availability of information concerning antitrust cases was deficient in some ways, but the overall impact of Posner's study is still noteworthy. With the evolution of antitrust law and its interpretation, Posner's statistical analysis can provide an illustration of how those changes impacted the number of antitrust filings, as well as the results of those proceedings.

A more in-depth study of antitrust cases completed in 1985 consisted of cases filed in several districts between the years of 1973 and 1983 (Salop & White, 1985). Cases were mined from the Georgetown Private Antitrust Litigation Project and surveys were sent to the parties in those cases to collect descriptive information about the cases. The information collected included data about the parties involved, the type of activity challenged, the relevant antitrust statutes, procedural information and other characteristics about the case (Salop & White, 1985). In addition to providing a descriptive analysis of the antitrust cases, the study also focused on the costs associated with those cases and the settlements or monetary awards given. Salop and White's study takes Posner's statistical analysis a step further. The time period is shorter, but the sample of cases provides a description of the trends in antitrust law cases. Once again, the study does not look to the content of the judicial opinions of the cases sampled but focuses only on the characteristics of the case.

A more recent study took a closer look into the content of judicial opinions in antitrust cases (Carrier, 2009). Rather than focusing strictly on the outcome, Carrier (2009) conducted an empirical study on how courts apply the rule of reason analysis in antitrust cases (Carrier, 2009). The application of the analysis requires the court to balance the anticompetitive effects of the conduct to the procompetitive justifications. Carrier discovered that a majority of the courts do not balance but actually engage in a burden shifting approach to the rule of reason (Carrier, 2009). This means that each party bears a burden of proof. The plaintiff has the burden of proving the conduct has an anticompetitive effect in a relevant market. If he satisfies his burden, it then shifts to the defendant who has a burden of demonstrating that the conduct has procompetitive justifications. Also, Carrier found that in most cases courts rarely engage in the full rule of reason analysis because parties do not always meet their burden of proof (Carrier,

2009). Actually, most suits were dismissed early in the analysis because the plaintiff could not prove an anticompetitive effect in the relevant market (Carrier, 2009).

This study is an improvement in the empirical study of antitrust law because Carrier (2009) went past the facial characteristics of antitrust cases and delved in the judicial opinions to uncover how courts actually apply of the rule of reason. Although it lacks an empirical method that lends credibility to most empirical research, the study successfully provided an understanding of how courts apply the law. However, with the challenges courts have faced in interpreting the Sherman Act and antitrust law, a more detailed analysis of judicial opinions would seem quite beneficial to truly understand how courts have interpreted and applied antitrust law. The nature of an industry can influence how law is applied, and an empirical analysis of the characteristics of a particular industry (in this case professional sports) can provide further guidance in the role of antitrust law.

### **Empirical Legal Research**

In the academic community, legal research has been a distinctive niche that has garnered much criticism and skepticism (Epstein & King, 2002). Legal research is distinguished from other areas of research because it does not employ the traditional scientific method. Legal scholarship traditionally is based on normative research which requires the scholar to engage in methods of interpretation and rhetoric (Goldsmith & Vermeule, 2002). The goal is to support an argument and persuade the reader. The success of a legal scholar is based on his powers of persuasion and skills in rhetoric (Monsma, 2006).

Legal research has traditionally disregarded the scientific method of research because the importance is not how one gathers or analyzes data, but how he or she uses the law and legal decisions to make an argument (Monsma, 2006). While some legal scholars are content with

being isolated from other areas of research, others have made attempts to explore the possibility of using empirical research methods in conducting legal research with the intent of gaining acceptance, respect, and interest from scholars in other fields (Epstein & King, 2002).

The goal of empirical research in social science is to make inferences about things not known based on the facts that are known (Monsma, 2006). Unlike legal research, science stresses the importance of the rules of inference and replication. It requires that claims be made through a method that is reliable and valid (Epstein & King, 2002). Science makes empirical claims about the world. Legal research, on the other hand, has traditionally been viewed as normative because it seeks to influence legal decisions and predict how legal decisions are made (Monsma, 2006). Legal research looks at “how the law guides and directs human behavior” (Monsma, 2006, p. 177). However, it can be considered empirical by employing qualitative methods of research.

While many legal scholars have viewed empirical research and legal research as two mutually exclusive categories, they can complement each other. Empirical research is a tool that legal scholars can use to uncover the external factors that influence judges’ decisions (Tamanaha, 2009). Empirical research can allow scholars to detect trends and patterns in judicial decisions, determine how politics, society and rulings influence one another, and solve legal problems through the use of quantitative and qualitative analyses and social science techniques (George, 2006). An increasing number of legal scholars are attempting to use the methods of empirical research. While this may seem like a novel approach to legal research, its roots can be traced back to the development of the theory of legal realism (Tamanaha, 2009).

**Legal Realism: A Theoretical Perspective.** Legal realism is a descriptive theory of adjudication that views the law and legal reasoning as rationally indeterminate (Leiter, 2010). Those who subscribe to the legal realist theory of adjudication believe that legal reasoning is

indeterminate, that judges respond to the “situation types” rather than rules or doctrine and look to the business practices of an industry to determine the case outcome (Leiter, 2010, p. 112) .

As one of the pioneers of legal realism, Karl Llewellyn looked at law as a concept with no definite boundaries or exclusions (Llewellyn, 1962). While he is often credited with being the founder of legal realism, several other scholars, including Jerome Frank, were instrumental in exposing those in both the legal and academic communities to the new theory of adjudication (Tamanaha, 2009). At first, this pioneering group of scholars could not clearly define the term legal realism (Tamanaha, 2009). Llewellyn adamantly rejected the notion that realism is a new school of thought, but rather, he and Frank contended that legal realists were united through their skepticism of the law and their curiosity (Llewellyn, 1962). All of the scholars within this group held a skeptical and relatively realistic view of judicial decision-making (Tamanaha, 2009).

An explanation of legal realism as a theoretical perspective clears up the misconceptions surrounding the founding group of realists. Legal realism has two aspects: a skeptical aspect and a rule-bound aspect (Tamanaha, 2009). The skeptical aspect refers to an awareness that judges have personal and political beliefs that can influence how they use or manipulate legal rules (Tamanaha, 2009). The rule-bound aspect refers to the idea that there are legal, social, and institutional limits effecting how judges apply the law (Tamanaha, 2009). Combined, these two factors drive the legal realists’ belief that judges do not make decisions based solely on the law but are influenced by external factors. However, the limitations imposed by their positions and society limit the impact those outside factors can have (Tamanaha, 2009).

Despite the minor differences in beliefs among legal realists, they agreed on several characteristics of legal realism including:

the promotion of an instrumental view of law as a means to serve social ends; the pursuit of social scientific approaches to law; attempts of reformers seeking to transform legal education in order to improve legal practice and judging; the initiatives of reformers seeking to advance a progressive political agenda in and through law; or some amalgamation of all four. (Tamanaha, 2009, p. 737)

Legal realists sought to uncover the reality of judicial decision-making. In trying to understand and study the law, one must look to the organizations with the control and power to form law, whether it be a legislature or society (Llewellyn, 1962). Even earlier judges, including Justice Cardozo and Justice Holmes, realized that a judge's own reality played a role in how he decides a case and interprets the law (Tamanaha, 2009). While some scholars discuss the law and how judges should apply it, legal realists appreciate the importance of knowing and understanding how judges actually decide cases (Llewellyn, 1962).

The "Core Claim" of legal realists is that judges react to the situation and facts of a case and rule based on what they think is fair and not necessarily the applicable law (Leiter, 1997, p. 269). In making these decisions, judges have wide latitude when choosing which facts of a case they deem important to a ruling and which facts are irrelevant and subsequently left out of written opinions (Tamanaha, 2009). Judges are also able to decide when and how to use *stare decisis* and manipulate the facts of a case so that it may or may not apply, depending on how they want to rule (Tamanaha, 2009).

Legal realists acknowledge that judges do not have blinders on when it comes to the law. Contrary to how most scholars have simplified the legal realist view as simply a belief that judges decide based on their political ideology, classic legal realists like Llewellyn actually argued that judges are influenced by industry norms and practices, as well as non-legal ideas of

fairness (Leiter, 2010). Llewellyn further clarified this point in his own writings about social science methods in legal research. He looked at law as a social science and focused on the behavior of the actors involved (Llewellyn, 1962). In their research, social scientists must look at more than just one opinion of a court to determine its behavior and patterns (Llewellyn, 1962). They must look at not only a collection of rulings but also the content of those opinions (Llewellyn, 1962).

Legal realists sought to prove that judges do not base their decisions solely on the applicable law, as legal formalism contends (Tamanaha, 2009). Legal realists assert that judges' decisions are influenced and impacted by non-legal factors. It is the impact of these non-legal factors that legal realists believe can be measured through empirical research (Leiter, 1997).

**The Rules of Inference in Legal Research.** In carrying on the traditions of classic legal realists, current legal scholars have attempted to engage in empirical legal research. The question of applying empirical methods to legal research has been met with some controversy. Epstein and King, two advocates of empirical legal research, assert that although a number of articles and authors have claimed to use empirical legal research, these studies lacked the rules of inference that give credibility to empirical research (Epstein & King, 2002). Epstein and King provided rules of inference that allow legal research to conform to the standards of good quality research in the academic community.

While describing the rules of inference, Epstein and King addressed the procedures for collecting, analyzing, and measuring data. It is important that research is replicable and reliable, and also that the methods used ensure that the data are properly collected, measured, and analyzed (Epstein & King, 2002). However, Epstein and King's rules of inference are not inclusive, and they did not provide support for the rules they have chosen to include. In addition,

critics have pointed out that even Epstein and King have failed to follow their own guidelines in writing their article (Cross, Heise, & Sisk, 2002). Also, by giving all cases equal weight, Epstein and King ignore the characteristics of the law, the country's legal structure, and judicial decision-making that make legal research so unique (Goldsmith & Vermeule, 2002).

While they do not expressly oppose empirical legal research, Goldsmith and Vermeule responded to Epstein and King's rules of inferences and challenged what they consider to be good legal research. Legal research is not meant to be empirical, but "doctrinal, interpretive and normative" (Goldsmith & Vermeule, p. 153, 2002). Epstein and King ignored the purpose of legal scholarship and were incorrect in putting legal scholars in the same category as political scientists (Goldsmith & Vermeule, 2002). The goals of legal scholars are very different from those of social scientists, and as a result, the rules of inferences proposed by Epstein and King are not appropriate for legal research (Goldsmith & Vermeule, 2002).

Goldsmith and Vermeule (2002) did well to point out Epstein and King's departure from traditional legal scholarship. While there is a growing field of empirical legal scholarship, the benefits and importance of doctrinal, normative research should not be discounted. However, this growing niche of legal scholarship does demand that attention be given to some guidelines for credible empirical legal research. The rules of inference set out by Epstein and King may not be the universally accepted list of guidelines, but they are all principles that can contribute to the credibility of empirical legal research.

There are some elements of empirical research that should be incorporated into legal scholarship. However, characteristics of the judicial system can make that difficult. Cases have individual levels of salience, and that variance is ignored when cases become mere subjects in a research study. Also, statistical analysis does not factor in the relevance of an individual judicial



opinion. With traditional legal research, the significance of case law is recognized and acknowledged in a way that cannot be measured in empirical research (Goldsmith & Vermeule, 2002). Assertions in legal scholarship based on judicial decisions should not be subjected to empirical research and statistical analysis before they are accepted as true (Goldsmith & Vermeule, 2002).

While Revesz did not completely reject the efforts of Epstein and King, he felt that they had overdramatized the problems in empirical legal scholarship as they have broadly defined them (Revesz, 2002). Epstein and King insisted that unless their rules are adhered to, the body of empirical legal scholarship will be forever “flawed” and not up to par with empirical scholarship in other areas (Epstein & King, p. 6, 2002). There is a misconception that the inclusion of quantitative methods and empirical research in legal scholarship makes it more credible and valid than normative legal scholarship (Monsma, 2006). While the rules can be helpful in improving empirical legal scholarship, all of the rules of empirical research applied by the social sciences may not produce good empirical legal research (Goldsmith & Vermeule, 2002).

Although there may be a disconnect between the legal community and other social sciences, critics took particular issue with Epstein and King’s insistence on following rules of inference to produce quality legal scholarship. Empirical research does provide credibility for legal research, but it should be noted that this credibility is only significant to those outside of the legal community. Many scholars contend that legal research is not like social science research, as it has different goals and different data to analyze and measure (Goldsmith & Vermeule, 2002). Legal scholars who attempt to conduct legal research are torn between using empirical methods to ensure replicability and reliability, and the goals of legal research (Epstein & King, 2002). While the debate between traditional legal research and empirical legal research is far from over,

scholars should recognize that both forms of research can complement one another. Each has its advantages and drawbacks, but when joined together it is possible for one to provide strength and support where the other falls short.

**Shortfalls of Empirical Legal Research.** There are legal scholars and political scientists who use empirical models and methodologies to analyze judicial decision-making and the ways in which extralegal factors influence appellate decision-making, but Edwards and Livermore (2009) identified several shortcomings of empirical legal research. Their concerns about empirical legal research include the use of judicial decisions as data, the use of statistical tools to analyze that data, and the validity of the attitudinal model and empirical methodologies as applied to legal research (Edwards & Livermore, 2009). However, these shortcomings may be better described as misconceptions of empirical legal research.

Edwards and Livermore argue that the use of judicial decisions as “raw data” that are collected, analyzed and used to draw conclusions about judicial decision-making is questionable (Edwards & Livermore, 2009, p. 1903). It is quite difficult and almost impossible to statistically distinguish between the legal factors such as applicable law, precedent, the legal history of the cases, judicial deliberations, and extralegal factors, when determining which of these factors have the most influence on how judges rule (Edwards & Livermore, 2009). However, these same judicial decisions are also the data from which traditional legal research draws conclusions, making it equally as questionable. Additionally, the use of statistical analysis in empirical legal research has been questioned because there is no formula for legal reasoning. This makes it difficult for one to assign numerical values to the process, but empirical legal research is not limited to quantifying data through statistical analysis (Edwards & Livermore, 2009). Indeed,

qualitative methods are also available and may be more appropriate for developing theories of judicial decision-making than quantitative analysis.

Some argue that there is too much significance placed on the attitudinal model of judicial behavior which states that judges' decisions are based mainly on their political preferences and that the law is a secondary consideration (Edwards & Livermore, 2009). Under the attitudinal model, the focus is on the outcome and less on the legal reasoning behind the decisions (Edwards & Livermore, 2009). As a result, conclusions (sometimes extreme) are drawn based on outcomes that may not adequately explain a judge's position on the law (Edwards & Livermore, 2009). Those who apply this model are primarily concerned with identifying judges' political ideology and defining them as liberal or conservative. However researchers are misled in thinking that using judicial opinions will provide significant insight on a judge's ideology and his decision-making process (Edwards & Livermore, 2009). How judges use and apply the law, precedent, and legal reasoning are all important, but none can be measured through their political ideology (Edwards & Livermore, 2009).

While this may be a fair assessment of the attitudinal model, all empirical legal research does not apply this model. In comparison to the theory of legal realism, both take the position that judicial decision-making goes beyond the four corners of the applicable law. However, legal realism does not suggest that judges make decisions based primarily on their political ideology (Leiter, 2010). Legal realists do not ignore the significance of the applicable law and legal reasoning, but they do acknowledge the existence and impact of external factors outside the law (Leiter, 2010). Through content analysis, researchers can uncover and examine those factors that do influence judicial opinions.

Also, there is an element of judicial decision making that is not and cannot be taken into account in empirical research: judicial deliberations (Edwards & Livermore, 2009). The deliberations that occur among appellate judges are confidential and are usually not included in the written opinion. The content of deliberations would provide the most insight regarding the factors judges consider when deciding cases. Empirical legal research, including the attitudinal model, cannot consider judicial deliberation in its analysis but neither can traditional legal research. Both researchers are usually limited to the contents of a judicial opinion. The absence of deliberations may be a weakness of empirical legal analysis, but this limitation is not unique to empirical legal research.

There are limitations to empirical methodologies that make it difficult to sufficiently measure the data contained in a judicial opinion (Edwards & Livermore, 2009). Several problems can occur with coding judicial decisions and measuring independent and dependent variables. The dependent variable is usually the outcome of the case, but when researchers code the outcome of appellate cases, the categories are usually limited to who prevails (appellant or appellee) or the ideological outcome (Edwards & Livermore, 2009). In actuality, there may be several different potential and complex outcomes. Overlooking those outcomes when coding, can lead to erroneous analysis and oversimplified conclusions (Edwards & Livermore, p. 1925, 2009). However, empirical research allows for the scholar to develop a research design and create a coding scheme, determine the population, and select units of analysis to minimize the possibilities for erroneous analysis and overly broad conclusions (Johnson, 1987).

Edwards and Livermore's criticism that coding tends to be limited to the outcome and excludes the actual content of the court's opinion completely ignores the content analysis methodology. One of the benefits of the content analysis methodology is that it can be tailored

for empirical legal research (Hall & Wright, 2008). Rather than just looking at the outcome of a case, content analysis takes a more in-depth look at the decision. The systematic coding allows the researcher to uncover the factors that lead to the outcome. The content analysis methodology allows the researcher to develop a coding scheme to include an unlimited number of independent variables that can be measured through the data analysis. Critics of empirical legal research should be aware of other methodologies and models besides the attitudinal model that allow researchers to conduct more thorough and accurate empirical analysis.

It is clear from the dearth of empirical methods in legal research that some are skeptical of its benefits to the field. While traditional legal research has its merits and can be beneficial to the study of law, empirical methods provide factual data that can supplement traditional legal research and support an argument (Hall & Wright, 2008). Empirical legal research is a growing field, but its application is limited in certain areas of law. There are a few empirical studies regarding antitrust law, but they do not delve into the content of the judicial opinions (Posner, 1970; Salop & White, 1985). Instead, they have revealed patterns in the facial characteristics of the cases. There is no existing research that examines the application of antitrust law to sport leagues through a content analysis methodology.

### **Content Analysis in Legal Research**

A content analysis model is an empirical methodology seldom used in legal scholarship (Hall & Wright, 2008). Content analysis includes elements of empirical research by requiring the analyst to explain case selection and themes so that others may replicate those steps. Thus, the credibility depends on the ability of others to replicate the findings, not rhetorical power which is more important in normative research (Hall & Wright, 2008).

Content analysis flows from legal realism, which emphasized the importance of studying judicial behavior (Hall & Wright, 2008). Scholars who use content analysis fall into two main categories: those who code opinions to predict outcomes based on factors discussed in the opinions, and those who code to understand the attitudes behind judicial behavior (Hall & Wright, 2008). As it became more popular with legal scholars, the methodology has been applied to different areas of law. A recent study on unconscionability exemplifies the content analysis methodology, with empirical evidence and statistical analysis being used to develop a new consent theory of unconscionability (DiMatteo & Rich, 2006).

Content analysis is a way for scholars to review a large number of cases and detect overall trends in judicial opinions. One shortfall of the methodology as applied to judicial opinions is that the researchers who used it did not refer to any literature about the methodology but rather developed their own (Hall & Wright, 2008). However, the content analysis methodologies used in other areas of academic research provide models that can and have been applied to legal research (Johnson, 1987). Use of these existing and accepted models can provide the validity and reliability missing in legal research.

There are three components to content analysis: selecting cases, coding cases and analyzing the coding (Hall & Wright, 2008). Case selection is very systematic with content analysis, while interpretive methods allow the scholar to select the cases he wants to study without explanation (Hall & Wright, 2008). The systematic approach to case selection gives the content analysis method replicability. Content analysis employs a systematic coding of cases which requires the researchers to develop a well-defined coding scheme that brings attention to the various elements of a case (Hall & Wright, 2008). Coding cases can help make the analysis more objective and once again, replicable. Analyzing the coding brings a quantitative element

into legal research that allows the researcher to draw conclusions from all of the data collected (Hall & Wright, 2008). Despite a thorough analysis, researchers should avoid any presumptions of certainty that they may want to assert in their results (Hall & Wright, 2008).

One of the drawbacks of content analysis is that it cannot detect the "subtleties of the judicial process" like an interpretive method (Hall & Wright, 2008). Empirical research looks at all cases as equals and does not recognize that some opinions have more significance than others. As a result, some suggest that content analysis should only be used with cases that carry the same weight (Hall & Wright, 2008). In addition, it is only appropriate for answering certain research questions and not those that involve interpretation of the law or how it is applied in specific cases. Additionally, content analysis is not helpful in normative research and cannot be used to explain the reasons for certain interpretations or the meaning of judicial opinions. It is best used for descriptive studies that fall into two categories: "(1) those that examine the background of legal doctrines, case subject matter, or case outcomes, versus (2) those that focus on particular techniques of opinion writing, such as syntax, semantics, citations, or reasoning style" (Hall & Wright, p. 90, 2008). The methodology was appropriate for determining what factors influenced and what factors were most prevalent in courts' findings of unconscionability (DiMatteo & Rich, 2006). Likewise, in the present study a content analysis methodology can detect the factors that were considered most often when courts apply Section One of the Sherman Act to professional sport leagues.

One major problem for the content analysis methodology is circularity in judicial opinions. Circularity refers to the idea that the facts addressed in the opinion may not accurately portray the reality of the case (Hall & Wright, 2008). Rather than include all of the facts of the case, judges will only include those facts that are relevant to and support their decision. This

limitation is one of all types of legal research, not just content analysis. Researchers should not assume that the opinions included in their research are complete and accurate accounts of the cases (Hall & Wright, 2008).

Epstein and King have provided rules to follow that lend credibility to empirical legal research, and others have applied those rules to develop a content analysis methodology designed for legal research (Hall & Wright, 2008; Johnson, 1987). Although the methodology does not have an extensive history of being applied to judicial decisions, it can be uniquely tailored for empirical research and beneficial in determining what common factors in judicial opinions most influence a court's decision. In addition to detecting important factors, content analysis can also reveal trends and patterns in judicial opinions. However, not all research questions can be answered with content analysis or any other type of empirical methodology. The interpretive methods of legal scholarship are more suitable for questions about judicial reasoning or interpretation but content analysis is a viable option for legal scholars who want to conduct empirical legal research as an alternative or complement to traditional legal research.

The amount of empirical research dedicated to understanding how courts apply antitrust law is minimal but significant as each study has been more expansive than its predecessors. The use of empirical methods to understand antitrust cases involving professional sport leagues is nonexistent. The unique features and characteristics of sport leagues can introduce new and different problems into the application of antitrust law. This study builds on the past studies of Posner (1970) and Salop and White (1985) by using social science methodology to analyze antitrust cases involving professional sport leagues. It also adds to the body of research by combining the descriptive methods with a content analysis methodology to understand these antitrust cases.



Content analysis is an appropriate methodology because it allows “for examination of written and oral communication” (Insch, 1997, p. 2). Pederson and Pitts (2005) define it as “the systematic and replicable examination of symbols and communication...in order to describe the communication and draw inferences about its meaning” (Pitts & Pederson, 2005, p. 36). Content analysis is unobtrusive because the subjects studied are not manipulated (Pitts & Pederson, 2005). The methodology helps the researcher determine the focus of society or certain institutions, detecting or describing trends and patterns in communication and other objectives (Insch, 1997). While the method is typically associated with communications research, it can be used to draw conclusions about selected cases (Levine, 2006). In the area of legal research, content analysis is a way for scholars to review a large number of cases and detect overall trends and common characteristics in judicial opinions (Hall & Wright, 2008).

Insch, et al., laid out detailed guidelines for using the content analysis methodology. Their procedure included eleven steps: (1) identify the research questions and constructs; (2) identify the texts to be examined; (3) specify the units of analysis; (4) specify the categories; (5) generate a sample coding scheme; (6) collect data (pre-test); (7) purify the coding scheme; (8) collect data; (9) assess reliability; (10) assess the construct validity; (11) analyze the data (Insch, 1997). Although their focus was on the application of the methodology to leadership, their model can be applied to other areas of study. However, legal research raises different research questions, which requires varying the steps and techniques in content analysis. As a result, “specification of precise ‘how-to’ guidelines is not always possible” (Johnson, 1987, p. 178). However, there are three specific components that should be included in the application of content analysis in judicial opinion: selecting cases, coding cases, and analyzing the coding (Hall & Wright, 2008, p. 79).

## Research Questions

The rule of reason has been the court system's method of analysis for determining whether the conduct of professional sport leagues violates Section One of the Sherman Act. However, the application of the rule of reason has been inconsistent among the federal courts. As Carrier explained, in many cases the courts rarely engage in a full rule of reason analysis because either the plaintiff or defendant fails to meet his burden of proof (Carrier, 2009). Additionally, the use of the less restrictive alternatives inquiry as a final element in the rule of reason has not been formally recognized by the Supreme Court (Feldman, 2009). However, each of the federal circuits has developed its own version of the less restrictive alternative test (Feldman, 2009). In professional sport leagues, the cooperation necessary among otherwise independent economic competitors has further complicated the analysis and led to uncertainties in the application of the rule of reason analysis.

The horizontal restraints are necessary in professional sport leagues to generate a product. These restraints have been the focus of many challenges faced by the leagues under antitrust law. When faced with antitrust lawsuits regarding their conduct professional sport leagues have used affirmative defenses to combat these challenges and have seen some success as a result (Chicago Professional Sports Ltd., 1996; NASL v. NFL, 1982; San Francisco Seals v. NHL, 1974). Content analysis was applied in this study to answer two questions that address the unique issues and various restraints of sport leagues that have been challenged under antitrust law:

Research Question 1: What step(s) in the Rule of Reason analysis do courts consider most often in antitrust cases under Section One of the Sherman Act involving professional sport leagues?

Research Question 2: How often are certain, selected characteristics mentioned in court decisions ruling in favor of a professional sport league in antitrust cases under Section One of the Sherman Act?

## **CHAPTER 3**

### **METHODOLOGY**

#### **Population and Sample**

The population of cases represented in this study was federal antitrust cases where a professional sport league's conduct is challenged under Section One of the Sherman Act. Because this study involved a comprehensive analysis of judicial opinions, the sample consists of the total population of relevant cases. The sampling unit consisted of all federal court cases at the district court and appellate court levels. Cases heard on the Supreme Court level were excluded because the Court has complete discretion over which cases it will hear and usually is asked to answer a specific question. The unit of analysis was limited to the majority opinion of a judicial decision. Concurring opinions and dissenting opinions were not included because this study was concerned only with the factors that influenced the holding in each case.

A search was conducted on LexisNexis to produce all minable cases concerning challenges to the conduct of professional sport leagues under Section One of the Sherman Act. The search conducted on LexisNexis was: "Sherman AND antitrust AND sports AND league AND CORE-TERMS(team)". The search yielded 184 cases. However, because this study concerned only those cases challenging conduct under Section One of the Sherman Act, there were only 99 cases where the court addressed a professional sport league's conduct under Section One of the Sherman Act. The remaining cases produced in the search were excluded for several reasons: a professional sport league was not a party in the action, the court did not address challenges under the Sherman Act, or the conduct was challenged under Section Two.

To adequately address each research question, the cases were divided into two groups. Group One consists of the aggregate of antitrust cases that challenged the conduct of a professional sport league under Section One of the Sherman Act. Group Two included only a subset of cases where the court ruled in favor of the professional sport league. Cases heard in a higher court do not always include final rulings, but instead, are remanded to a lower court with instructions for that court. As a result, the appellee or petitioner is considered the prevailing party if the court rules in his or her favor under Section One of the Sherman Act.

### **Instrumentation and Data Collection**

To answer the research questions and test the corresponding hypotheses, two coding instruments were developed. The instruments consisted of coding schemes to measure the frequency of factors (independent variables) and the outcome of cases (the dependent variable). The first coding scheme was developed to analyze the frequency of the steps in the rule of reason analysis. There were six factors in this coding scheme encompassing the elements of rule of reason analysis under Section One of the Sherman Act. The first coding scheme also included coding for the dependent variable: whether the court ruled in favor of the professional league. The second coding scheme consisted of eighteen factors that indicate the characteristics mentioned in the judicial decisions. These factors were collected from a case and literature review. These characteristics contributed to a descriptive analysis of cases where professional sport leagues prevailed. Each factor in the two coding schemes was given a score of 1=yes or 0=no. A value of one indicated that the factor is present in the sampling unit. A value of zero indicates that the factor is not present in the sampling unit. The coding was done by the author of the study. To ensure that the coding instrument was valid and appropriate for answering the research questions, the initial research design was submitted to a Delphi panel of experts in the

fields of antitrust law and sport law. Before approving the research design, the Delphi panel suggested additional questions to include in the coding schemes to adequately address the research question.

### **Data Analysis**

Data collected through content analysis can be analyzed in different ways to derive information. The most common statistical technique used in content analysis is regression, which allows the researcher to detect relationships among variables and through logistic regression, develop a formula that can predict the likelihood of a particular outcome based on the presence of factors or independent variables (Hall & Wright, 2008). Other types of analysis include factor analysis, cluster analysis, and frequency analysis (Insch, 1997).

In this study, the data collected from the sampling units were computed in SPSS for a frequency analysis and measure of cross-tabulations. A frequency analysis can be used to count and compare the use factors included in the coding scheme (Bos, 1999). By measuring the frequencies of different factors, trends can be uncovered not only in judicial decision making, but also in the types of conduct challenged under antitrust law. The data will also be analyzed for cross-tabulations to study any possible relationships among the different factors measured.

## **CHAPTER 4**

### **RESULTS**

The total population consisted of 99 cases, all of which were coded to address the first research question. Of the 99 cases coded, the court ruled in favor of a professional sport league in 57 of those cases. The frequency analysis provides an understanding of how often the courts applied each step in the rule of reason analysis. The results from the second coding scheme reveal the most common characteristics in cases where the court ruled in favor of the league as well as possible relationships among the characteristics measures. The following is a presentation of the results in response to the research questions as well as an in-depth discussion of the frequencies and cross-tabulations measured in the study.

#### **Results from Coding Scheme 1**

The first research question addressed the court's use of the Rule of Reason analysis in antitrust cases involving professional sport leagues. To address this question, the total population of cases ( $N=99$ ) were subjected to the first coding scheme to measure the frequency of each factor in the analysis. The result showed that of the total population of cases, the plaintiff proved an anticompetitive effect in 30 cases, and the defendant demonstrated a procompetitive justification in 31 cases. The court engaged in balancing in only twelve cases and inquired about less restrictive alternatives in six of the cases. Based on the frequency measures from the first coding scheme, the results indicate that courts consider the anticompetitive effect and the procompetitive justification most often when analyzing antitrust cases involving professional

sport leagues. However, the courts appeared to consider procompetitive justifications slightly more often.

Table 1

*The Frequency of the Elements of the Rule of Reason Analysis in Antitrust Cases Involving Professional Sport Leagues (N = 99)*

Rule of Reason Element	Ruling In Favor of League		Rulings Against the League		Combined Rulings		Chi-Square	Sig.
	<i>n</i>	%	<i>N</i>	%	<i>n</i>	%	$\chi^2*$	<i>p</i> *
Definition of Relevant Market	8	14.0	15	35.7	23	23.2	6.37	.010
Acceptance of Relevant Market	4	7.0	14	33.3	18	18.2	11.28	.001
Anticompetitive Effect	6	10.5	24	57.1	30	30.3	24.88	.000
Procompetitive Justification	12	21.1	19	45.2	31	31.3	6.58	.010
Balancing	0	0	12	28.6	12	12.1	18.53	.000
Less Restrictive Alternatives	0	0	6	14.3	6	6.1	8.67	.003

*Note.* The total population of cases ( $N = 99$ ) were coded to measure the frequency of elements of the rule of reason analysis.

\*  $\chi^2$  = the probability of a relationship between each element and the ruling,  $p < .05$ .

The results shown in Table 1 illustrate the frequency of the elements in the rule of reason analysis. In the first step of the rule of reason analysis, plaintiffs must show an anticompetitive effect in a relevant market. In some cases courts may require the plaintiff to define the relevant geographic and product market. The plaintiffs defined a relevant market in 23 of the 99 cases



coded. Because the plaintiff proved an anticompetitive effect in 30 of the cases coded, it appears that the plaintiff's definition (or lack thereof) did not preclude his/her from proving an anticompetitive effect. The Chi-Square values in Table 1 indicate the possibility of a relationship between an element of the rule of reason and the outcome of a case.

Figure 1 *The Frequency of the Elements of the Rule of Reason Analysis*

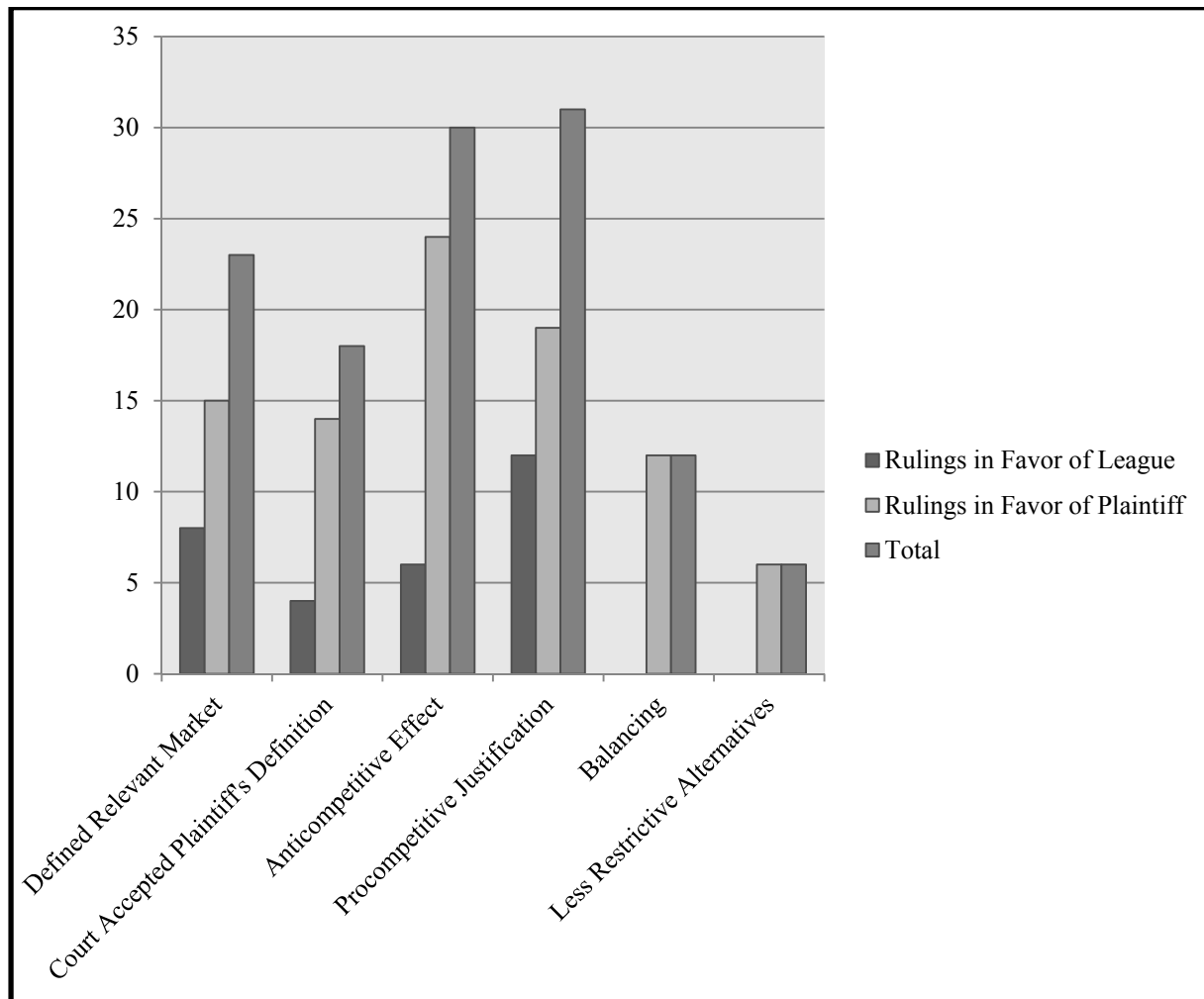


Figure 1. The comparison of frequency measures for each of the rule of reason elements in all of the total population of cases (N=99).

Figure 1 is a graphic illustration comparing the frequencies of the steps of the rule of reason analysis in cases where the court ruled in favor of the league and in favor of the plaintiff. The illustration also shows the frequencies of elements of the rule of reason in all of the cases coded.

The hypothesis for the first research question was that the courts consider whether the plaintiff proved an anticompetitive effect most often in antitrust cases involving professional sport leagues. In comparing the frequencies of the plaintiff proving an anticompetitive effect and the defendant showing a procompetitive justification, this hypothesis must be rejected. The court addressed the plaintiff's proof of an anticompetitive effect in 30 cases, while reference to a defendant offering a procompetitive justification was addressed in 31 cases. The courts appeared to be more concerned with professional sport leagues providing procompetitive justifications for the challenged conduct.

The results indicate that there were 13 cases where an anticompetitive effect was proven but a defendant did not demonstrate a procompetitive justification. Of those 13 cases, the court ruled in favor of the league in five cases, which suggests that factors (such as affirmative defenses) outside the rule of reason influenced the courts' decision. In the remaining eight cases it appears that the rule of reason analysis ended because the defendant sport league could not meet its burden of proof.

Table 2

*Comparison of the Use of Elements in the Rule of Reason Analysis (N = 99)*

Rule of Reason Step	Ruling in Favor of the League		Ruling in Favor of the Plaintiff	
	<i>n</i>	%	<i>n</i>	%
Anticompetitive Effect	6	10.5	24	57.1
Procompetitive Justification	12	21.1	19	45.2
Anticompetitive Effect and Procompetitive Justification	1	1.8	16	38.1
Balancing	0	0.0	12	28.6
Less Restrictive Alternative	0	0.0	6	14.3
Mean*	1.74		2.44	
S.D.	0.56		1.24	

*Note.* Table 2 shows a comparison of the frequency of elements in the rule of reason analysis as well as the mean step where courts made their rulings.

\*Mann-Whitney  $U = 525.00$ , ( $p < .05$ ), shows significance in the rule of reason steps on the court's ruling.

Table 2 shows the results from the data analysis revealing that professional sport leagues did not succeed as often when courts engaged in the rule of reason analysis. The table provides a comparison of how each party fared at the different stages of the rule of reason. When ruling in favor of the league, the court never reached the balancing step of the analysis. However, when the court ruled in favor of the plaintiff, it engaged in more steps of the rule of reason. In this

study the Mann-Whitney test was used to compare the cases where the court ruled in favor of the league with the cases where the court ruled against the league. The test reflected the significance of each step in the rule of reason analysis in the courts' decisions, and as seen in Table 2, it revealed that when comparing the two groups of cases, there was a significant difference between the groups in how far the court went into the rule of reason as well as the importance of each step in the analysis.

### **Results from Coding Scheme 2**

In response to the second research question, the purpose of the second coding scheme was to determine the frequency of selected characteristics appearing in cases where professional sport leagues were successful against challenges under Section One of the Sherman Act. Of the 99 cases coded, the league was successful in 57 cases, and from these decisions, data were collected using the second coding scheme to answer the second research question. Several different characteristics such as subject matter, opposing party, and affirmative defenses were included in this coding scheme. The most common challenged conduct in cases where a league was the prevailing party was a player restraint, which accounted for 30 of the cases. Leagues enjoyed the most success against plaintiffs who were not parties to a collective bargaining agreement. Finally, professional sport leagues asserted an affirmative defense in 34 of the cases where the court ruled in their favor. While these were the most prevalent characteristics in cases decided in favor of professional sport leagues, a more detailed analysis of other characteristics is included in the discussion below.

Table 3

*The Frequency of Selected Characteristics in Antitrust Cases Involving Professional Sport Leagues (N = 99)*

Selected Characteristic	Rulings in Favor of League		Rulings Against the League		Combined Rulings	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Players Restraints	30	52.6	23	54.8	53	53.5
Broadcasting Rights	5	8.8	6	14.3	11	11.1
Ownership Rights	13	22.8	9	21.4	22	22.2
Licensing and Marketing Rights	6	10.5	2	4.8	8	8.1
Antitrust Exemption	10	21.1	12	23.8	22	22.2
Single Entity Defense	8	17.5	10	19.0	18	18.2
Labor Exemption	16	28.1	14	33.3	30	30.3
Non-CBA Party	35	61.4	23	54.8	58	58.6
Athlete	25	43.9	20	47.6	45	45.5
Owner	7	12.3	7	16.7	14	14.1
International Geographic Market	3	5.3	2	4.8	5	5.1
National Geographic Market	6	10.5	8	19.0	14	14.1
Entertainment Product Market	0	0.0	1	2.4	1	1.0
Sport Product Market	1	1.8	0	0.0	1	1.0
Market Power	6	10.5	7	16.7	13	13.1
Standing	10	17.5	20	47.6	30	30.3
Competitive Balance	6	10.5	10	23.8	16	16.2
Consumer Welfare	3	5.3	3	7.1	6	6.1

*Note.* Table 3 illustrates the frequency measures for the total population ( $N = 99$ ) through a comparison of cases where the court ruled in favor of the league and cases where the court ruled in favor of the plaintiff.

The frequencies of the characteristics coded are shown in Table 3. The conduct of professional sport leagues challenged under Section One of the Sherman Act usually concern player restraints, ownership rights, broadcasting rights, or licensing and marketing rights. Player restraints were the subject of a majority of the antitrust cases coded and also constituted the challenged conduct in a majority of cases where the league was the prevailing party. Of the 57 cases coded where the league was the prevailing party, player restraints were at issue in 30 of them. Ownership rights accounted for 13 of the cases where the league was successful. Additionally, broadcasting rights were disputed in five cases, and licensing marketing rights were the subject matter of six cases where the court ruled in favor of the league.

In order to bring an antitrust suit, a plaintiff must establish antitrust standing by alleging an antitrust injury caused by the defendant's anticompetitive conduct. Defendants can challenge a plaintiff's standing in an antitrust suit in order to possibly avoid scrutiny under Section One of the Sherman Act. As seen in Table 3, the league was successful in 10 of the cases where they challenged the plaintiff's standing, which accounts for only 17.5% of the cases where the league prevailed.

The second coding scheme also revealed the types of parties professional sport leagues were most successful against in antitrust challenges under Section One of the Sherman Act. In a majority of the cases coded, third parties outside of the collective bargaining relationship were the plaintiffs. Plaintiffs not in a collective bargaining relationship accounted for the opposing parties in 35 of the cases where the court ruled in favor of a professional sport league. Athletes were opposing parties in 25 of the cases where a professional sport league was successful. Finally, team owners were opposing parties in seven cases where a professional sport league was the prevailing party.

Professional sport leagues have routinely asserted affirmative defenses against antitrust challenges to avoid the application of Section One of the Sherman Act. The affirmative defenses measured in this study included antitrust exemptions, labor exemptions, and the single entity defense. While multiple defenses could have been raised in one case, the labor exemption was the defense asserted most often in the cases coded and also the defense found in a majority of the cases where the court ruled in favor of a professional league. The professional sport leagues asserted the labor exemption in 16 of the cases where the court ruled in its favor. Leagues claimed a single entity defense in six of the cases where it was a prevailing party. The third affirmative defense measured, an antitrust exemption, was asserted in 10 of the cases where a professional sport league was successful.

There were two hypotheses for the second research question. The first hypothesis was that player restraints are challenged most frequently in antitrust cases where leagues are successful. This hypothesis must be accepted, as the results show that player restraints were at issue most frequently in cases where leagues were successful. The second hypothesis was that in all cases where the court ruled in favor of a professional sport league, the league asserted an affirmative defense. This hypothesis must be rejected, because the results indicate that of the 57 cases where the court ruled in the league's favor, an affirmative defense was asserted in only 34 of the cases, as seen on Table 3.

Table 4

*The Frequency of Affirmative Defenses with Each Type of Challenged Conduct in Cases Where the Court Ruled in Favor of the League (N = 57)*

Affirmative Defense	Player Restraints		Broadcasting Rights		Ownership Rights		Licensing and Marketing Rights	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Labor Exemption	16	28.1	0	0.0	0	0.0	0	0.0
Antitrust Exemption	6	10.5	2	3.5	0	0.0	1	1.8
Single Entity Defense	2	3.5	1	1.8	5	8.8	2	3.5

*Note.* Table 7 illustrated the frequency of each affirmative defense used with each type of challenged conduct in cases where the court ruled in favor of the league ( $N = 57$ ).

As seen in Table 4, when the affirmative defenses are examined in conjunction with the most frequently challenged conduct (i.e. player restraints) it appears that professional sport leagues have enjoyed the most success when the subject matter concerns labor issues that are addressed in a collective bargaining relationship protected by labor law. Of the 57 cases where the court ruled in favor of the league, the challenged conduct concerned player restraints in 30 of those cases. The cross tabulations showed that professional sport leagues were successful in 16 of those cases where they asserted the labor exemption. Professional sport leagues' success against antitrust challenges with the labor exemption reinforces the courts' insistence on keeping the line between labor law and antitrust law clear and distinct.



Table 5

*The Frequency of Affirmative Defenses with Each Type of Challenged Conduct in Cases Where the Court Ruled in Favor of the Plaintiff (N=42)*

Affirmative Defense	Player Restraints		Broadcasting Rights		Ownership Rights		Licensing and Marketing Rights	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Labor Exemption	14	33.3	0	0.0	0	0.0	0	0.0
Antitrust Exemption	2	4.8	5	11.9	1	2.4	0	0.0
Single Entity Defense	1	2.4	4	9.5	3	7.1	1	2.4

*Note.* Table 5 illustrated the frequency of each affirmative defense used with each type of challenged conduct in cases where the court ruled in favor of the plaintiff (N=42).

Table 5 shows the frequency of each type of affirmative defense in cases in where the court ruled in favor of the plaintiff. The frequencies are displayed with the types of conduct challenged in those cases. Because player restraints were the most frequent type of conduct challenged in all of the cases coded, it is not surprising that in a majority of the cases where the plaintiff prevailed, the labor exemption was asserted as an affirmative defense (i.e. 14 times). From both Tables 4 and 5, it appears that the labor exemption was only asserted in cases where the conduct challenged concerned player restraints. Table 5 also shows that the plaintiff did not prevail in any cases where the league asserted an antitrust exemption when the challenged conduct concerned broadcasting rights.

When analyzed in relation to the type of conduct challenged under Section One, there also appears to be a relationship between the type of affirmative defense raised and the identity of the opposing party. Cases concerning player restraints constituted 53 cases of the total

population. The plaintiffs in 45 of those cases were athletes. In fact, player restraints were the only types of conduct challenged by athletes in all of the cases coded. Ironically, challenges to conduct usually kept within the confines of labor law account for a majority of the challenges to professional sport leagues. While courts have worked hard to keep antitrust and labor law separate that has not stopped athletes from using Section One of the Sherman Act to address their grievances.

Table 6

*The Frequency of Affirmative Defenses with Each Type of Plaintiff in Cases Where the Court Ruled in Favor of the League (N = 57)*

Affirmative Defense	Athlete-Plaintiff		Non-CBA Plaintiff		Owner-Plaintiff	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Labor Exemption	15	26.3	5	8.8	0	0.0
Antitrust Exemption	4	7.0	8	14.0	2	3.5
Single Entity Defense	2	3.5	8	14.0	1	1.8

*Note.* Table 6 illustrates the frequency of each affirmative defense with each type plaintiff in cases where the court ruled in favor of the league (*N* = 57).

Table 7

*The Frequency of Affirmative Defenses with Each Type of Plaintiff in Cases Where the Court Ruled in Favor of the Plaintiff (N = 42)*

Affirmative Defense	Athlete-Plaintiff		Non-CBA Plaintiff		Owner-Plaintiff	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Labor Exemption	13	31.0	3	7.1	1	2.4
Antitrust Exemption	2	4.8	7	16.7	3	7.1
Single Entity Defense	1	2.4	6	14.3	3	7.1

*Note.* Table 7 illustrates the frequency of each affirmative defense with each type plaintiff in cases where the court ruled in favor of the plaintiff (*N* = 42).

Table 6 shows the relationship between the type of party challenging the league’s conduct and the affirmative defense asserted in those cases where the leagues prevailed. The leagues had the most success when they asserted the labor exemption against plaintiffs who were athletes. Table 7 shows the relationship between the affirmative defenses and the type of plaintiff in cases where the court ruled against the league. The labor exemption was asserted against an owner-plaintiff only one time, with the court ruling in favor of the plaintiff in that case. Table 7 also illustrates that the court ruled in favor of plaintiffs who were athlete-plaintiffs in thirteen of the cases where a professional sport league asserted the labor exemption.

**Discussion**

Michael Carrier’s study analyzing the application of the Rule of Reason analysis across all antitrust cases revealed that because of the burden shifting approach many courts engage in when applying the rule of reason, they rarely reach the balancing step of the analysis. Carrier

attributed this to the belief that plaintiffs do not often prove an anticompetitive effect and therefore the analysis does not move beyond the first step. The results of this study, however, do not mirror those of Carrier's study, which may be attributed to the nature of professional sport leagues. Because of the necessity for horizontal restraints, courts may be more interested in the procompetitive justifications of the conduct.

The second step of the rule of reason analysis requires that a defendant offer a procompetitive justification for the alleged anticompetitive conduct. A defendant professional sport league demonstrated a procompetitive justification in 31 of the cases coded. It is important to point out that all of the cases where an anticompetitive effect was proven and a procompetitive effect was demonstrated do not coincide. The cross-tabulations reveal that of the 30 cases where an anticompetitive effect was shown, a defendant offered a procompetitive justification in only 17 cases. The court applied a quick look approach in only one case. These results indicate that even though the plaintiff may not have proven an anticompetitive effect the defendant still offered procompetitive justifications for the challenged conduct.

In the third step of the rule of reason analysis, the court balances the anticompetitive effect with any procompetitive justifications. Carrier found that because many plaintiffs could not prove an anticompetitive effect, and because of the burden-shifting approach, the courts rarely engaged in the balancing step of the rule of reason analysis. In this study, the cross-tabulations showed that a procompetitive justification was demonstrated in seventeen cases where an anticompetitive effect was also proven. However, the court only engaged in balancing in 12 of those cases. This may indicate that the procompetitive justification offered by the defendant was not accepted by the court, because of those five cases, the court still ruled in against the professional sport league in four of them. A court ruled in favor of a league in the

remaining case not subjected to balancing, which may suggest that other factors outside the rule of reason analysis, like an affirmative defense, influenced that court's decision.

If the procompetitive benefits outweigh the anticompetitive effects the court, while not required, may inquire about less restrictive alternatives as a final step in the rule of reason analysis. Of the 12 cases where the court engaged in balancing, it only questioned the existence of less restrictive alternatives in six of them, and it did not rule in favor of the league in any of those cases. Because the burden shifting approach to the rule of reason analysis can interrupt its application at each step, this small number should not suggest that the court did not attempt to apply the analysis. It may only indicate one party did not meet its burden in the analysis.

The results of the first coding scheme reveal that the court considered the procompetitive benefits more than any other step in the rule of reason analysis in cases challenging the conduct of professional sport leagues. One possible explanation for this is that courts are aware that the conduct of professional sport leagues do have some anticompetitive effects but because of the cooperative nature of these leagues, they are more concerned with the procompetitive benefits, if any, that are achieved through the conduct. Of the 31 cases where a professional sport league offered a procompetitive justification, a court ruled in favor of the league 12 times. The plaintiff proved an anticompetitive effect in only one of those cases. This furthers illustrates the importance of a procompetitive justification. Even though the plaintiff did not meet his burden, the court still questioned the procompetitive justifications of the defendant league.

As stated earlier, of the 17 cases in which both an anticompetitive effect and a procompetitive justification were shown, a professional league was the prevailing party in only one case. Leagues also had no success when a court engaged in balancing (0 out of 12 cases), nor when it inquired into less restrictive alternatives (0 out of 6 cases). These results show that

leagues had significantly more success outside of the rule of reason analysis and provide guidance to leagues about the importance of a procompetitive justification to the challenged conduct. It may also suggest that those representing professional sport leagues should do whatever they can to avoid rule of reason analysis whether by asserting affirmative defenses, challenging a plaintiff's standing, or negotiating a settlement.

Application of the rule of reason analysis requires a plaintiff to show an anticompetitive effect in a relevant market. As stated earlier, the relevant market is comprised of both a geographic market and a product market. How a plaintiff defines the relevant market, can determine the defendant's market power, whether the challenged conduct was anticompetitive, and also the significance of the plaintiff's injury. As revealed in the first coding scheme, the court addressed the plaintiff's definition of the relevant market in only 23 of the cases coded. When plaintiffs defined the market on a national level, the league was successful in six out of 14 cases, and when plaintiffs defined the market as international, the league prevailed in three out of five cases. In regards to the product market, the league was successful in one case where the plaintiff attempted to define the product market as all sports. Coincidentally, the court did not accept the plaintiff's definition of the relevant market when it was defined as all sports in that case. The results illustrated that the definition of the relevant market was not always essential to proving an anticompetitive effect. However, when a plaintiff does define a relevant market, professional sport leagues should take the opportunity to challenge the definition, as it is a potential way to avoid the rule of reason analysis. Additionally, the definition of the relevant market also helps to determine the professional sport league's market power. While it is not necessary for a plaintiff to prove that a defendant has significant market power, the league was only successful in six of the 13 cases where the court addressed its market power.

Courts have recognized that a sport league's interest in maintaining competitive balance can serve as a procompetitive justification dating back to *Board of Regents* (Board of Regents, 1984). With this concession, it would seem that professional sport leagues would offer this benefit whenever their conduct is challenged under Section One. Competitive balance was measured in the second coding scheme to determine how frequently professional sport leagues offered it as a procompetitive justification. Of the 57 cases where professional sport leagues were successful, competitive balance was offered as a procompetitive justification in only six of those cases. Despite the courts' acceptance of competitive balance as a procompetitive justification, professional sport leagues did not use it as a procompetitive benefit very often, nor were they successful each time they used it. Of the 99 cases in this study, professional sport leagues only offered competitive balance as a defense 10 times, prevailing in six of those cases (out of the 57 total cases they won). One reason for the modest use of the justification may be that courts have stated that a procompetitive justification, while legitimate, must still be reasonably related to the challenged conduct.

Finally, for policy enforcement, the coding scheme measured the frequency of courts citing consumer welfare as a basis for its judgment in antitrust cases involving professional sport leagues. Many scholars have opined that consumer welfare was the main goal and policy of the Sherman Act and it should be the main consideration for courts when applying the Sherman Act. Of the cases coded, the court mentioned consumer welfare in only six times with the league succeeding in three of these cases.

### **Limitations**

Earlier empirical studies in antitrust law analyzed its application on a universal scale. This study sought to focus on its application to professional sport leagues. This gives a more

industry-specific analysis of the application of Section One of the Sherman Act, but it also makes for a small population of cases to study. The study provides a descriptive analysis of the characteristics of antitrust cases involving professional sport leagues. It also provides an analysis of the possible relationship between elements in the rule of reason analysis and the outcome of cases through Chi-square tests. However, it does not indicate possible relationships among the characteristics of cases where professional sport leagues were successful.

Another limitation in the study concerns the reliability of the results. There are three types of reliability test for designs: stability, reproducibility, and accuracy (Potter & Levine-Donnerstein, 1999). Stability refers to the extent to which a coder will consistently code the same data the same way each time he/she does it (Potter & Levine-Donnerstein, 1999). Since only one person collected the data and applied the coding schemes in the present study, the major threat to reliability is fatigue, according to Potter and Levine-Donnerstein. However, this is the weakest test for the reliability of an instrument. Reproducibility refers to the likelihood that others who use the same coding scheme will have to the same results (Potter & Levine-Donnerstein, 1999). This type of reliability is best achieved through the use of multiple coders, but because that was not done in this study, this type of reliability is brought into question. Finally the strongest reliability test is accuracy, which refers to how well the coders' results conform to certain standards (Potter & Levine-Donnerstein, 1999). While this is the best test of reliability, it is also the most difficult to achieve and as a result, many have considered reproducibility the most effective test (Potter & Levine-Donnerstein, 1999). Because the research design, coding schemes, and coding were all performed by one person, this raises questions about the reliability of the study. Furthermore, because this study focuses on the coding of manifest content, "reliability is a necessary precondition for validity" (Potter & Levine-Donnerstein, 1999, p. 272).



The questions raised about the reliability of this study, also raise questions about its validity. Multiple coders could not be used in this study, so the Delphi panel of experts was assembled and consulted for revisions to the research design which was applied only after their approval. The use of a Delphi panel ensured that the coding scheme and research design were appropriate for answering the research questions posed in this study and increasing the validity of the research design.

This study measured the frequency of certain characteristics, but it did not attempt to isolate each characteristic or establish a connection to the case outcomes. Variables like affirmative defenses were characteristics in a majority of the cases where professional sport leagues were the prevailing party. However, the study does not indicate which variables were most influential in the courts' decisions, nor does it distinguish which variable the court ultimately based its decision upon. This study only illustrates which factors were present with the frequencies revealing which factors were most prevalent.

## **CHAPTER 5**

### **CONCLUSION**

In the Introduction to this study, professional sport leagues were called a quagmire for courts. The application of antitrust law to their conduct has been a challenge forcing courts to reconcile the interests and goal of antitrust law with the needs and requirements of a successful league. Their unique combination of on-the-field competition and off-the-field cooperation to generate a successful product has resulted in an inconsistent application of the Sherman Act. With such a unique and complicated industry, there was a need to fully understand how professional sport leagues are perceived and what characteristics courts consider most often when analyzing their conduct under antitrust law. This empirical analysis has provided a starting point for understanding how courts decide antitrust cases involving professional sport leagues.

Earlier studies by Posner (1970), Salop & White (1985), and Carrier (2009) provide a preliminary understanding of the enforcement and application of antitrust law, but the current study sought to examine one industry to understand the application of Section One of the Sherman Act to the unique characteristics of professional sport leagues. The purpose of this study was to identify the factors discussed most frequently in judicial opinions, not to create a predictive formula for case outcomes. The results of this study are not intended to influence future judicial decisions nor are they intended to predict the outcomes of future antitrust cases under Section One of the Sherman Act. The results are instead meant to provide guidance for professional sport leagues and parties challenging their conduct regarding the way in which leagues are treated under the Sherman Act. They also provide insight about how courts consider

the unique nature of the sport industry and its unique attributes that separate it from other industries. In addition, this study illustrated how courts apply the rule of reason analysis to professional sport leagues.

Through an application of empirical methods to judicial decision-making, the study collected and analyzed data that reveal what courts have done and show signs of a pattern in their application of the rule of reason analysis. Carrier's study indicated that antitrust cases rarely move past the first step in the rule of reason analysis (Carrier, 2009). However, this study brought to light the importance of the procompetitive benefits, as courts appeared to inquire about them more often than anticompetitive effects. The results showed that even in cases where a plaintiff did not demonstrate an anticompetitive effect, courts were more interested in the procompetitive justifications leagues could offer.

The empirical analysis also revealed the characteristics of antitrust cases challenging the conduct of professional sport leagues under Section One. With the courts' insistence on keeping antitrust law and labor law completely separated, it may be no surprise that leagues enjoyed the most success in cases where the conduct challenged concerned player restraints. Thus, the study provides empirical support that professional sport leagues may find comforting, given that player restraints have been challenged more frequently than any other type of conduct.

Despite the limitations of this study, it contributes to the body of knowledge concerning both sport and antitrust law. The use of content analysis provided an in-depth look at the relevant judicial opinions in addition to the facial characteristics of antitrust cases. It also has practical significance and provides guidance for professional sport leagues and practitioners representing and advising them. Empirical legal research that delves into the content of judicial opinions is especially beneficial in antitrust law because violations of the Sherman Act may result in trebled

damages. By understanding how antitrust is applied within the context of professional sport leagues, practitioners and leagues can more accurately assess the merits of an antitrust suit and move forward with empirical evidence guiding the way. Legal scholars may have an understanding of the rules of law and what courts should do when analyzing antitrust cases, but empirical methods have revealed how courts actually apply the law. This study is a comprehensive analysis that gives a general overview of the common factors and characteristics present in antitrust cases involving professional sport leagues.

### **Implications**

There are both practical and theoretical implications arising from this study. Despite the limitations of this study, its results do shed light on the treatment of professional sport leagues under antitrust law and provide guidance on how they should handle future challenges under Section One of the Sherman Act. One implication of this study can be derived from the leagues' success when courts engage in the rule of reason analysis. As the results showed, the more often courts engaged in the rule of reason analysis, the less successful leagues were. Furthermore, much of the leagues' success came when they asserted an affirmative defense. Therefore, leagues should try to resolve cases before courts engage in the rule of reason analysis. This can be accomplished through asserting an affirmative defense that makes the Sherman Act inapplicable, challenging a plaintiff's standing to bring an antitrust suit, or negotiating a settlement.

In many cases, plaintiffs either had no problem proving an anticompetitive effect and the court applied the quick look approach in one case where the plaintiff did not have to prove an anticompetitive effect. As a result, leagues appeared to have an important burden of demonstrating that the conduct in question had a procompetitive justification. The results show that of the 31 cases where defendant leagues offered a procompetitive justification, they were

successful in only twelve of those cases. Their success in those cases can be attributed to factors outside the rule of reason analysis, as the court did not engage in balancing in any of those 12 cases. Because of the potential for success by establishing a procompetitive justification, leagues should ensure that any justifications offered are not only legitimate, but also reasonably related to the challenged conduct.

In addition to the scrutiny leagues encounter under the rule of reason analysis, they should be mindful of the subject matter of the challenged conduct. Leagues have been faced with challenges to player restraints more often than other types of conduct measured in this study. However, when leagues assert the labor exemption against challenges to player restraints, they have been quite successful. If practitioners representing professional sport leagues are not able to succeed using affirmative defenses, the likelihood of success diminishes.

While the results indicate that leagues have also enjoyed success with challenges concerning ownership rights, broadcasting rights, and licensing and marketing rights, they are not faced with these types of challenges very often. Additionally, the cross-tabulations reveal that in those cases (19) where the leagues were successful, leagues asserted the single entity defense in eight of the cases. Practitioners and leagues should take the Supreme Court's ruling in *American Needle* into consideration in this regard, though, as the decision undermines the viability of the single entity defense.

Overall, this study presents an initial attempt to apply empirical legal research to antitrust law, and provides endless possibilities for future studies and analysis of professional sport leagues. This study has determined the frequency with which the various steps in the rule of reason are applied by courts, and identifies other characteristics courts consider when applying it to professional sport leagues. By using the variables measured in this study, future studies can

predict the likelihood of success for professional sport leagues in these antitrust cases.

Additionally, this study provided a comprehensive analysis of all antitrust cases challenging the conduct professional sport leagues under Section One, leaving it to a future analysis to identify and analyze the differences among the federal circuits in their treatment of professional sport leagues.

## REFERENCES

- Addyston Pipe and Steel Company v. United States, 175 U.S. 211 (1899).
- American Needle v. National Football League, 538 F.3d 736 (7th Cir. 2008).
- American Needle v. National Football League, 130 S.Ct 2201 (2010).
- Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1917).
- Bork, R. H. (1966). Legislative Intent and the Policy of the Sherman Act. *Journal of Law and Economics*, 9, 7-48.
- Bork, R. H. (1993). *The antitrust paradox: a policy at war with itself*. Free Press: New York.
- Bos, W. (1999). Content analysis in empirical social research. *International journal of educational research*, 31(8), 659.
- Broadcast Music, Inc., et al. v. Columbia Broadcasting System, Inc., et al., 441 U.S. 1 (1979).
- Brown v. Pro Football, Inc., 518 U.S. 231 (1996).
- Carrier, M. A. (2009). The Rule of Reason: An Empirical Update for the 21st Century. *George Mason Law Review*, 16(4), 827-838.
- Carroll, M. S., Connaughton, D., & Spengler, J. O. (2007). Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation. *Journal of Legal Aspects of Sport*, 17, 163-205.
- Chicago Professional Sports Ltd Partnership v. National Basketball Association, 95 F.3d 593 (7th Cir. 1996).
- Chicago Professional Sports Ltd. Partnership v. National Basketball Association, 754 F.Supp 1336 (N.D. Ill. 1991).

Clayton Act, 15 § 17 (1914).

Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50 (2nd Cir. 1997).

Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752 (1984).

Cross, F., Heise, M., & Sisk, G. (2002). Exchange: Empirical Research and The Goals of Legal Scholarship: Above the Rules: A Response to Epstein and King. *University of Chicago Law Review*, 69, 135-153.

Dickson, P. R., & Wells, P. K. (2001). The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared. *Journal of Public Policy & Marketing*, 20(1), 3-14.

DiMatteo, L. A., & Rich, B. L. (2006). A Consent Theory of Unconscionability: An Empirical Study of Law in Action. *Florida State University Law Review*, 33, 1067-1118.

Edwards, H. T., & Livermore, M. A. (2009). Thirty-Ninth Annual Administrative Law Symposium Pitfalls of Empirical Studies That Attempt to Understand The Factors Affective Appellate Decisionmaking. *Duke Law Journal*, 58(8), 1896-1989.

Epstein, L., & King, G. (2002). The Rules of Inference. *University of Chicago Law Review*, 69(1), 1-132.

Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, et al., 259 U.S. 200 (1922).

Feldman, G. A. (2009). The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis. *American Univ. Law Review*, 58(February), 74.

Flood v. Kuhn, et al., 407 U.S. 258 (1972).

Garner, B. A., & Black, H. C. (Eds.). (2004) *Black's Law Dictionary* (8th ed.). St. Paul, MN : Thomson/West, c2004.



- Gellhorn, E., & Tatham, T. (1985). Making Sense Out of the Rule of Reason. *Case Western Reserve Law Rev.*, 35, 155-175.
- George, T. (2006). Symposium: The Next Generation of Law School Rankings: Ranking Methodologies: An Empirical Study of Empirical Legal Scholarship: The Top Law Schools. *Indiana Law Journal*, 81, 141-160.
- Goldman, L. (1989). Sports, Antitrust, and the Single Entity Theory. *Tulane Law Review*, 63(March), 42.
- Goldsmith, J., & Vermeule, A. (2002). Exchange: Empirical Research and the Goals of Legal Scholarship: Empirical Methodology and Legal Scholarship. *University of Chicago Law Review*, 69, 14.
- Goodman, B. T. (1995). Sports Broadcasting Act: As Anachronistic as the Dumont Network, The. *Seton Hall J. Sport L.*, 5, 469.
- Grandy, C. (1993). Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis. *The Journal of Economic History*, 53(1993), 362.
- Grauer, M. C. (1983). Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Wodel. *Michigan Law Review*, 82(1), 1-59.
- Grewe, R. (2002). Antitrust Law and the Less Restrictive Alternatives Doctrines: A Case Study of Its Application in the Sports Context. *Sports Lawyers Journal*, 9(Spring), 26.
- Grow, N. (2006). There's No "I" in League: Professional Sports Leagues and the Single Entity Defense. *Michigan Law Review*, 105(1), 27.
- Grow, N. (2009). Reevaluating the Curt Flood Act of 1998. *Nebraska Law Review*, 87, 14.

- Hall, M. A., & Wright, R. F. (2008). Systematic Content Analysis of Judicial Opinions. *California Law Review*, 96, 63-122.
- Hazlett, T. W. (1992). The Legislative History of the Sherman Act Re-examined. *Economic Inquiry*, 30(2), 263.
- Hovenkamp, H. (1987). Fact, Value and Theory in Antitrust Adjudication. *Duke Law Journal*, 1987(5), 897-914.
- Insch, G. S. (1997). Content analysis in leadership research: Examples, procedures, and suggestions for future use. *The leadership quarterly*, 8(1), 1.
- Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).
- Johnson, C. (1987). Content-Analytic Techniques and Judicial Research. *American Politics Quarterly*, 15(1), 29.
- Kaiser, L. L. (2004). 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. *DePaul L. Rev.*, 54, 1237.
- Kovacic, W. E. (2000). Antitrust Policy: A Century of Economic and Legal Thinking. *The Journal of Economic Perspectives*, 14(1), 43.
- Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
- Leiter, B. (1997). Rethinking Legal Realism: Toward a Naturalized Jurisprudence. *Tex. L. Rev.*, 76, 267.
- Leiter, B. (2010). Legal Formalism and Legal Realism: What's the Issue? *Legal Theory*, 16(02), 111-133.
- Levine, K. L. (2006). The Law Is Not The Case: Incorporating Empirical Methods Into The Culture of Case Analysis. *University of Florida Journal of Law & Public Policy*, 17, 283.

Llewellyn, K. N. (1962). *Jurisprudence; realism in theory and practice*. University of Chicago Press: Chicago.

Lock, E. (1989). The Scope of the Labor Exemption in Professional Sports. *Duke Law Journal*, 1989(2), 339-419.

Los Angeles Memorial Coliseum Commission v. National Football League, et al., 726 F.2d 1381 (9th Cir. 1984).

Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

Major League Baseball v. Charlie Crist, 331 F.3d 1177 (11th Cir. 2003).

Manfred, R. D. (1997). Brown v. Pro Football, Inc.: The Supreme Court Reaches the Correct Result for Collective Bargaining in Professional Sports and Other Unionized Industries. *Labor Law Journal*, 48(8), 456.

Mason, D. S. (1999). What is the sports product and who buys it? The marketing of professional sports leagues. *European Journal of Marketing*, 33(3/4), 402-419.

Mendelsohn, C. (2003). Fraser v. Major League Soccer: A New Window of Opportunity for the Single-Entity Defense in Professional Sports. *Sports Lawyers Journal*, 10(Spring), 28.

Milton, H., & Zifchak, W. C. (1981). Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption. *Columbia Law Review*, 81(3), 459-515.

Monsma, D. (2006). The Academic Equivalence of Science and Law: Normative Legal Scholarship in The Quantitative Domain of Social Science. *T.M. Cooley Law Review*, 23, 157-218.

National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

North American Soccer League v. National Football League, 505 F.Supp 659 (S.D.N.Y. 1980).

North American Soccer League v. National Football League, 670 F.2d 1249 (2nd Cir. 1982).

Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958).

Patterson, M. R. (2000). The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History. *San Diego Law Review*, 37(1).

Piazza v. Major League Baseball, 831 F.Supp 420 (E.D. Penn. 1993).

Pitofsky, R. (1990). New Definitions of Relevant Market and the Assault on Antitrust. *Columbia Law Review*, 90(7), 1805-1864.

Pitts, B. G., & Pederson, P. M. (2005). Examining the Body of Scholarship in Sport Management: A Content Analysis of the *Journal of Sport Management*. *The SMART Journal*, 2(1), 20.

Posner, R. A. (1970). A statistical study of antitrust enforcement. *The Journal of Law & Economics*, 13(2), 365.

Posner, R. A. (2001). *Antitrust law* (2nd ed.). University of Chicago Press: Chicago.

Potter, W. J., & Levine-Donnerstein, D. (1999). Rethinking validity and reliability in content analysis. [Article]. *Journal of Applied Communication Research*, 27(3), 258.

Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989).

Radovich v. National Football League, et al., 352 U.S. 445 (1957).

Revesz, R. L. (2002). Exchange: Empirical Research and The Goals of Legal Scholarship: A Defense of Empirical Legal Scholarship. *University of Chicago Law Review*, 69, 169-188.

Roberts, G. R. (1986). The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View. *Tulane Law Review*, 60(January), 24.

Ross, S. F. (1997). The misunderstood alliance between sports fans, players, and the antitrust laws. *University of Illinois Law Review*(2), 519-581.

Salop, S. C., & White, L. J. (1985). Economic Analysis of Private Antitrust Litigation. *Georgetown Law Journal*, 74, 65.

San Francisco Seals, Ltd. v. National Hockey League, et al., 379 F.Supp 966 (C.D. Calif 1974).

Shapiro, C. (2009). Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court. *Hastings L.J.*, 60(February), 477-537.

Sherman Act § 1 and 2, 15 Stat. (1890).

Sports Broadcasting Act § 1291 (2012).

The Standard Oil Company of New Jersey et al. v. United States, 221 U.S. 1 (1911).

Tamanaha, B. Z. (2009). Understanding Legal Realism. *Texas Law Review*, 87(4), 731-785.

Toolson v. New York Yankees, Inc., et al., 346 U.S. 356 (1953).

Treadwell, S. (1996). An Examination of the Nonstatutory Labor Exemptions from the Antitrust Laws, in the Context of Professional Sports. *The Fordham Urban Law Journal*, 23(3), 955.

United State v. Brown University, 5 F.3d 658 (3rd Cir. 1993).

United States v. Aluminum Co. of America, et al., 148 F.2d 416 (2nd Cir. 1945).

United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955).

United States v. National Football League, 116 F.Supp 319 (E.D Penn. 1953).

United States v. National Football League, 196 F.Supp 445 (E.D. Penn 1961).

United States v. Topco Associates Inc., 405 U.S. 596 (1972).

United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).

United States v. Trenton Potters Company, et al., 273 U.S. 392 (1927).

- Winrow, B., & Johnson, K. (2008). The Rule of Law Is the Rule of Reason. *North Dakota Law Review*, 84(1), 59-83.
- Yancey, J. P. (1996). Is The Quick Look Too Quick?: Potential Problems With The Quick Look Analysis of Antitrust Litigation. *Kansas Law Review*, 44, 671.
- Zelek, E. F., Jr., Stern, L. W., & Dunfee, T. W. (1980). A Rule of Reason Decision Model after Sylvania. *California Law Review*, 68(1), 13-47.
- Zimbalist, A. S. (2002). Competitive Balance in Sports Leagues: An Introduction. *Journal of Sports Economics*, 3(2), 111-121.

## APPENDIX A

### Coding Scheme 1

Coding Scheme 1: Elements of the Rule of Reason Analysis	Yes=1, No=0
1. Does the plaintiff define a relevant market?	
2. Does the court accept the plaintiff's definition of the relevant market?	
3. Did the plaintiff show an anticompetitive effect of the restraint in the relevant market?	
4. Does the defendant offer a procompetitive justification?	
5. Does the court balance the anticompetitive effect with the procompetitive justification?	
6. Does the court inquire about less restrictive alternatives?	
7. Does the court rule in favor of the league?	

## APPENDIX B

### Coding Scheme 2

Coding Scheme 2: Case Characteristics	Yes=1, No=0
1. Does the challenged conduct involve player restraints?	
2. Does the challenged conduct involve broadcasting rights?	
3. Does the challenged conduct involve ownerships rights?	
4. Does the challenged conduct involve licensing or marketing?	
5. Does the league argue for an antitrust exemption?	
6. Does the league present a single entity defense?	
7. Does the league argue for a labor exemption to the antitrust challenge?	
8. Is the plaintiff a third party (not a party to a collective bargaining agreement)?	
9. Is the plaintiff an athlete?	
10. Does the plaintiff have ownership rights in a league team?	
11. Is the relevant market defined on an international scale?	
12. Is the relevant market defined on a national scale?	



13. Is the product market defined as all entertainment?	
14. Is the product market defined as all sports?	
15. Is there mention of the league's market power?	
16. Does the court address the plaintiff's standing to sue?	
17. Is competitive balance an offered procompetitive justification by the defendant?	
18. Does the court mention consumer welfare?	