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PUNTING ON LOGIC: THE ROBERTS COURT TO SACK SMALL BUSINESS ONCE AGAIN IN *AMERICAN NEEDLE V. NFL*

I. INTRODUCTION

When the United States Supreme Court (Supreme Court) granted certiorari to *American Needle, Inc. v. National Football League* on June 29, 2009,¹ it created a ripple effect throughout the major media organizations. A Sports Illustrated headline read, “Why American Needle-NFL is most important case in sports history.”² The New York Times warned readers, “Antitrust Case Has Implications Far Beyond N.F.L.”³ ESPN’s home web page declared, “Antitrust case could be Armageddon.”⁴ When athletic issues arise, traditional sports outlets are typically the only ones to report the news. This time, however, articles discussing the Supreme Court’s decision to grant certiorari to *American Needle* surfaced all over the national media, including The Wall Street Journal,⁵ The Washington Post,⁶ and non-sports related Internet blogs.⁷

Why has so much ink been spilled over an antitrust lawsuit? The answer to this question lies in the repercussions that will be felt by sports

1. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (2009) [hereinafter *Petition for Certiorari Granted*].

2. Michael McCann, *Why American Needle-NFL is Most Important Case in Sports History*, SPORTSILLUSTRATED.COM, Jan. 12, 2010, http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/americanneedlev.nfl/index.html.

3. Ken Belson & Alan Schwarz, *Antitrust Case Has Implications Far Beyond N.F.L.*, N.Y. TIMES, Jan. 7, 2010, at B13.

4. Lester Munson, *Antitrust Case Could Be Armageddon*, ESPN.COM, July 17, 2009, http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261.

5. Posting of Ashby Jones to Wall St. J. L. Blog, *Threading ‘American Needle’: Could It Destroy Free Agency in the NFL?*, <http://blogs.wsj.com/law/2010/01/12/threading-american-needle-could-it-destroy-free-agency-in-the-nfl/> (Jan. 12, 2010, 4:12 EST) [hereinafter *Threading American Needle*].

6. Drew Brees, *The NFL Shouldn’t Call All the Plays*, WASH. POST, Jan. 10, 2010, at B2.

7. See Posting of Marc Edelman to Above the Law, *Sports and the Law: SCOTUS Grants Cert in American Needle v. NFL*, http://abovethelaw.com/2009/06/sports_and_the_law_scotus_gran.php (June 30, 2009, 10:00 EST); Posting of Lyle Denniston to SCOTUSblog, *Pro Sports and Antitrust: Argument Preview*, <http://www.scotusblog.com/2010/01/pro-sports-and-antitrust-argument-preview/> (Jan. 12, 2010, 7:32 EST); Posting of Gabriel A. Feldman to The Huffington Post, *American Needle and the NFL’s Single Entity Argument*, http://www.huffingtonpost.com/gabriel-a-feldman/american-needle-and-the-n_b_409532.html (Jan. 2, 2010, 11:09 EST) [hereinafter *The Huffington Post*].

fans, professional athletes, coaches, and small businesses like American Needle, a hat manufacturer in Illinois.⁸ Simply put, a ruling in favor of the National Football League (NFL) in *American Needle*—that the league is a single entity rather than thirty-two separate teams—would mean that the league is completely immune from antitrust laws.⁹ If the Supreme Court grants the NFL total immunity from antitrust laws, it would also apply to the National Hockey League, the National Basketball Association (NBA), and the Bowl Championship Series.¹⁰ The immunity would completely transform the way professional sports leagues (sports leagues) conduct their business.¹¹

A decision for the NFL “has the potential to adversely affect fans through higher prices for merchandise, concessions, parking at stadiums and even in fees to join fantasy football leagues.”¹² The largest implications, however, would be felt on the labor front.¹³ A victory for the NFL could spark “a significant shift in the leverage sports leagues have over players unions . . . giv[ing] the [sports] league[s] latitude to implement a salary structure of its choosing without fear of antitrust scrutiny and penalties for collusion.”¹⁴ Without the ability to challenge sports leagues on antitrust grounds,¹⁵ the players’ only option would be to go on strike.¹⁶

If the Supreme Court sides with the NFL, many small businesses will be completely shut out from doing business with the league and “will have less recourse to sue on antitrust grounds.”¹⁷ Without price competition from small businesses, the NFL will be able to engage in exclusive commercial deals with the highest bidder, such as Nike or Reebok,¹⁸ ultimately forcing small businesses out of the market and driving up prices for fans. With so much at stake in *American Needle*—on and off the playing field—how the Supreme Court rules will reshape the foundation of sports law, resulting in a significant impact on sports fans, leagues, players, and small businesses.¹⁹

8. Belson & Schwarz, *supra* note 3, at B13.

9. Munson, *supra* note 4.

10. *Id.*

11. McCann, *supra* note 2.

12. Belson & Schwarz, *supra* note 3, at B13.

13. *Threading American Needle*, *supra* note 5.

14. Belson & Schwarz, *supra* note 3, at B13.

15. Brees, *supra* note 6, at B2.

16. *See* Belson & Schwarz, *supra* note 3, at B13.

17. Belson & Schwarz, *supra* note 3, at B13; *see also* Ken Belson, *The N.F.L. Is Squeezing Discounters Over Apparel*, N.Y. TIMES, Jan. 20, 2010, at B11.

18. *See The Huffington Post*, *supra* note 7; Belson & Schwarz, *supra* note 3, at B13.

19. Belson & Schwarz, *supra* note 3, at B13.

This Note examines the role that the Supreme Court's recent pro-business antitrust jurisprudence under the guidance of Chief Justice John Roberts will play in determining whether sports leagues can constitute a single entity in *American Needle*. Part II provides a general overview of *American Needle* and shows how the case made its way to the Supreme Court. Part III analyzes *Copperweld Corp. v. Independence Tube Corp.*²⁰ and the creation of the single entity doctrine. Part IV discusses the current split in the federal circuit courts as to the correct application of *Copperweld* to sports leagues and urges the Supreme Court to adopt the majority approach in *American Needle*. Part V analyzes the current pro-business trend of the Supreme Court and the role that the justices' political affiliations have played in its antitrust jurisprudence under Chief Justice Roberts. Part VI of this Note will examine the effect that the appointment of Justice Sonia Sotomayor to the Supreme Court by President Barack Obama may have on the Supreme Court's current pro-business antitrust jurisprudence. Finally, this Note will conclude that despite the fact most commentators and the majority of circuit courts have rejected single entity treatment for sports leagues, the Supreme Court's recent antitrust jurisprudence strongly points towards a ruling in favor of the NFL in *American Needle*.

II. BACKGROUND

Currently, a direct conflict exists in the federal circuit courts of appeal on the issue of whether a sports league should be considered a single entity for purposes of Section 1 of the Sherman Antitrust Act (Sherman Act).²¹ In 1984, the Supreme Court held in *Copperweld* that a parent company and its wholly owned subsidiary are incapable of conspiring with each other for purposes of Section 1 of the Sherman Act (Section 1), stating that they act as a single entity and therefore should be completely immune from antitrust liability under Section 1.²² However, "what the Supreme Court has never decided is [whether] *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration," such as sports leagues.²³ The majority of federal circuit courts have used *Copperweld* to hold that sports leagues should not be given single en-

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

21. James A. Keyte, *American Needle Reinvigorates the Single-Entity Debate*, ANTITRUST, Summer 2009, at 48 (stating that *American Needle* "creates a clear split between the Seventh Circuit and several other circuits, including the First, Second, and Ninth, all of which have declined to accord single-entity status to sports leagues").

22. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

23. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002).

tity status under Section 1.²⁴ However, the Seventh Circuit in *American Needle*, as well as a minority of federal circuit courts, has used *Copperweld* to hold that sports leagues should be treated as a single entity for Section 1 purposes.²⁵ Because the Supreme Court did not set clear guidelines in *Copperweld* as to when single entity status should be applied,²⁶ the Supreme Court granted certiorari to *American Needle*²⁷ to resolve the current federal circuit court split and to clarify whether a professional sports league should be considered a single entity for purposes of Section 1.²⁸

American Needle Inc. is a headwear manufacturer that features the logos and trademarks of professional sports teams on baseball style hats.²⁹ The NFL is an association, consisting of thirty-two teams, that produces a season of highly integrated games that culminates in two member teams playing for the Super Bowl championship.³⁰ For over twenty years, American Needle was one of many vendors that held a license from the NFL authorizing it to use each NFL team's intellectual property to create headwear bearing the team logos.³¹ However, in 2000, the NFL decided to solicit bids from individual vendors for an exclusive license to manufacture

24. See 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1478c, at 327 (2d ed. 2003) (stating that "the courts have mainly rejected" single entity status for professional sports leagues); Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 238 (2006) ("[C]ourts have overwhelmingly rejected efforts by club-run leagues to be treated as single entities."); Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 893 n.11 (2008) ("Many courts have rejected the single-entity defense in the scope of premier American sports leagues.").

25. Brief for the NFL Respondents at 6, *petition for cert. filed*, *Am. Needle, Inc. v. Nat'l Football League*, (U.S. Jan. 21, 2009) (No. 08-661), 2009 WL 164245 [hereinafter *Brief for the NFL*] ("The Seventh Circuit has now twice held that a professional sports league *can* constitute a single entity even if its member teams are separately owned."); see also Brief of Amici Curiae Nat'l Basketball Ass'n and NBA Properties in support of the NFL Respondents' Response at 4, *petition for cert. filed*, *Am. Needle, Inc. v. Nat'l Football League*, (U.S. Jan. 21, 2009) (No. 08-661), 2009 WL 164243 [hereinafter *Brief for the NBA*] ("The Fourth and Fifth Circuits appear to agree with the Seventh, having applied *Copperweld* to find the activities of other sports leagues to fall outside the scope of Section 1.").

26. James T. McKeown, *2008 Antitrust Developments in Professional Sports: To The Single Entity And Beyond*, 19 MARQ. SPORTS L. REV. 363, 367 (2009) (stating that the "Supreme Court did not set clear parameters for what constitutes a single economic entity, and antitrust defendants have cited *Copperweld* to argue that other forms of relationship fall within the single entity classification.").

27. *Petition for Certiorari Granted*, *supra* note 1.

28. See McCann, *supra* note 2.

29. See *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 738 (7th Cir. 2008).

30. *Brief for the NFL*, *supra* note 25, at 1.

31. *Am. Needle*, 538 F.3d at 737-38.

headwear.³² The following year, the NFL refused to renew its headwear license with American Needle, and instead granted an exclusive headwear license to Reebok.³³ As a result, American Needle brought an antitrust lawsuit against the NFL, NFL teams, NFL Properties, and Reebok, claiming that the exclusive headwear agreement with Reebok violated Section 1.³⁴ Since each NFL team owns its respective logos and trademarks, American Needle argued that the teams' collective agreement to grant the exclusive license to Reebok was a conspiracy to restrict vendors, such as American Needle, from acquiring licenses to the NFL team's intellectual property.³⁵ The NFL responded by arguing that when licensing a member team's intellectual property, the NFL was acting as a single entity pursuant to *Copperweld* and was thus immune from Section 1 liability.³⁶ Applying the *Copperweld* doctrine—that “single entities cannot restrain trade in violation of the Sherman Antitrust Act”—the district court granted the NFL's motion for summary judgment.³⁷ The district court reasoned that, “by promoting NFL football through collective licensing . . . the NFL teams ‘act[] as an economic unit’ in such a manner that ‘they should be deemed . . . a single entity.’”³⁸

Following the judgment, American Needle appealed to the Court of Appeals for the Seventh Circuit claiming that the district court erred in treating the NFL as a single entity for purposes of Section 1.³⁹ Relying on its earlier decision in *Chicago Professional Sports Limited Partnership v. National Basketball Association*,⁴⁰ the Seventh Circuit started its analysis by embracing the “possibility that a professional sports league *could* be considered a single entity under *Copperweld*.”⁴¹ The court of appeals rejected American Needle's argument that the exclusive license with Reebok deprived the market of independent sources of economic power and instead reasoned “that the NFL teams share[d] a vital economic interest in collectively promoting NFL football. . . . [To] compete[] with other forms of entertainment.”⁴² The Seventh Circuit ultimately affirmed the district court's

32. *Id.* at 738.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 738–39.

37. *Am. Needle*, 538 F.3d at 739.

38. *Id.*

39. *Id.* at 741.

40. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598 (7th Cir. 1996).

41. *Am. Needle*, 538 F.3d at 742.

42. *Id.* at 743.

decision, declaring that “the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property”⁴³

Although the Seventh Circuit held that the NFL could be considered a single entity when licensing its intellectual property,⁴⁴ the question still remained as to whether the NFL should be treated as a single entity with respect to other core ventures.⁴⁵ The *American Needle* holding, although in favor of the NFL, actually added to the confusion regarding *Copperweld*’s application to sports leagues by creating a split between the Seventh Circuit and other circuits such as the First and Ninth, which had denied single entity treatment to sports leagues.⁴⁶ In an effort to clarify the proper application of *Copperweld* to sports leagues, the NFL took the unusual step of supporting American Needle’s request for certiorari to the Supreme Court.⁴⁷ This was done to secure a uniform rule recognizing all sports leagues as single entities.⁴⁸ Presumably because the federal circuits are in direct conflict regarding *Copperweld*’s application to sports leagues, the Supreme Court granted certiorari against the advice of the United States Solicitor General.⁴⁹ By granting the NFL’s request for certiorari,⁵⁰ the Supreme Court is likely to establish a rule that clarifies how sports leagues are to be treated under *Copperweld*.⁵¹

III. COPPERWELD AND THE SINGLE ENTITY DOCTRINE

In 1984, the Supreme Court established the single entity doctrine in

43. *Id.* at 744.

44. *Id.* (“[T]he NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property”).

45. See *Brief for the NFL*, *supra* note 25, at 4 (stating that “[t]he NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule that (i) recognizes the single-entity nature of highly integrated joint ventures”).

46. Keyte, *supra* note 21, at 48 (stating that *American Needle* “creates a clear split between the Seventh Circuit and several other circuits, including the First, Second, and Ninth, all of which have declined to accord single-entity status to sports leagues”).

47. *Brief for the NFL*, *supra* note 25, at 4 (stating that “[t]he NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule that (i) recognizes the single-entity nature of highly integrated joint ventures”).

48. *Id.*

49. Brief for the United States as Amicus Curiae at 1, *petition for cert. filed*, Am. Needle, Inc. v. Nat’l Football League, (U.S. May 28, 2009) (No. 08-661), 2009 WL 1497823 [hereinafter *Brief for the U.S.*] (“In the view of the United States, the petition for a writ of certiorari should be denied.”).

50. *Petition for Certiorari Granted*, *supra* note 1.

51. See McCann, *supra* note 2.

Copperweld.⁵² There, the plaintiff alleged that a tubing company and its parent corporation had conspired in violation of Section 1.⁵³ In the lower federal courts, the Court of Appeals for the Seventh Circuit affirmed the district court's decision to hold the parent corporation and its wholly owned subsidiary liable under Section 1.⁵⁴ The Supreme Court granted certiorari to determine whether a parent and its wholly owned subsidiary were capable of conspiring for purposes of Section 1.⁵⁵ The Supreme Court started its analysis by looking at the language and history of the Sherman Act itself.⁵⁶ Section 1 states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony⁵⁷

After reviewing the plain language of the Sherman Act, the Supreme Court found that by enacting the statute, Congress made a conscious decision to accord different treatment under the Sherman Act to the type of conduct in this case.⁵⁸ The Supreme Court noted that, “[u]nless we second-guess the judgment of Congress . . . we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach” of Section 1.⁵⁹ From this, the Supreme Court concluded that a parent company and its wholly owned subsidiary were incapable of conspiring with each other in violation of the Sherman Act.⁶⁰ The Supreme Court held that for purposes of Section 1, a parent and its wholly owned subsidiary are to be considered a single entity, and thus immune from Section 1 liability.⁶¹

The Supreme Court came to its holding by reasoning that there was a “complete unity of interest” between a parent and its wholly owned sub-

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

53. *Id.* at 755–58.

54. *Id.* at 758.

55. *Id.* at 767.

56. *Id.*

57. Sherman Act, 15 U.S.C. § 1.

58. *Copperweld*, 467 U.S. at 775 (“[T]he Act’s plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct.”).

59. *Id.* at 776.

60. *Id.* at 777 (holding “that *Copperweld* and its wholly owned subsidiary *Regal* are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.”).

61. *Id.* at 771.

subsidiary.⁶² Because of this “complete unity of interest,” the Supreme Court reasoned that there could be no combination or agreement of the type that joined parties who had previously maintained different interests.⁶³ Since it was this type of agreement that Section 1 sought to prevent, the Supreme Court held that there was no justification for liability against a parent company and its wholly owned subsidiary under Section 1.⁶⁴

A. *Copperweld* Creates Uncertainty For Antitrust Defendants

While *Copperweld* is important for establishing a clear rule that a parent company and its wholly owned subsidiary are to be considered a single entity for purposes of Section 1,⁶⁵ the decision has created significant uncertainty in other contexts.⁶⁶ In *Copperweld*, the Supreme Court failed to set clear guidelines for what other types of relationships may be afforded single entity status, causing defendants in antitrust litigation to argue for application of the *Copperweld* single entity doctrine to other forms of business relationships.⁶⁷ As the First Circuit noted in *Fraser v. Major League Soccer, L.L.C.*, “what the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself.”⁶⁸ As a result of the confusion about what other types of business relationships may receive single entity treatment, some federal circuit courts have applied single entity status to certain types of business relationships while other federal circuit courts have denied single entity treatment to the very same types of business relation-

62. *Id.*

63. *Id.* (stating that “[i]f a parent and a wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served differed interests . . .”).

64. *Copperweld*, 467 U.S. at 771 (reasoning that because a parent and its wholly owned subsidiary could not produce a “sudden joining of economic resources that had previously served different interests . . . there is no justification for § 1 scrutiny.”).

65. *Id.* at 776.

66. See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002) (“[W]hat the Supreme Court has never decided is how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself.”); see also McKeown, *supra* note 26, at 367 (stating that the “Supreme Court did not set clear parameters for what constitutes a single economic entity, and antitrust defendants have cited *Copperweld* to argue that other forms of relationship fall within the single entity classification.”).

67. McKeown, *supra* note 26, at 367 (stating that the “Supreme Court did not set clear parameters for what constitutes a single economic entity, and antitrust defendants have cited *Copperweld* to argue that other forms of relationship fall within the single entity classification.”).

68. *Fraser*, 284 F.3d at 56.

ships.⁶⁹ This is exactly what has happened in the application of the single entity doctrine to sports leagues in the federal circuit courts.⁷⁰ As explained below, the federal circuit courts are currently in direct conflict on the issue of whether single entity status, and the immunity to the Sherman Act it affords under *Copperweld*, extends to sports leagues.⁷¹

IV. COMPARE AND CONTRAST: THE APPROACHES TO ANALYZING PROFESSIONAL SPORTS LEAGUES AS A SINGLE ENTITY

A. *The Majority Approach*

The majority of federal circuit courts have rejected the notion that sports leagues are a single entity under *Copperweld*.⁷² Consequently, they have held that the individual teams are separate entities capable of conspiring with one another for purposes of Section 1 of the Sherman Act.⁷³ The Ninth Circuit articulated the reasoning behind this position in the seminal case *Los Angeles Memorial Coliseum Commission v. National Football League*.⁷⁴ In this 1984 case, the NFL argued that the structure of its league is similar to that of a joint venture and thus should be afforded single entity

69. *Compare Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (“We do not agree that *Copperweld*, which found a corporation and its wholly owned subsidiary to be a single enterprise for purposes of §1, applies to the facts of this case or affects the prior precedent concerning the NFL.”) (citation omitted), *with Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598 (7th Cir. 1996) (“We see no reason why a sports league *cannot* be treated as a single firm . . .”).

70. *Compare Sullivan*, 34 F.3d at 1099 (“We do not agree that *Copperweld*, which found a corporation and its wholly owned subsidiary to be a single enterprise for purposes of §1, applies to the facts of this case or affects the prior precedent concerning the NFL.”) (citation omitted), *with Chi. Prof'l Sports*, 95 F.3d at 598 (“We see no reason why a sports league *cannot* be treated as a single firm . . .”).

71. Keyte, *supra* note 21, at 48 (stating that *American Needle* “creates a clear split between the Seventh Circuit and several other circuits, including the First, Second, and Ninth, all of which have declined to accord single-entity status to sports leagues . . .”).

72. *See AREEDA & HOVENKAMP, supra* note 24, at 327 (stating that “the courts have mainly rejected” single entity status for professional sports leagues); Ross & Szymanski, *supra* note 24, at 238 (“[C]ourts have overwhelmingly rejected efforts by club-run leagues to be treated as single entities.”); Edelman, *supra* note 24, at 893 n.11 (“Many courts have rejected the single-entity defense in the scope of premier American sports leagues.”).

73. *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984) (stating that “[t]hese attributes operate to make each team an entity in large part distinct from the NFL.”); *Sullivan*, 34 F.3d at 1099 (“We do not agree that *Copperweld*, which found a corporation and its wholly owned subsidiary to be a single enterprise for purposes of §1, applies to the facts of this case or affects the prior precedent concerning the NFL.”) (citation omitted).

74. *L.A. Mem'l Coliseum*, 726 F.2d at 1381.

status under *Copperweld*.⁷⁵ In rejecting the NFL's argument, the Ninth Circuit found that each team acts as an individual entity, wholly distinct from the NFL itself.⁷⁶ In analyzing the structure of the league, the Ninth Circuit first noted that each team was independently owned, and that each team's profits and losses were not shared, which is a characteristic that is not common in the types of joint ventures and partnerships that are usually given single entity status.⁷⁷ Second, because profits and losses are not shared, each NFL team is forced to compete with one another to secure media coverage, fan support, sponsorship deals, television revenues, and talented players and coaches.⁷⁸

The First Circuit, in *Sullivan v. National Football League*, stated that it was this exact type of competition between the NFL teams that removed the league from consideration for single entity status under *Copperweld*.⁷⁹ The First Circuit stated that this type of competition off of the field "tends to show that the teams pursue diverse interests and thus are not a single enterprise under §1."⁸⁰ Other circuits have denied single entity status to other sports leagues as well, such as Major League Soccer,⁸¹ the Ontario Hockey League,⁸² and a professional tennis league.⁸³ In reviewing these holdings,

75. *Id.* at 1387 (stating that "[t]he NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade.").

76. *Id.* at 1390 (stating that "[t]hese attributes operate to make each team an entity in large part distinct from the NFL.").

77. *Id.* at 1389–90 (reasoning that "although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other 'single entities.'").

78. *Id.* at 1390 ("In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. . . . [T]here is also competition for fan support, local television and local radio revenues, and media space.").

79. *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) ("We do not agree that *Copperweld*, which found a corporation and its wholly owned subsidiary to be a single enterprise for purposes of §1, applies to the facts of this case or affects the prior precedent concerning the NFL.") (citation omitted).

80. *Id.*

81. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 48 (1st Cir. 2002) (denying single entity status to Major League Soccer).

82. *See Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) (holding that "[j]ust as the National Football League could not accurately be characterized as a 'single economic entity,' neither could the OHL, which exists only as constituted by its twenty member teams").

83. *See Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2nd Cir. 1988) (holding that "[c]ourts have consistently held that, since joint ventures—including sports leagues and other such associations—consist of multiple entities, they can violate §1 of the Sherman Act").

the decision to reject single entity status for sports leagues seems to be based on the distinct diversity in interests of each individual team, from independent ownership to competition for players, fans, and media coverage.⁸⁴ These diverse interests are inconsistent with the “complete unity of interest” element that *Copperweld* requires for single entity treatment.⁸⁵

B. The Minority Approach

The Seventh Circuit has twice held that sports leagues *can* be considered a single entity under *Copperweld*, even though the majority of federal circuit courts have held that sports leagues should not be considered a single entity for purposes of Section 1.⁸⁶ Other circuits, including the Fourth and Fifth, have reached similar conclusions.⁸⁷ These courts have noted that *Copperweld* does not set a clear standard for how sports leagues should be viewed in terms of the single entity doctrine,⁸⁸ and believe that the question should be answered “one league at a time—and perhaps one facet of a league at a time.”⁸⁹

The Seventh Circuit articulated this position in the seminal case *Chi. Prof'l Sports Ltd. P'ship*,² decided in 1996.⁹⁰ The court first focused on the fact that each team in the NBA, although independently and separately owned, produces a single product that could not be produced without the cooperation of all of the other teams.⁹¹ As the court famously noted, “a league with one team would be like one hand clapping.”⁹² Under its “creation of a single product” viewpoint, the Seventh Circuit analogized the

84. See Keyte, *supra* note 21, at 49 (stating that in sports league cases it is not difficult “to highlight facts about league structure, governance, and the characteristics of individual teams to argue that not every team has a complete unity of interest with every other team.”).

85. See *id.*

86. *Brief for the NFL*, *supra* note 25, at 6 (“The Seventh Circuit has now twice held that a professional sports league *can* constitute a single entity even if its member teams are separately owned.”).

87. *Brief for the NBA*, *supra* note 25, at 4 (“The Fourth and Fifth Circuits appear to agree with the Seventh, having applied *Copperweld* to find the activities of other sports leagues to fall outside the scope of Section 1.”).

88. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (“These cases do not yield a clear principle about the proper characterization of sports leagues—and we do not think that *Copperweld* imposes one ‘right’ characterization.”).

89. *Id.* (stating a need to ask “*Copperweld*’s functional question one league at a time—and perhaps one facet of a league at a time”).

90. *Id.* at 593.

91. *Id.* at 598–99 (stating that the NBA “produces a single product; cooperation is essential”).

92. *Id.*

NBA to an automaker.⁹³ The Seventh Circuit stated that the NBA is “one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet.”⁹⁴

In holding that the NBA *could* be considered a single entity under *Copperweld*, the Seventh Circuit also relied on language from the Supreme Court decision of *Brown v. Pro Football, Inc.*, which stated that “the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival” and that “circumstance[s] make[] the league more like a single bargaining employer.”⁹⁵ Other circuits have used this same reasoning in applying single entity status to soccer organizations and professional golf associations.⁹⁶ In holding that sports leagues *can* be considered a single entity under Section 1, these courts seem to focus their attention on the necessity required of each team to work together to create the game itself, which is in line with the complete unity of interest element required under *Copperweld*.⁹⁷

C. Why the Majority Approach is Better

Most commentators agree that the majority of federal circuit courts have engaged in the proper approach of analysis in holding that sports leagues should not be considered a single entity for purposes of Section 1.⁹⁸ Such commentators agree with the First⁹⁹ and Ninth Circuits¹⁰⁰ that sports leagues fail to meet the *Copperweld* requirement of “complete unity of interest” that is necessary to be afforded single entity treatment.¹⁰¹ In regards

93. *Id.* at 599.

94. *Chi. Prof'l Sports*, 95 F.3d at 599.

95. *Id.* (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248–49 (1996)).

96. *Brief for the NBA*, *supra* note 25, at 4 (“The Fourth and Fifth Circuits appear to agree with the Seventh, having applied *Copperweld* to find the activities of other sports leagues to fall outside the scope of Section 1.”).

97. *See Chi. Prof'l Sports*, 95 F.3d at 598–99.

98. *See AREEDA & HOVENKAMP*, *supra* note 24, at 327 (stating that “the courts have mainly rejected” single entity status for professional sports leagues); Ross & Szymanski, *supra* note 24, at 238 (“[C]ourts have overwhelmingly rejected efforts by club-run leagues to be treated as single entities.”); Edelman, *supra* note 24, at 893 n.11 (“Many courts have rejected the single-entity defense in the scope of premier American sports leagues.”).

99. *See Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994).

100. *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1389–90 (9th Cir. 1984).

101. *See Edelman*, *supra* note 24, at 894 (arguing that “sports leagues lack sufficient unity of interest for any court to classify them as ‘single entities’”).

to a lack of “complete unity of interest,” many commentators focus on league structure and governance, and the diverse interests of individual teams.¹⁰² Consistent with the holdings of the First and Ninth Circuits,¹⁰³ commentators specifically point to the competition among each league’s member teams in areas such as ticket sales, player acquisition, corporate sponsorships, and television, radio and merchandising revenues to support their position.¹⁰⁴

1. The Majority Approach is Consistent with the Original Meaning Behind the Single Entity Doctrine

The Supreme Court should use the opportunity presented in *American Needle* to firmly establish that sports leagues are not to be considered a single entity for purposes of Section 1. The Supreme Court should follow the reasoning used by the majority of federal circuit courts by rejecting the NFL’s claim for single entity treatment because the majority approach’s reasoning is consistent with the original meaning behind single entity status established in *Copperweld*.¹⁰⁵ To receive single entity status, *Copperweld* requires a “complete unity of interest.”¹⁰⁶ According to the Supreme Court in *Copperweld*, the “complete unity of interest” between a parent company and its wholly owned subsidiary was the exact type of coordinated behavior Congress believed fell outside the Sherman Act’s scope.¹⁰⁷ The Supreme Court explained that the “complete unity of interest” between a parent company and its wholly owned subsidiary could not form the type of agreement covered by Section 1.¹⁰⁸ The Supreme Court stated that, “if a

102. See Keyte, *supra* note 21, at 49 (stating that in sports league cases it is not difficult “to highlight facts about league structure, governance, and the characteristics of individual teams to argue that not every team has a complete unity of interest with every other team.”).

103. See *Sullivan*, 34 F.3d at 1099 (“We do not agree that *Copperweld*, which found a corporation and its wholly owned subsidiary to be a single enterprise for purposes of § 1 . . . applies to the facts of this case or affects the prior precedent concerning the NFL.”) (citation omitted); *L.A. Mem’l Coliseum*, 726 F.2d at 1390 (stating that “[t]hese attributes operate to make each team an entity in large part distinct from the NFL.”).

104. See Edelman, *supra* note 24, at 925 (“[T]here is little doubt that clubs in these leagues lack complete unity of interest in each of the following areas: (1) individual gate receipts (including other stadium revenues); (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues.”).

105. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

106. *Id.*

107. *Id.* at 776 (“Unless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.”).

108. *Id.* at 771 (holding that “the very notion of an ‘agreement’ in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning”).

parent and wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.”¹⁰⁹

In an effort to stay true to the original purpose behind the creation of the single entity doctrine, the Supreme Court must reject the NFL’s request for single entity status in *American Needle*. As stated above,¹¹⁰ the majority of federal circuit courts and commentators agree there is little doubt that sports leagues lack the “complete unity of interest” that is required under *Copperweld*.¹¹¹ Treatment of sports leagues as a single entity would thus be inconsistent with the Supreme Court’s reasoning for affording single entity status.¹¹² With sports leagues, there are different interests among its member teams, and there is justification for Section 1 scrutiny.¹¹³ As the majority of federal circuit courts and commentators have pointed out, these different interests can be seen in the fact that each NFL member team acts as an individual entity, wholly distinct from the NFL itself.¹¹⁴ As a result, each NFL team is forced to compete with one another to secure media coverage, fan support, sponsorship deals, television revenues, and talented

109. *Id.*

110. See *supra* Part IV.A.

111. See *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1390 (9th Cir. 1984) (stating that “[t]hese attributes operate to make each team an entity in large part distinct from the NFL.”); *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (stating that the NFL teams’ competition off of the field “itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under §1”); Edelman, *supra* note 24, at 925 (“[T]here is little doubt that clubs in these leagues lack ‘complete unity of interest’ in each of the following areas: (1) individual gate receipts (including other stadium revenues); (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues.”).

112. *Copperweld*, 467 U.S. at 771.

113. See *L.A. Mem’l Coliseum*, 726 F.2d at 1390 (stating that “[t]hese attributes operate to make each team an entity in large part distinct from the NFL.”); *Sullivan*, 34 F.3d at 1099 (stating that the NFL teams’ competition off of the field “itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under §1”); Edelman, *supra* note 24, at 925 (“[T]here is little doubt that clubs in these leagues lack ‘complete unity of interest’ in each of the following areas: (1) individual gate receipts (including other stadium revenues); (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues.”).

114. *L.A. Mem’l Coliseum*, 726 F.2d at 1390 (stating that “[t]hese attributes operate to make each team an entity in large part distinct from the NFL.”); see also *Sullivan*, 34 F.3d at 1099 (stating that the NFL teams’ competition off of the field “itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under §1”); Edelman, *supra* note 24, at 925 (“[T]here is little doubt that clubs in these leagues lack ‘complete unity of interest’ in each of the following areas: (1) individual gate receipts (including other stadium revenues); (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues.”).

players and coaches.¹¹⁵ These different interests show a lack of “complete unity of interest” between the NFL and its member teams and provide justification for rejecting single entity treatment. Therefore, if the Supreme Court is to stay true to the original meaning behind the single entity doctrine, it must reject single entity treatment for sports leagues.

2. The Seventh Circuit’s Holding in *American Needle* Was Limited to the Narrow Context of Promoting Intellectual Property

The Supreme Court should reject the NFL’s request to extend the Seventh Circuit’s holding in *American Needle* to all facets of sports leagues because that holding was specifically limited to the particular facts of the case.¹¹⁶ Noting that it had never “render[ed] a definitive opinion as to whether the teams of a professional sports league can be considered a single entity”¹¹⁷ under *Copperweld*, the Seventh Circuit specifically limited its review to “the actions of the NFL and its member teams as they pertain to the teams’ agreement to license their intellectual property collectively via NFL Properties.”¹¹⁸ For more than forty years, the NFL and its teams “have promoted NFL Football by collectively licensing and marketing their identifying trademarks for use on consumer products” such as hats and jerseys.¹¹⁹ These activities are carried out by NFL Properties, the teams’ jointly owned affiliate.¹²⁰ In the narrow context of licensing its intellectual property, the court found it significant that the NFL “competes with other forms of entertainment for a [] [limited] audience” and emphasized that the loss of that audience to other “forms of entertainment necessarily impacts the individual teams’ success.”¹²¹ The court stated that “nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers.”¹²² Because of these facts, the court held that the NFL acted as a single entity in the limited context of promot-

115. See *L.A. Mem’l Coliseum*, 726 F.2d at 1390 (“In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. . . . [T]here is also competition for fan support, local television and local radio revenues, and media space.”).

116. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 742 (7th Cir. 2008) (“Thus, in reviewing the district court’s decision, we will limit our review to . . . the actions of the NFL and its member teams as they pertain to the teams’ agreement to license their intellectual property collectively via NFL Properties.”).

117. *Id.* at 741.

118. *Id.* at 742.

119. *Brief for the NFL*, *supra* note 25, at 1.

120. *Id.*

121. *Am. Needle*, 538 F.3d at 743.

122. *Id.* at 744.

ing its intellectual property.¹²³

While the NFL may act as a single entity when licensing its intellectual property, the Supreme Court must not forget that the NFL “teams may assume different roles in different circumstances—with different consequences for antitrust enforcement.”¹²⁴ Therefore, although the Supreme Court could affirm the Seventh Circuit holding and allow an exception for the NFL in instances when it is licensing its intellectual property, it must still hold that sports leagues remain subject to Section 1 liability because its member teams still compete with each other in areas such as ticket sales, player acquisition, corporate sponsorships, and television, radio and merchandising revenues.¹²⁵ Because the Seventh Circuit’s holding in *American Needle* was limited to the particular facts in that case,¹²⁶ the Supreme Court should not extend its holding and afford single entity status to all facets of sports leagues.

3. Rejecting the Minority Approach on Policy Grounds

The Supreme Court should also reject single entity status to sports leagues on policy grounds. Since its enactment, the Sherman Act has been used as a tool to protect consumers and small businesses from anticompetitive conduct.¹²⁷ “The courts, Congress, and commentators . . . all [recognize] the importance to consumer welfare of antitrust constraints—or the absence thereof—in the sports league context.”¹²⁸ As the Second Circuit so

123. *Id.* (holding that “the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property”).

124. *Brief for the U.S.*, *supra* note 49, at 17 (citing *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56–57 (1st Cir. 2002)).

125. *See* Edelman, *supra* note 24, at 925 (“[T]here is little doubt that clubs in these leagues lack ‘complete unity of interest’ in each of the following areas: (1) individual gate receipts (including other stadium revenues); (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues.”).

126. *Am. Needle*, 538 F.3d at 742 (“Thus, in reviewing the district court’s decision, we will limit our review to . . . the actions of the NFL and its member teams as they pertain to the teams’ agreement to license their intellectual property collectively via NFL Properties.”).

127. *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses.”); Posting of Caleb Groos to FindLaw, *DOJ Antitrust Enforcement to Return: New Approach to Bundling and Predatory Pricing?*, http://blogs.findlaw.com/free_enterprise/2009/05/doj-antitrust-enforcement-to-return-new-approach-to-bundling-and-predatory-pricing.html (May 11, 2009, 12:34 EST) [hereinafter *FindLaw*] (stating that the “ultimate goal of antitrust laws [is] the protection of consumer welfare”).

128. Supplemental Brief of Petitioner at 9, *petition for cert. filed*, *Am. Needle, Inc. v. Nat’l Football League*, (U.S. June 8, 2009) (No. 08-661), 2009 WL 1604441 [hereinafter *Supplemental Brief*]; *see, e.g.*, *Major League Baseball v. Crist*, 331 F.3d 1177, 1188 (11th Cir. 2003) (“[T]he welfare losses stemming from the potentially anticompetitive agreements among profes-

aptly put it, to immunize the NFL from Section 1 scrutiny would be “[t]o tolerate such a loophole [that] would permit league members to escape anti-trust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects.”¹²⁹

The consequences of granting sports leagues Section 1 immunization are numerous.¹³⁰ For example, with Section 1 immunization, the NFL and other sports leagues could: (1) reduce the competition for free agents in sports leagues by restricting a player’s ability to move from one team to another; (2) enforce a salary schedule which could restrict competition by teams for prospective players, coaches, and management personnel; (3) further restrict control over team marketing, merchandising and broadcasting rights; and (4) damage the negotiating ability of the player unions, likely resulting in more player strikes or lock outs.¹³¹ By ruling against the NFL, the Supreme Court will preserve the ability of small businesses to sue the league on antitrust grounds.¹³² This will prevent many small businesses from being completely shut out from doing business with the league.¹³³ With price competition from small businesses,¹³⁴ the NFL will not be able to engage in exclusive commercial deals with the highest bidder,¹³⁵ which likely would have run small businesses into the ground and driven up prices for fans.¹³⁶

By refusing to grant single entity status to sports leagues, the Supreme Court will preserve the ability of the federal circuit courts to regulate sports leagues under Section 1.¹³⁷ This will ensure that consumers are protected from any anticompetitive conduct by sports leagues and their teams, consistent with the goals of the Sherman Act.¹³⁸ In sum, the Supreme Court

sional sports clubs have been well documented.”).

129. *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982).

130. *See infra* Part IV.C.3.

131. *Munson*, *supra* note 4; *see also* *Belson & Schwarz*, *supra* note 3, at B13.

132. *See* *Belson & Schwarz*, *supra* note 3, at B13.

133. *See FindLaw*, *supra* note 127 (“Enforcing our laws against anti-competitive behavior could mean more room for small businesses to compete. . . . [A]ntitrust enforcement will shift business behavior in favor of competition open to more small businesses.”); *see also* *Belson & Schwarz*, *supra* note 3, at B13; *Belson*, *supra* note 17, at B11.

134. *See The Huffington Post*, *supra* note 7.

135. *See* *Belson & Schwarz*, *supra* note 3, at B13.

136. *See id.*

137. *Edelman*, *supra* note 24, at 926 (stating that “[b]y rejecting the notion that premier American sports leagues are ‘single entities,’ federal courts importantly retain the ability to regulate premier American sports clubs under Section One of the Sherman Act.”).

138. *Edelman*, *supra* note 24, at 926–27 (arguing that by rejecting single entity status for

should use the *American Needle* case to establish a rule that denies single entity status to sports leagues.

V. A PRO-BUSINESS COURT IN ANTITRUST JURISPRUDENCE UNDER CHIEF JUSTICE JOHN ROBERTS

While it is usually not easy to predict how the Supreme Court will rule in a particular case, sometimes a review of the Supreme Court's political leanings and its recent decisions in a particular area of law can cast some insight on the possible outcome. In reviewing the Supreme Court's most recent decisions under the guidance of Chief Justice Roberts, it is apparent that "since John Roberts was appointed chief justice in 2005, the [Supreme] [C]ourt has seemed only more receptive to business concerns."¹³⁹ Under the Chief Justice's leadership, forty percent of the cases his Supreme Court (Roberts Court) granted certiorari to involved business interests, up ten percent from the Rehnquist Court.¹⁴⁰ The Roberts Court's recent pro-business trend has prompted Jeffrey Rosen, a professor of law at George Washington University Law School, to jokingly refer to the Roberts Court as "Supreme Court Inc."¹⁴¹

Consistent with this general pro-business trend, the emerging anti-trust jurisprudence from the Roberts Court can also be characterized as conservative, pro-business, and pro-defendant.¹⁴² This trend is evident by the fact that the Roberts Court heard more antitrust cases in its first two terms than it had in the five years prior under the Rehnquist Court.¹⁴³ In

professional sports leagues, "American consumers remain protected against the risks of anti-competitive conduct within the professional sports industry."); see also *Supplemental Brief*, *supra* note 128, at 9 ("The courts, Congress, and commentators . . . all recognize[] the importance to consumer welfare of antitrust constraints—or the absence thereof—in the sports league context.").

139. Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38, 40.

140. *Id.* at 38, 40 (stating that "[f]orty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years.").

141. *Id.* at 38-39. See also Jeffrey Rosen, *GW Law School Profile*, <http://www.law.gwu.edu/Faculty/profile.aspx?id=1763> ("The Chicago Tribune named him one of the 10 best magazine journalists in America and the L.A. Times called him, 'the nation's most widely read and influential legal commentator.'").

142. Matthew Freimuth & Estee M. Konor, *Sotomayor's Approach To Antitrust*, LAW360, July 9, 2009, http://www.hunton.com/files/tbl_s47Details%5CFileUpload265%5C2619%5CSotomayors_Approach_To_AntitrustLaw360_7.09.pdf. See generally Jeffrey Rosen, *Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 929 (2009).

143. See Rosen, *supra* note 139, at 40 (stating that "[w]hile the Rehnquist Court heard less than one antitrust decision a year, on average, between 1988 and 2003, the Roberts Court has heard seven in its first two terms—and all of them were decided in favor of the corporate defen-

each and every case, the Roberts Court ruled “in favor of the corporate defendants,” a telling foreshadowing of things to come in *American Needle*.¹⁴⁴

A. Major Victories for Big Business Under the Roberts Court in the Twombly and Iqbal Antitrust Decisions

The Roberts Court has gone to great lengths to protect big business in antitrust lawsuits.¹⁴⁵ In response to the growing number of antitrust cases against big businesses in recent years, the Roberts Court in *Bell Atl. Corp. v. Twombly* had an opportunity to consider the appropriate pleading standard for a Sherman Act Section 1 claim.¹⁴⁶ Since the 1957 *Conley v. Gibson*¹⁴⁷ case, Rule 8(a)(2) of the Federal Rules of Civil Procedure had been interpreted as “requir[ing] only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”¹⁴⁸ Before *Twombly*, Rule 8(a)(2) was considered to merely require liberal notice pleading, which could be seen as an effort by the courts to keep the merits of the claim as the central focus of the litigation.¹⁴⁹ The idea behind this relaxed pleading standard was to ensure that each litigant had his day in court.¹⁵⁰ However, in a drastic shift from how Rule 8(a)(2) had been interpreted for fifty years after *Conley*, the Roberts Court, in an effort to shield big businesses from expensive antitrust suits, used *Twombly* to reinterpret Rule 8(a)(2) as requiring a heightened fact pleading standard.¹⁵¹ The Roberts Court reasoned that:

[S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that dis-

dants.”).

144. *Id.* (stating that in regards to antitrust cases, “the Roberts Court has heard seven in its first two terms—and all of them were decided in favor of the corporate defendants.”).

145. *See infra* Part V.A–B.

146. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007).

147. *Conley v. Gibson*, 355 U.S. 41 (1957).

148. *Bell Atl.*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

149. *Id.* at 575 (Stevens, J., dissenting) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

150. *Id.*

151. *Id.* at 556.

covery will reveal evidence of illegal agreement.¹⁵²

In support of its new interpretation of Rule 8(a)(2), the Roberts Court focused on the costs of antitrust litigation to defendants.¹⁵³ The Roberts Court noted that “[t]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”¹⁵⁴ By recognizing that “some threshold of plausibility must be crossed at the outset before a [recognizable] antitrust case should be permitted to go into its inevitably costly and protracted discovery phase,”¹⁵⁵ the Roberts Court took a major step towards protecting big businesses from antitrust suits in the federal courts.

Following the *Twombly* decision, there was confusion in the lower federal courts as to whether the heightened pleading standard set forth in the case applied only to antitrust cases or to all federal cases.¹⁵⁶ In 2009, the Roberts Court used *Ashcroft v. Iqbal* to resolve this issue.¹⁵⁷ Instead of limiting the scope of *Twombly* to the narrow context of antitrust cases, the Roberts Court instead decided to take the *Twombly* holding one step further.¹⁵⁸ In *Iqbal*, the Roberts Court stated that the *Twombly* heightened pleading standard applies for “all civil actions.”¹⁵⁹ While *Iqbal* was not a business case, it can be seen as another major victory for big business un-

152. *Id.*

153. *See id.* at 558 (“Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”) (citation omitted).

154. *Bell Atl.*, 550 U.S. at 558 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

155. *Id.* (quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J. sitting by designation)).

156. *See* Yuri Mikulka, *Ashcroft v. Iqbal: Raising the Federal Pleading Standard for Plaintiffs and Providing a New Defense Tool for Corporate Defendants*, LAWUPDATES.COM, Aug. 18, 2009, http://www.lawupdates.com/tips/entry/iashcroft_v_iqbal_i_raising_the_federal_pleading_standard_for_plaintiffs_a.

157. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (“Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’ Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.”) (internal citations omitted).

158. *See* Mikulka, *supra* note 156; *Ashcroft*, 129 S. Ct. at 1953.

159. *Ashcroft*, 129 S. Ct. at 1953.

der the Roberts Court.¹⁶⁰ Democrat lawmaker Henry Johnson of Georgia called the “decision an unexpected gift for the business community.”¹⁶¹ The Roberts Court’s holding in *Iqbal* makes it much more difficult for plaintiffs to survive motions to dismiss by defendants—usually big businesses—in all federal complaints, not just antitrust suits.¹⁶²

B. Other Recent Antitrust Cases Under the Roberts Court

Twombly and *Iqbal* are not the only decisions by the Roberts Court that limit antitrust enforcement and/or liability against defendants.¹⁶³ In *Credit Suisse Sec. (USA) LLC v. Billing*, the Roberts Court limited antitrust law when securities regulations apply by holding that securities law precludes antitrust claims.¹⁶⁴ The Roberts Court eliminated the price-squeeze claim as an antitrust cause of action in *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, by overturning a sixty-year-old precedent written by Judge Learned Hand.¹⁶⁵ In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Roberts Court overturned a plaintiff’s Sherman Act Section 2 monopolization claim.¹⁶⁶ The Roberts Court overruled a sixty-year-old interpretation of the Robinson-Patman Act in *Volvo Trucks N. Am., Inc. v.*

160. See Kristina Peterson, *US Dem Reps Craft Bill to Prevent Easily Dismissing Lawsuits*, NASDAQ.COM, Oct. 27, 2009, <http://nasdaq.com/aspx/stock-market-news-story.aspx?storyid=200910271746dowjonesdjonline000543&title=us-dem-reps-craft-bill-to-prevent-easily-dismissing-lawsuits>.

161. *Id.*

162. Mikulka, *supra* note 156 (“[F]or plaintiffs lacking requisite facts to support a claim at the outset, it will mean fewer opportunities for relief. This is good news for defendants looking for some reprieve from the onslaught of civil litigation filed against corporations . . .”).

163. See *infra* Part V.B.

164. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 283–85 (2007) (“We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets. . . . We therefore conclude that the securities laws are ‘clearly incompatible’ with the application of the antitrust laws in this context.”).

165. *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109, 1120 n.3, 1123 (2009) (“Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us. . . . [W]e hold that the price-squeeze claims set forth in that complaint are not cognizable under the Sherman Act.”).

166. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 326 (2007) (“[The plaintiff] has not satisfied the *Brooke Group* standard. Therefore, its predatory-bidding theory of liability cannot support the jury’s verdict. For these reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.”).

Reeder-Simco GMC, Inc., when it overturned a plaintiff's price discrimination claim.¹⁶⁷ In *Texaco Inc. v. Dagher*, the Roberts Court held that no *per se* liability exists for joint ventures that set prices.¹⁶⁸ The Roberts Court again overruled a sixty-year-old precedent in *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, by holding that a "patent does not necessarily confer market power upon the patentee."¹⁶⁹ In *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, the Roberts Court disregarded almost one hundred years of legal precedent, by holding that minimum resale price maintenance by businesses is no longer unlawful *per se*.¹⁷⁰

An examination of the recent antitrust decisions by the Roberts Court leads one to infer a pro-business, pro-defendant agenda.¹⁷¹ Not a single case taken by the Roberts Court has expanded antitrust enforcement or liability.¹⁷² Rather, all of the cases mentioned above limited the scope of antitrust liability. Some did so by overturning long-standing precedents favoring plaintiffs, while others reversed jury verdicts or court of appeal

167. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 182, 185 (2006) (Stevens, J., dissenting) ("Today, however, by adopting a novel, transaction-specific concept of competition, the Court eliminates that statutory protection in all but those rare situations in which a prospective purchaser is negotiating with two Volvo dealers at the same time. . . . For decades, juries have routinely inferred the requisite injury to competition under the Robinson-Patman Act from the fact that a manufacturer sells goods to one retailer at a higher price than to its competitors. This rule dates back to the following discussion of competitive injury in Justice Black's opinion for the Court in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).").

168. *Texaco Inc. v. Dagher*, 547 U.S. 1, 6–7 (2006) ("We see no reason to treat Equilon differently just because it chose to sell gasoline under two distinct brands at a single price. As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price. If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason. But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.").

169. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 38–39, 45–46 (2006) ("The presumption that a patent confers market power migrated from patent law to antitrust law in *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947). . . . Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.").

170. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007) ("In *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. . . . We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.").

171. See *supra* Part V.A–B.

172. See *supra* Part V.A–B.

decisions favoring plaintiffs.¹⁷³ The current trend of the Roberts Court antitrust jurisprudence certainly favors the NFL in *American Needle*.

C. *The Politics of Antitrust Law and the Roberts Court*

1. The Politics of Antitrust Law

The Roberts Court's recent pro-business trend in its antitrust jurisprudence should not come as a surprise. For the past twenty-five years, antitrust enforcement has been linked to the political leaning of the oval office.¹⁷⁴ This political link is in accord with what Congress intended when the Sherman Act was passed.¹⁷⁵ Robert Pitofsky, a Georgetown Law professor and former Chairman of the Federal Trade Commission,¹⁷⁶ has noted that "an antitrust policy that failed to take political concerns into account would be unresponsive to the will of Congress and out of touch with the rough political consensus that has supported antitrust enforcement for almost a century."¹⁷⁷ With Democrat presidents, there has been an expansion of antitrust law and a shift towards strong antitrust enforcement by the Federal Trade Commission (FTC) and the United States Department of Justice (DOJ) against big businesses.¹⁷⁸ With Republican presidents, there has been a contraction of antitrust law and a reduction in antitrust enforcement

173. See *supra* Part V.A–B.

174. See *infra* Part V.C.1. See generally Posting of Ashby Jones to Wall St. J. L. Blog, *The Antitrust Revolution is Underway, But How Far Can It Go?*, <http://blogs.wsj.com/law/2010/02/01/the-antitrust-revolution-is-underway-but-how-far-can-it-go/tab/article> (Feb. 1, 2010, 9:39 EST) [hereinafter *Antitrust Revolution*] (stating that "antitrust followers predicted that enforcement activities would start slowly ramping up" soon after President Barack Obama took office following the lax enforcement of the antitrust laws against anticompetitive corporate behavior during the eight years George W. Bush was president).

175. See Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1052 (1979).

176. Robert Pitofsky, Georgetown Law Full Time Faculty Biography, http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=FullTime&ID=307 ("Professor Pitofsky has had a distinguished career in government and is especially known for his work in the antitrust field. He has served as a commissioner of the Federal Trade Commission . . . [and] is co-author of the text, *Cases & Materials on Antitrust*.").

177. Pitofsky, *supra* note 175, at 1052.

178. See *infra* Part V.C.1. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 250 (1985) ("Historically, liberals have been fairly successful in getting Congress to write liability-expanding antitrust statutes."); Michael Catanzaro, *The Antitrust Club: A Weapon in Bill Clinton's Hands*, NAT'L REV., Sept. 25, 2000, at 24, 26 (stating that there is a "hostility to successful businesses that animates the Clinton antitrust apparatus"); *Antitrust Revolution*, *supra* note 174 (stating that "President Obama began installing the top antitrust enforcers in the land in the early months of 2009 . . . [a]fter eight years of lax enforcement" under President George W. Bush).

by the FTC and DOJ against big businesses.¹⁷⁹

For example, in the late 1980s under Republican President Ronald Reagan, the antitrust division of the FTC had mounted “about as minimal an antitrust program as can be imagined.”¹⁸⁰ Under President Reagan and fellow Republican President George H. W. Bush, the antitrust division of the DOJ filed only three cases regarding the conduct of monopolies.¹⁸¹ In contrast, President William J. Clinton, the Democrat successor to George H. W. Bush, took an extremely different approach to antitrust enforcement.¹⁸² President Clinton’s antitrust regime was “hyperactive, politicized and regulatory.”¹⁸³ From 1994 to 1999, President Clinton’s “antitrust division filed a total of 481 cases, vastly increased its investigations of supposed monopolies, and intensified reviews of mergers and acquisitions.”¹⁸⁴ President George W. Bush, the Republican successor to President Clinton, subsequently contracted the expansive antitrust enforcement approach of the Clinton administration and reverted to the minimal enforcement of antitrust that was seen under Republican Presidents Reagan and George H. W. Bush.¹⁸⁵ Under President George W. Bush, the DOJ did not pursue a single anti-monopoly case and his administration installed high hurdles for enforcement against anticompetitive conduct.¹⁸⁶ However, in May 2009, under the guidance of President George W. Bush’s Democrat successor President Barack Obama, the DOJ announced that it would return to the “more strict enforcement of federal antitrust laws” seen in the Clinton administration.¹⁸⁷ True to its word, in January 2010, the DOJ announced that the Obama administration had directed it to “review the legality of the controversial Bowl Championship Series” and determine if it “potentially runs afoul of the nation’s antitrust laws.”¹⁸⁸

179. See *infra* Part V.C.1. See Hovenkamp, *supra* note 178, at 250 (“Leaders in conservative administrations have asked for legislation weakening the [antitrust] laws . . .”). See also *Antitrust Revolution*, *supra* note 174 (stating that there was lax enforcement of the antitrust laws against anticompetitive corporate behavior during the eight years George W. Bush was president).

180. Catanzaro, *supra* note 178, at 24, 26 (quoting Robert Pitofsky).

181. *Id.* at 26.

182. See *id.*

183. *Id.* at 28.

184. *Id.* at 26.

185. See *FindLaw*, *supra* note 127.

186. *Id.*

187. *Id.*

188. *Justice Dept.: Obama Administration May Take Action on BCS*, SPORTSILLUSTRATED.COM, Jan. 29, 2010, <http://sportsillustrated.cnn.com/2010/football/ncaa/01/29/obama.bcs.ap/index.html>.

2. The Politics of the Roberts Court Justices

When one considers the fact that the current Roberts Court is composed of more conservative, pro-business justices such as Roberts, Alito, Thomas, Kennedy, and Scalia, it should come as no surprise that the Roberts Court held for the corporate defendants in each of its recent antitrust decisions.¹⁸⁹ Judge Richard Posner of the Seventh Circuit Court of Appeals recently wrote an article discussing the connection between the political ideologies of the Supreme Court justices and their voting records.¹⁹⁰ The article, *Rational Judicial Behavior: A Statistical Study*, used “a database that include[d] the political background and voting records of the past 70 years of Supreme Court justices—who appointed each justice and how the justices decided every case—to come up with a ranking, from most conservative to least conservative, of the 43 justices who have served on the court since 1937.”¹⁹¹ Unsurprisingly, the study revealed that over the past 70 years, Republican-appointed justices had a tendency to vote conservatively, while Democrat-appointed justices had a tendency to vote liberally.¹⁹² Republican presidents appointed seven of the nine Supreme Court justices that were on the Roberts Court during its recent pro-business antitrust jurisprudence.¹⁹³ According to Judge Posner’s study, Justices Thomas, Scalia, Roberts, and Alito are “[f]our of the five most conservative justices to serve on the Supreme Court” since 1937.¹⁹⁴ The study also ranked Republican appointee and current justice on the Roberts Court, Anthony Kennedy, as the tenth most conservative Supreme Court justice since 1937.¹⁹⁵ Former President George W. Bush’s appointments of the Chief Justice and Justice Alito to the Supreme Court may turn out to be his most long lasting legacy, as they have shifted the Supreme Court in a more conservative direction.¹⁹⁶ This shift favors the NFL in *American Needle*.

189. Rosen, *supra* note 139, at 40 (stating that in regards to antitrust cases, “the Roberts Court has heard seven in its first two terms—and all of them were decided in favor of the corporate defendants.”); *see also* Munson, *supra* note 4.

190. *See* William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. OF LEGAL ANALYSIS 775 (2009).

191. Justin Ewers, *Ranking the Politics of Supreme Court Justices: Four of the Five Most Conservative Justices Since 1937 are on the Bench Today*, U.S. NEWS & WORLD REP., May 12, 2008, <http://www.usnews.com/articles/news/national/2008/05/12/ranking-the-politics-of-supreme-court-justices.html>; Landes & Posner, *supra* note 190.

192. Ewers, *supra* note 191.

193. *Id.*

194. *Id.*; *see also* Landes & Posner, *supra* note 190.

195. *See* Landes & Posner, *supra* note 190.

196. Nina Totenberg, *A Changed Court Faces Key Decisions In New Term*, NPR.COM, Oct. 5, 2009, <http://www.npr.org/templates/story/story.php?storyId=113438661>.

D. The NFL: Asking for Single Entity Treatment in the Right Place at the Right Time

For decades, the NFL has unsuccessfully sought antitrust immunity under *Copperweld* in the federal circuit courts.¹⁹⁷ As explained above,¹⁹⁸ the majority of federal circuit courts have rejected the NFL's previous attempts for single entity treatment under Section 1¹⁹⁹ because its individual member "teams compete with each other for free-agent players, for coaches, for executives, for sponsors, for naming rights money and for fans."²⁰⁰ However, with the Roberts Court obvious pro-business trend in its most recent antitrust jurisprudence, the NFL might finally be presenting its argument for single entity treatment under *Copperweld* "in the right place at the right time."²⁰¹

The NFL is "one of America's most profitable collection of businesses," with combined team revenues in 2008 of over \$6.5 billion.²⁰² The NFL's individual member team revenues in 2007 ranged from \$195 million to over \$300 million per year.²⁰³ Many of the NFL franchises are "now valued at over \$700 million per year."²⁰⁴ With this in mind, the NFL is hoping that the conservative, pro-business and pro-defendant trend of the Roberts Court's most recent antitrust jurisprudence continues in *American Needle*.

1. The NFL's Use of the *Twombly* Holding in *American Needle*

In *Twombly*, the Roberts Court focused its analysis on "[t]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts."²⁰⁵ In an effort to appeal to the Roberts Court's position against costly antitrust litigation that it announced in *Twombly*, the sports leagues

197. Munson, *supra* note 4.

198. See *supra* Part V.A–C.

199. See AREEDA & HOVENKAMP, *supra* note 24, at 327 (stating that "[t]he courts have mainly rejected" single entity status for professional sports leagues); Ross & Szymanski, *supra* note 24, at 238 ("[C]ourts have overwhelmingly rejected efforts by club-run leagues to be treated as single entities."); Edelman, *supra* note 24, at 893 n.11 ("Many courts have rejected the single-entity defense in the scope of premier American sports leagues.").

200. Munson, *supra* note 4.

201. *Id.*

202. Edelman, *supra* note 24, at 891.

203. See *Special Report: NFL Team Valuations*, FORBES.COM, Sept. 10, 2008, http://www.forbes.com/lists/2008/30/sportsmoney_nfl08_NFL-Team-Valuations_Revenue.html.

204. See Edelman, *supra* note 24, at 891.

205. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (9th Cir.1984)).

argue that the answer to the question of whether they function “as a single entity for purposes of Section 1 is a threshold issue that can bring otherwise costly and burdensome antitrust litigation to an early end.”²⁰⁶ The NFL argues that the “application of *Copperweld* to professional sports leagues is a frequently recurring issue”²⁰⁷ that “result[s] in years of litigation and enormous burden and expense.”²⁰⁸ The sports leagues maintain that the inconsistent application of *Copperweld* caused by the current federal circuit court split “forces the league[s] to operate under a cloud of uncertainty as to whether its most basic collective actions will, depending on [which circuit is] chosen by an antitrust plaintiff, subject it to a ruling that its member teams have ‘conspired’ in violation of Section 1.”²⁰⁹

For the NFL and other sports leagues, this “uncertainty chills collaboration and decision-making, and it inevitably decreases interbrand competition.”²¹⁰ The chilling effect on collaboration and decision-making caused by the current federal circuit court split is especially costly to sports leagues because it is the very [type of] “conduct [that] the antitrust laws are designed to protect.”²¹¹ The leagues contend that a uniform standard “finding that a professional sports league is a single entity whose collective activities fall outside the scope of Section 1”²¹² would allow “for potential early resolution of [Section 1] antitrust challenges [which] furthers judicial economy and avoids unnecessary discovery, motions practice, trial, and other litigation burdens.”²¹³ The NFL’s argument is consistent with the

206. *Brief for the NBA*, *supra* note 25, at 6–7.

207. *Brief for the NFL*, *supra* note 25, at 10–11 (“The experience of the NFL is not unusual among professional sports leagues; nor has the cascade of antitrust suits against them abated. Major League Baseball, the National Hockey League, NASCAR, and the ATP Tour each is currently defending, or has recently defended, Section 1 antitrust suits challenging its decisions about how to produce its integrated entertainment product.”).

208. *Id.* at 13.

209. *Brief for the NBA*, *supra* note 25, at 6.

210. *Brief for the NFL*, *supra* note 25, at 9; *see also Brief for the NBA*, *supra* note 25, at 6 (“Mindful of that ever-present threat, the league is therefore unfairly limited and constrained in its ability to develop business strategies that might enable it to compete more effectively in the larger entertainment marketplace.”).

211. *Brief for the NFL*, *supra* note 25, at 9 (arguing that under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, “mistaken standards that permit inference of conspiracy when none should be found ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” 475 U.S. 574, 594 (1986)).

212. *Brief for the NBA*, *supra* note 25, at 8.

213. *Brief for the NFL*, *supra* note 25, at 13. *See Brief for the NBA*, *supra* note 25, at 7 (stating that “[t]he trial court’s management of this case was consistent with the goals announced by this Court in *Bell Atlantic Corp. v. Twombly*, where it emphasized that deficiencies in a case ‘should . . . be exposed at the . . . minimum expenditure of time and money by the parties and the court.’” 550 U.S. 544, 558 (2007)) (citation omitted) (alteration in original)).

goals announced in *Twombly* and is sure to appeal to the Roberts Court in *American Needle*.²¹⁴

2. The NFL's *Twombly* Argument Is Inconsistent with the Approach Used By the Seventh Circuit

While the NFL's appeal to the Roberts Court for a uniform standard based on preventing costly antitrust litigation may be consistent with the goals announced in *Twombly*,²¹⁵ it is inconsistent with the analysis used by the Seventh Circuit that led it to grant the NFL single-entity status in the first place.²¹⁶ The Seventh Circuit held in *American Needle* that "whether a professional sports league is a single entity should be addressed not only 'one league at a time,' but also 'one facet of a league at a time.'"²¹⁷ It was specifically because of this more searching inquiry into a specific "facet of a league" that the Seventh Circuit held that in the specific facet of "promoting NFL football through licensing the teams' intellectual property," "the NFL teams are best described as a single" entity.²¹⁸ Therefore, rather than offering the potential for early resolution of antitrust challenges that the NFL seeks in its appeal to the Roberts Court,²¹⁹ the Seventh Circuit's approach to single entity analysis actually "appears to require *more* factual

214. *Brief for the NFL*, *supra* note 25, at 13 (arguing that a uniform standard would allow "for potential early resolution of [Section 1] antitrust challenges [which] furthers judicial economy and avoids unnecessary discovery, motions practice, trial, and other litigation burdens."); see *Brief for the NBA*, *supra* note 25, at 7 (stating that "[t]he trial court's management of this case was consistent with the goals announced by this Court in *Bell Atlantic Corp. v. Twombly*, where it emphasized that deficiencies in a case 'should . . . be exposed at the . . . minimum expenditure of time and money by the parties and the court.'" 550 U.S. 544, 558 (2007)) (citation omitted) (alteration in original)).

215. *Brief for the NFL*, *supra* note 25, at 13 (arguing that a uniform standard would allow "for potential early resolution of [Section 1] antitrust challenges [which] furthers judicial economy and avoids unnecessary discovery, motions practice, trial, and other litigation burdens."); see *Brief for the NBA*, *supra* note 25, at 7 (stating that "[t]he trial court's management of this case was consistent with the goals announced by this Court in *Bell Atlantic Corp. v. Twombly*, where it emphasized that deficiencies in a case 'should . . . be exposed at the . . . minimum expenditure of time and money by the parties and the court.'" 550 U.S. 544, 558 (2007)) (citation omitted) (alteration in original)).

216. See *infra* Part V.D.2.

217. *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 742 (7th Cir. 2008) (quoting *Chi. Prof'l Sports Ltd. v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996)).

218. *Id.* at 744.

219. *Brief for the NFL*, *supra* note 25, at 5–6 ("This case presents an appropriate opportunity to resolve this recurring circuit dispute, to provide further guidance on the principles recently articulated by this court in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), and to permit resolution, early in the litigation, of Section 1 antitrust challenges to the decisionmaking of highly integrated joint ventures.").

analysis than that normally needed under the Supreme Court's single entity analysis in *Copperweld*.”²²⁰

Under the traditional *Copperweld* analysis, the NFL could simply “offer evidence of [its] corporate structure and that, by itself, is sufficient to permit the court to find” for or against affording single entity status.²²¹ This simple corporate structure analysis reduces litigation costs by “limit[ing] the range of discovery relevant to a motion for summary judgment based on *Copperweld*.”²²² In contrast to the simple corporate structure arguments that are sufficient in the traditional *Copperweld* analysis, “[u]nder the Seventh Circuit’s ‘fact intensive’ look at ‘one facet of a league at a time,’ the courts will need to look at more than just corporate structure, with the Seventh Circuit [asking for] . . . an inquiry . . . into the market and competition questions that courts typically bypass” under the traditional *Copperweld* analysis.²²³ The inquiry into the market and competition that the Seventh Circuit approach demands is more costly than the traditional approach because “more discovery would be relevant and expected.”²²⁴ Therefore, while the Seventh Circuit approach may be costlier to the NFL, it is the only approach that has led to single entity treatment for the NFL. Thus, by asking the Roberts Court to make a ruling in *American Needle* based on limiting antitrust costs, the NFL is asking the Court to invalidate the only approach that has ever afforded the league single entity status.

VI. THE EFFECT THAT A DEMOCRAT PRESIDENT AND HIS SUPREME COURT APPOINTEE WILL HAVE ON THE ROBERTS COURT'S ANTITRUST JURISPRUDENCE IN *AMERICAN NEEDLE*

American Needle will be the first antitrust case heard during Roberts' tenure as Chief Justice of the Supreme Court with a Democratic president in the White House.²²⁵ Unlike his predecessor, President Obama has already announced his willingness to resume the vigorous approach to antitrust enforcement that was seen under the Clinton Administration.²²⁶ While it seems apparent that the Roberts Court does not share President Obama's position on antitrust enforcement,²²⁷ in August 2009, President Obama took

220. McKeown, *supra* note 26, at 367 (emphasis added).

221. *Id.* at 371 n.45.

222. *Id.*

223. *Id.* at 371.

224. *Id.* at 371 n.45.

225. *See supra* Part V.

226. *FindLaw, supra* note 127.

227. *See supra* Part V.A–C.

the first step in potentially halting the Roberts Court's recent pro-business, pro-defendant antitrust jurisprudence by appointing Sonia Sotomayor, a liberal justice, to replace Justice David Souter on the Supreme Court.²²⁸

A. Justice Sotomayor's Impact on the Roberts Court's Future Antitrust Jurisprudence

While Justice Sotomayor's appointment will not alter the Roberts Court's ideological makeup, she is replacing a liberal justice that tended to vote with the conservative majority on antitrust issues.²²⁹ Although Justice Souter has often been considered a reliable liberal vote, his antitrust jurisprudence has been conservative under the tenure of Chief Justice Roberts.²³⁰ Justice Souter wrote the *Twombly* decision and voted with the conservative majority in *Credit Suisse Securities, Weyerhaeuser, Volvo Trucks, Dagher*, and *Illinois Tool Works*²³¹—all cases that limited the scope of antitrust liability by either overturning long-standing precedents favoring plaintiffs, or by reversing jury verdicts or court of appeal decisions favoring plaintiffs.²³²

Also of particular note is the fact that Justice Thomas dissented in *Credit Suisse*²³³ and *Volvo Trucks*,²³⁴ showing that he will not always vote with the conservative majority of the Roberts Court on antitrust issues. Therefore, while at first glance it may seem that Justice Sotomayor's replacement of a liberal justice will do little to alter the Roberts Court's recent antitrust jurisprudence, Justice Souter's and Justice Thomas's antitrust voting records under the guidance of Chief Justice Roberts make it clear that Justice Sotomayor's vote may have a much greater impact in close antitrust decisions than originally anticipated.

B. Justice Sotomayor Is Likely to Adopt the Majority Approach in

228. *The Justices of the Supreme Court*,

<http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Apr. 11, 2010).

229. Freimuth & Konor, *supra* note 142 (stating that Sotomayor's "appointment will not alter the court's ideological makeup.").

230. David G. Savage, *A Man of Tradition, and Surprises*, L.A. TIMES, May 4, 2009, at A12 (stating that Justice Souter is a "liberal on the court today.").

231. *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

232. *See supra* Part V.A–B.

233. *See, e.g.*, *Credit Suisse*, 551 U.S. at 287 (Thomas, J., dissenting).

234. *See, e.g.*, *Volvo Trucks*, 546 U.S. at 182 (Stevens, J., dissenting).

American Needle Based on Her Second Circuit Antitrust Jurisprudence

While it remains to be seen what effect Justice Sotomayor will have on the current pro-business trend of the Roberts Court's antitrust jurisprudence in *American Needle*,²³⁵ a review of her decisions on the Second Circuit shows a familiarity with antitrust law,²³⁶ and suggests that she may be a justice that is willing to disagree with the current antitrust jurisprudence of the Roberts Court.²³⁷ To the extent that the Roberts Court displays a pro-business agenda in its antitrust jurisprudence, Justice "Sotomayor's prior [antitrust] decisions show no indication that she will necessarily fit that mold."²³⁸ Justice Sotomayor's past antitrust decisions reveal a "highly fact-specific approach to antitrust matters and an awareness of the legislative intent and policies underlying the federal antitrust laws."²³⁹ Justice Sotomayor's Second Circuit antitrust jurisprudence suggests that she favors the party whose position is consistent with the legislative intent underlying the antitrust statutes.²⁴⁰

While the impact of Justice Sotomayor's vote in *American Needle* is uncertain,²⁴¹ her Second Circuit antitrust jurisprudence reveals that she will likely follow the reasoning used by the majority of federal circuit courts and reject the NFL's claim for single entity treatment in *American Needle*.²⁴² As stated above,²⁴³ the majority of federal circuit courts and commentators agree that there is little doubt that sports leagues lack the com-

235. Freimuth & Konor, *supra* note 142 (stating that *American Needle* "will be the new Justice Sotomayor's first opportunity to weigh in on an antitrust matter from the Supreme Court and will provide antitrust practitioners with a more concrete sense of whether she will bring about any significant impact on the Roberts court's emerging antitrust jurisprudence.").

236. *Id.* (stating that Justice Sotomayor's Second Circuit antitrust "decisions demonstrate a highly fact specific approach to antitrust matters and an awareness of the legislative intent and policies underlying the federal antitrust laws.").

237. *See id.* ("However, to the extent the current court demonstrates a pro-defendant, pro-business ideological bias in antitrust matters, [Justice] Sotomayor's prior decisions show no indication that she will necessarily fit that mold.").

238. *Id.*

239. *Id.*; *see Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148, 159-61 (2d Cir. 2004) (using a detailed analysis of the Robinson-Patman Act's legislative history to find that Congress had intended the Act "to apply to all commodities distribution contracts, in all positions in the distribution chain.").

240. Freimuth & Konor, *supra* note 142 (stating that for Sotomayor, "legislative intent and policy are of paramount concern in addressing the scope and applicability of federal antitrust laws.").

241. *Id.* ("Thus, to a large extent, the impact of [Sotomayor's] assumed appointment on the Roberts court's antitrust jurisprudence is uncertain.").

242. *See infra* Part VI.B.

243. *See supra* Part IV.A.C.

plete unity of interest required under *Copperweld*.²⁴⁴ Treatment of sports leagues as a single entity in *American Needle* would then be inconsistent with the Supreme Court's reasoning for affording single entity status. Since the reasoning of the majority approach is consistent with the original meaning behind the single entity doctrine established in *Copperweld*, Justice Sotomayor is likely to find that the different interests among the member teams provide justification for Section 1 scrutiny of sports leagues. Therefore, consistent with her adherence to legislative intent in antitrust cases while on the Second Circuit, Justice Sotomayor will likely reject the NFL's request for single entity status in *American Needle*.

VII. CONCLUSION

This Note has examined the current split that exists in the federal circuit courts of appeal on the issue of whether a sports league should be considered a single entity for purposes of Section 1 of the Sherman Act. The approach taken by the majority of federal circuit courts is preferable because sports leagues fail to meet the *Copperweld* requirement of complete "unity of interest" that is necessary for single entity treatment.²⁴⁵ The Roberts Court should adopt the majority approach because the approach recognizes the diverse interests of individual teams,²⁴⁶ "the importance to consumer welfare of antitrust constraints" on sports leagues,²⁴⁷ and is consistent with the original meaning behind the single entity doctrine.²⁴⁸

While it seems logical that the Roberts Court would adopt the approach favored by most commentators and the majority of federal circuit courts, a review of the Roberts Court's most recent antitrust jurisprudence makes that outcome unlikely.²⁴⁹ Not a single case taken by the Roberts Court has expanded antitrust enforcement or liability.²⁵⁰ Rather, all of the cases have limited the scope of antitrust liability by either overturning long-

244. See also Edelman, *supra* note 24, at 925 ("[T]here is little doubt that clubs in these leagues lack 'complete unity of interest' in each of the following areas: (1) individual gate receipts (including other stadium revenues); (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues.").

245. See *id.* at 894 (arguing that "sports leagues lack sufficient unity of interest for any court to classify them as 'single entities.'").

246. See Keyte, *supra* note 21, at 49 (stating that in sports league cases it is not difficult "to highlight facts about league structure, governance, and the characteristics of individual teams to argue that not every team has a complete unity of interest with every other team.").

247. *Supplemental Brief*, *supra* note 128, at 9.

248. See *supra* Part IV.C.1.

249. See *supra* Part V.A–C.

250. See *supra* Part V.A–B.

standing precedents favoring plaintiffs or by reversing jury verdicts or court of appeal decisions favoring plaintiffs.²⁵¹ Therefore, despite the fact that logic would point to the majority approach being adopted, the current pro-business, pro-defendant trend of the Roberts Court's most recent anti-trust jurisprudence is likely to continue in *American Needle*, with a ruling in favor of the NFL.

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251. *See supra* Part V.A–B.

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** The United States Supreme Court decided *American Needle, Inc. v. National Football League* on May 24, 2010, holding that the National Football League is not a single entity for purposes of Section 1 of the Sherman Act. The Court agreed with the author and the majority of federal circuit courts that sports leagues fail to meet the Copperweld requirement of complete “unity of interest” that is necessary for single entity treatment. The Court’s holding is a clear departure from the pro-business, pro-defendant trend of its most recent antitrust jurisprudence. However, whether *American Needle* signifies the end to the Roberts Court’s pro-business antitrust jurisprudence, or is simply an aberration, is yet to be seen.