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# THE PRICE OF ADMISSION: HOW INCONSISTENT ENFORCEMENT OF ANTITRUST LAWS IN AMERICA'S LIVE ENTERTAINMENT SECTOR HURTS THE AVERAGE CONSUMER

NATHAN B. GRZEGOREK\*

## I. INTRODUCTION

The 1935 World Series boasted an average attendance of 48,000 jubilant Chicago Cubs and Detroit Tigers fans for each of the six games,<sup>1</sup> despite a national unemployment rate of twenty percent.<sup>2</sup> In 1938, while the nation continued to struggle through the Great Depression,<sup>3</sup> the Pimlico Special race between Seabiscuit and War Admiral drew an astonishing crowd of 43,000 spectators.<sup>4</sup>

Eight decades later on September 20, 2009, during the Great Recession,<sup>5</sup> the Dallas Cowboys hosted the New York Giants at

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1. See *1935 World Series*, BASEBALL-ALMANAC.COM, <http://www.baseball-almanac.com/ws/yr1935ws.shtml> (last visited Mar. 19, 2011) (tracking the attendance numbers at Wrigley and Navin Field for the 1935 world series).

2. See Robert VanGiezen & Albert E. Schwenk, *Compensation from before World War I through the Great Depression*, COMPENSATION AND WORKING CONDITIONS, Fall 2001, available at <http://www.bls.gov/opub/cwc/cm20030124ar03p1.htm> (Jan. 30, 2003) (tracking the unemployment rate in the United States from 1923-1942).

3. *Id.* After four years of increased employment, the unemployment rate in 1938 rose to nineteen percent. *Id.*

4. *Pimlico Horseracing Track in Maryland*, HORSERACING.COM, <http://www.horseracing.com/tracks/maryland/pimlico/> (last visited Mar. 19, 2011). "The entire establishment has a capacity of 14,852." *Id.*

5. See Justin Lahart, *The Great Recession: A Downturn Sized Up—Unemployment Lines Have Been Long Before, but No Prior Slump Since World War II Has Hurt So Much on So Many Fronts*, WALL ST. J., July 28, 2009, at A12 (recounting that other economic downturns have been worse by some

their new stadium.<sup>6</sup> The game set an NFL attendance record<sup>7</sup> despite high ticket costs.<sup>8</sup> In the same year, rock legends U2 and Paul McCartney set concert attendance records during their respective tours.<sup>9</sup>

#### A. Live Entertainment during an Economic Downturn

The above displays of extraordinary attendance during downturns in the United States economy demonstrate that although consumer spending noticeably decreases during economic declines,<sup>10</sup> Americans look to the entertainment sector to provide a form of “escapism” when their financial situation is bleak.<sup>11</sup> Thus,

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individual indicators, but “none since World War II has delivered so many severe blows to the economy at the same time.”).

6. *Big Opening for Cowboy's Stadium*, SPORTSILLUSTRATED.COM, Sept. 20, 2009, <http://sportsillustrated.cnn.com/2009/football/nfl/09/20/cowboys.stadium.ap/index.html>.

7. *Id.*

8. Jeff Mosier, *Ticket Resale Brisk for Cowboys, but Price not through Roof*, THE DALLAS MORNING NEWS, Sept. 18, 2009, [http://www.dallasnews.com/sharedcontent/dws/news/localnews/cowboysstadium/stories/DN-scalpers\\_18met.ART.State.Edition2.4bff35b.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/cowboysstadium/stories/DN-scalpers_18met.ART.State.Edition2.4bff35b.html). Club seats at the September 20, 2009 game “were on sale for prices ranging from \$100 over face value to more than \$1200.” *Id.*

9. See Daniel Kreps, *Paul McCartney Sets Fenway Park Concert Attendance Record*, ROLLINGSTONE.COM, Aug. 10, 2009, <http://www.rollingstone.com/music/news/15784/93152?method=method.fetch.track&title=%22Angel+Dance%22&artist=Robert+Plant&album=&page=1&pagesize=1> (remarking that “McCartney’s pair of gigs set a new record for the highest-ever two-night attendance in the stadium’s 97-year history.”); cf. *U2 360 Tour: Chicago, Boston and New York All Instantaneous Sell-Outs*, PRNEWswire, Mar. 30, 2009, <http://www.prnewswire.com/news-releases/u2-360-tour-chicago-boston-and-new-york-all-instantaneous-sell-outs-61979432.html> (acknowledging that when the U2 tickets were sold on March 30, 2009, the largest single day attendance records were set in New York, Boston, and Chicago).

10. See MICHAEL A. BERNSTEIN, *THE GREAT DEPRESSION: DELAYED RECOVERY AND ECONOMIC CHANGE IN AMERICA 1929-1939* (Cambridge Univ. Press 1987) (1987) (noting that “[B]y the mid-thirties consumers were so concerned with liquidating the relatively large amount of debt incurred at the start of the decade, and so wary given the experience of the crash, that the aggregate marginal propensity to consume fell.”); *Americans Continue to Decrease Spending on Entertainment and Eating Out*, BUSINESS WIRE, Mar. 31, 2009, <http://www.allbusiness.com/food-beverage/restaurants-food-service-dining-out-trends/12269558-1.html> (stating that three quarters of Americans planned to decrease their spending on entertainment in 2009).

11. See *Sports were Affected During the Great Depression*, SPORTSBUSINESSNEWS.COM, Jan. 25, 2009, [http://www.sportsbusinessnews.com/\\_news/news\\_390008.php](http://www.sportsbusinessnews.com/_news/news_390008.php) (quoting Dick Davies, a history professor at Nevada-Reno). During the Great Depression, people went to the ballpark “to get away from the economic horrors of empty wallets and ice boxes.” Ken Belson, *Apples for a Nickel, and Plenty of Empty Seats*, N.Y. TIMES, Jan. 6, 2009, [http://www.nytimes.com/2009/01/07/sports/baseball/07depression.html?\\_r=2&hp](http://www.nytimes.com/2009/01/07/sports/baseball/07depression.html?_r=2&hp).

while the live entertainment industry is not completely immune to the pitfalls of the American economy,<sup>12</sup> consumers in modern economic recessions will continue to use what little disposable income they have to enjoy the concerts and sporting events they love.<sup>13</sup>

*B. The Effect of a Monopoly in the Live Entertainment Industry during a Recession*

Because most businesses have decreased revenues during recessions,<sup>14</sup> they will usually lower their prices in an effort to attract customers.<sup>15</sup> Consumers are thus able to use their market power to choose which businesses to support with the limited resources they have. This is not the case, however, when businesses have a monopoly on a given market. Firms and businesses possessing monopolistic powers are able to control the price, quantity, and quality of available goods.<sup>16</sup> Monopolistic behavior hurts consumer welfare through price fixing, price discrimination, and restraints on potential competition that would otherwise drive the price of goods down.<sup>17</sup> Though antitrust laws are in place in the United States to combat monopolies,<sup>18</sup> businesses in the modern live entertainment sector have been able to curtail the strict enforcement of these laws, and the negative

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12. See Dustin Mattison, *St. Louis Cardinals and the Economic Crisis*, SCOUT.COM, Feb. 4, 2009, <http://stlcardinals.scout.com/2/841874.html> (noting that attendance in the National and American leagues throughout the decade of 1930-39 dropped about fifteen percent, compared with the previous decade); see also Belson, *supra* note 11 (stating that attendance plummeted forty percent from 1930 to 1933 and did not return to pre-Depression levels until after World War II, when millions of soldiers returned).

13. See, e.g., *Big Opening for Cowboy's Stadium*, *supra* note 6 (explaining that in 2009 opening day at the Cowboy's Stadium had the largest crowd in history for an NFL regular season football game).

14. David Goldman, *Economists See Recession Through 2009*, CNNMONEY.COM, Nov. 3, 2008, [http://money.cnn.com/2008/11/03/news/economy/nabe\\_survey/index.htm](http://money.cnn.com/2008/11/03/news/economy/nabe_survey/index.htm). In November of 2008, a survey of top economists found that "low consumer sentiment and poor economic conditions have sharply reduced demand for goods and services." *Id.*

15. See U.S. Bureau of Labor Statistics, *ECONOMIC NEWS RELEASE* (Aug. 2009), <http://www.bls.gov/news.release/ppi.nr0.htm> (finding that prices for finished goods fell 4.3 percent from August 2008 to August 2009).

16. See Burton D. Garland & Reuven R. Levary, *The Role of American Antitrust Laws in Today's Competitive Global Marketplace*, 6 U. MIAMI BUS. L.J. 43, 43 (1997) (articulating that prior to the enactment of antitrust laws, firms possessing monopolistic characteristics were able to control the price and availability of goods).

17. See *id.* (listing the effects of monopolies that antitrust laws are intended to combat).

18. See *id.* (stating that the primary function of American antitrust law was to protect consumers from the effects of monopolies).

effects of this conduct have been placed upon the consumer.<sup>19</sup>

This Comment argues that the current application of antitrust law to the live entertainment industry is inadequate. Specifically, it focuses on the how the three major American sports leagues (Major League Baseball (MLB), the National Football League (NFL), and the National Basketball Association (NBA)), the leading concert venue promoter (Live Nation, Inc.), and the leading concert ticket supplier (Ticketmaster, Inc.) escape antitrust scrutiny, and how this adversely affects the consumer. Part II discusses the background of antitrust law in the United States. Part II then focuses on recent instances of lax antitrust scrutiny, specifically within the live entertainment industry. Lastly, Part II investigates the merger between Ticketmaster and Live Nation. Part III analyzes how the live entertainment conglomerates persistently avoid unfavorable rulings in antitrust suits. Part III also argues that the special treatment of businesses in the live entertainment sector adversely affects the American economy as a whole, especially the individual consumer in an economic decline.

Part IV proposes a new approach to be used by courts when enforcing antitrust laws. This approach would modify the rationales that courts employ in antitrust claims against entertainment conglomerates. Part IV suggests a moderate reform that does not require upheavals in either the concert or sporting event industry.

## II. BACKGROUND

### A. *The American Antitrust Laws: History and Purpose*

The Sherman and Wilson Antitrust Acts were passed in 1890, during the height of the Industrial Revolution, in response to the

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19. See Richard Hardack, *What They Don't Want You to Hear: Beltone, Ticketmaster, and Exclusive Dealing*, 9 B.U. J. SCI. & TECH. L. 284, 315 (2003) (analyzing how Ticketmaster's business practices ultimately injure consumers); cf. *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 334 (2d Cir. 2009) (upholding a district court ruling against the plaintiff, who brought an antitrust action against the defendant, Major League Baseball Properties, Inc. (MLBP)). In *Salvino*, the plaintiff, Salvino Inc., argued that MLBP distributed income from utilization of trademarks equally to each member club, regardless of the fact that a small number of clubs generated the majority of the revenue. *Id.* at 295. Salvino contended that as a result of this practice, the incentive of many major league clubs to invest and promote its own trademark had been diminished. *Id.* Salvino concluded that this ultimately hurt the consumer through "reduced output, diminished the quality of product offered to the public, diminished the choice of product offered to the public, reduced and suppressed price competition leading to higher prices to the public and reduced market efficiency to the detriment of the public." *Id.*

“vast accumulation of wealth in the hands of a few large firms and individuals.”<sup>20</sup> These firms amassed their wealth through the organization of monopolies under the legal device of a trust, whereby stocks of two separate corporations were transferred to “trustees” in order to combine the two entities.<sup>21</sup> The sole purpose of establishing these “trusts” was to eliminate the competition in an area of business and control the market for a product.<sup>22</sup> The trusts of the late nineteenth century threatened to restrict competition and set market prices, thereby oppressing individuals and tearing at the very fabric of the American economy.<sup>23</sup> In response, Congress passed the Sherman<sup>24</sup> and Wilson Antitrust Acts,<sup>25</sup> which sought to combat this oppression by criminalizing “every contract, combination in the form of trust or otherwise, or conspiracy” that restrained trade.<sup>26</sup>

In 1914, Congress passed the Clayton Act to compliment the Sherman and Wilson Acts.<sup>27</sup> This Act further specified the types of “antitrust” behaviors that were prohibited and provided for private remedies.<sup>28</sup>

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20. 54 AM. JUR. 2D *Monopolies, Restraints of Trade, Unfair Trade Practices* § 1 (2010).

21. S.C.T. Dodd, *The Present Legal Status of Trusts*, 7 HARV. L. REV. 157, 157 (1893).

22. *Id.* at 158.

23. 54 AM. JUR. 2D, *supra* note 20, § 1.

24. See 15 U.S.C. § 1 (2006) (providing penalties for engaging in conduct that restrains trade).

25. See 15 U.S.C. § 8 (2006) (criminalizing restraints on trade, when either party to the “combination, conspiracy, trust, agreement, or contract” is “engaged in importing any article from any foreign country into the United States.”).

26. 15 U.S.C. §§ 1, 8.

27. 54 AM. JUR. 2D *supra* note 20, § 138. While the Sherman Act specifically protected against monopolies and restraints on trade, the Clayton Act added proscriptions against agreements which prohibit the purchase or use of a competitor’s goods. Compare 15 U.S.C. §§ 1-2, with 15 U.S.C. § 14 (2006).

28. 15 U.S.C. §§ 13-15 (2006); “[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court . . . .” 15 U.S.C. § 15. Section 2 of the original Clayton Act made it unlawful for a person to discriminate in price between different purchasers, where the effect of such discrimination was to “lessen competition or tend to create a monopoly.” Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (2006)); 54 AM. JUR. 2D *supra* note 20, § 173. As written, the statute only applied to price discrimination and only where the effect of such discrimination was to substantially hinder competition or to create a monopoly. 15 U.S.C. § 13. A Federal Trade Commission investigation in the 1930s revealed that this provision allowed large chain buyers to gain “discriminatory preferences over smaller ones by virtue of their greater purchasing power” and thus avoid the impact of the Clayton Act. F.T.C. v. Henry Broch & Co., 363 U.S. 166, 168-69 (1960). The Robinson-Patman Act was enacted in 1936 in order to correct this deficiency in the Clayton Act. *Id.* at 168.

Generally, federal antitrust laws preserve and protect competition so that consumers retain the benefits of a capitalist market system.<sup>29</sup> Antitrust laws are not focused on prohibiting unfair competition, but rather "conduct which unfairly tends to destroy competition itself."<sup>30</sup> There are four ways in which competition may be destroyed:<sup>31</sup> (1) through mergers, acquisitions, and joint ventures of two independent firms;<sup>32</sup> (2) a limited joint venture;<sup>33</sup> (3) cartel activity;<sup>34</sup> or (4) predatory pricing or monopolistic conduct.<sup>35</sup> It is therefore not enough that a single firm simply restrain trade "unreasonably."<sup>36</sup> For instance, it is legal for a firm or business to successfully capture customers from an inefficient business rival.<sup>37</sup> Though the rival's ability to compete may suffer, this is exactly the type of competition that antitrust laws are aimed at promoting and which benefit the consumer.<sup>38</sup>

As a means of enforcement and a way to preserve competition, the antitrust laws allow for private remedies.<sup>39</sup> In an antitrust complaint, a plaintiff may seek pecuniary or injunctive

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29. See *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1998) (holding that that Sherman Act's objective is the "protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods."); cf. *Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc.*, 443 F.Supp. 639, 642-43 (N.D. Fla. 1977) (holding that the Sherman Act was not designed to create a remedy for unfair competition or to protect competitors; rather, its purpose is to prevent unreasonable restraints on trade, such as injury or elimination of competitors).

30. 54 AM. JUR. 2D, *supra* note 20, § 1.

31. *Garland & Levary*, *supra* note 16, at 45.

32. *Id.* "[C]ompetition may be eliminated as a necessary consequence of mergers, acquisitions, and joint ventures which involve the complete integration of two or more previously independent firms." *Id.*

33. *Id.* "Frequently joint ventures are formed for the purpose of conducting research and development which may also eliminate some or all competitors." *Id.* "Furthermore, a parent company may covenant not to compete directly with its joint venture," or other parent companies of its joint venture. *Id.*

34. *Id.* at 45-46. Cartels result when industry leaders coordinate their economic activity through "price fixing, output limitation, customer allocation, or market allocation with the principal objective of achieving higher-than-competitive profit levels." *Id.* at 45-46.

35. *Id.* at 46. In order to negatively affect less powerful competitors by driving them out of the market, dominant firms with substantial markets power covenant to reduce and fix price levels such that the smaller competitors cannot match. *Id.*

36. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

37. *Id.*

38. *Id.*

39. 54 AM. JUR. 2D *supra* note 20, § 285. The federal antitrust laws, which include the Sherman, Wilson, Clayton, and Robinson-Patman Acts, are enforced by both government and by private persons. *Id.*

relief.<sup>40</sup> In order for a private plaintiff to bring an antitrust claim, he must first establish that he has antitrust standing, namely, that his claimed injuries are “of the types the antitrust laws were intended to prevent” and “reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.”<sup>41</sup> Antitrust standing, therefore, requires a private plaintiff to prove: “(1) an ‘antitrust injury’; and (2) a direct causal connection between that injury and a defendant’s violation of the antitrust laws.”<sup>42</sup> Once antitrust standing has been demonstrated, the plaintiff must establish the elements of a violation of the antitrust statute in question.<sup>43</sup>

There are several methods courts will use to evaluate a plaintiff’s case. Under the Sherman Act, there are two ways a

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40. See 15 U.S.C. § 15 (2006) (stating that a plaintiff “shall recover threefold the damages sustained, and the cost of suit including reasonable attorney’s fee.”); see also 15 U.S.C. § 26 (2006) (entitling injunctive relief against any threatened loss or damage by a violation of the antitrust laws).

41. *Tri-Gen Inc. v. Int’l Union of Operating Eng’rs, Local 150, AFL-CIO*, 433 F.3d 1024, 1031 (7th Cir. 2006) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). The United States, as a plaintiff in an antitrust suit, may sue anyone violating antitrust laws. 54 AM. JUR. 2D *supra* note 20, § 379. However, private plaintiffs must demonstrate antitrust standing. *Id.* Antitrust standing involves more than the “case or controversy” requirement for constitutional standing; it entails an analysis of “prudential considerations.” *Jes Properties, Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224, 1228 (11th Cir. 2006) (citing *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991)). The “prudential considerations” are aimed at determining whether a plaintiff is a proper party to bring a private antitrust action. *Tal v. Hogan*, 453 F.3d 1244, 1253 (10th Cir. 2006) (citing *Assoc. Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 535 n. 31 (1983)).

42. *Tal*, 453 F.3d at 1253 (quoting *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1254 (10th Cir. 2006)). See also *Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921, 939 (5th Cir. 1988) (holding that Section 4 of the Clayton Act has a specific injury requirement). Section 4 of the Clayton Act permits suits only by those persons “who shall be injured in business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15 (2006); cf. *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642, 648 (1969) (holding that an injured party can recover damages under the Robinson-Patman Act only if he is able to show a causal connection between the price discrimination in violation of the Act and the injury suffered—regardless of the “level” in the chain of distribution on which the injury occurs); but see *Mahone*, 836 F.2d at 939 (5th Cir. 1988) (holding that injury to competition is presumed to follow from the conduct proscribed by section 2 of the Sherman Act). Therefore, proving an injury to competition is not an element of a monopolization-based antitrust claim. *Id.* Section 2 of the Sherman Act states that “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony.” 15 U.S.C. § 2 (2006).

43. 54 AM. JUR. 2D *supra* note 20, § 571.

court can analyze a private plaintiff's claim.<sup>44</sup> The prevailing analysis is the rule of reason, which requires the fact-finder to weigh all the circumstances to decide whether a practice unreasonably restrains trade.<sup>45</sup> The alternate analysis treats certain conduct as a *per se* violation of the Sherman Act, regardless of its reasonableness.<sup>46</sup>

*Per se* antitrust violations are "agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."<sup>47</sup> Where a *per se* violation exists, no trial is necessary to show the extent to which the practice affected the market.<sup>48</sup> Additionally, if Clayton and Robinson-Patman Act<sup>49</sup> violations have taken place, the court employs the "dominant nature" test in order to analyze whether the dominant nature of the transaction falls within the provisions of the act.<sup>50</sup>

### B. Modern Antitrust Developments

In recent history, the antitrust policy of the Justice Department has swung like a pendulum; enforcement of laws dealing with monopoly power was too rigorous in the 1960s and 1970s, too lenient in the 1980s.<sup>51</sup> Though antitrust enforcement in the 1990s and 2000s is considered "moderate" by most antitrust

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44. *Sitkin Smelting & Refining Co., Inc. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir. 1978).

45. *Id.*

46. *Id.*

47. *See id.* (quoting *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958)).

48. *Sitkin Smelting & Refining Co.*, 575 F.2d at 446.

49. *See* 15 U.S.C. § 13a (2006) (providing criminal penalties for the sale of goods by a producer at prices meant to discriminate against the competitors of the purchaser). In general, Section 3 of the Robinson-Patman Act prohibits three kinds of practices: general price discrimination, geographical price discrimination, and selling "at unreasonably low prices for the purposes of destroying competition or eliminating a competitor." 54 AM. JUR. 2D *supra* note 20, § 223.

50. *Tri-State Broad. Co. v. United Press Int'l, Inc.*, 369 F.2d 268, 270 (C.A. Ga. 1966).

51. William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE U. L. REV. 319, 340-341 (2007); *see* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 384-85 (2003) (explaining that "Ronald Reagan's appointees to the Justice Department and the FTC are said to have moved antitrust enforcement 'radically to the right.' In doing so, Reagan's antitrust appointees undertook a 'minimalist' enforcement program and 'trivialized' the nation's antitrust laws.").

scholars,<sup>52</sup> in 2002, the Justice Department settled one of the biggest antitrust suits to date.<sup>53</sup> In *United States v. Microsoft Corp.*, the government contended that Microsoft willfully created a software monopoly by successfully preventing other operating systems and applications from being used on its computers.<sup>54</sup> After four years of litigation, the government failed to hold Microsoft accountable for antitrust violations.<sup>55</sup> The passive nature of antitrust enforcement in recent history can be attributed to the so-called “Chicago School,” which advocates a lax antitrust policy.<sup>56</sup> Due to this approach, antitrust laws have a restricted role in regulating the marketplace.<sup>57</sup>

### C. Antitrust in the Live Entertainment Industry

Though many industries have benefited from the restrained enforcement of antitrust laws, few have reaped the benefits like the entities that control America’s live entertainment industry. In recent years, the companies that dominate the sports and concert

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52. Kovacic, *supra* note 51, at 341.

53. See Harry First & Andrew I. Gavil, *Re-framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 687 (2006) (noting that one possible reason for the lenient settlement in the Microsoft case was the election of a Republican president in 2000); cf. *FTC Staff and Budget Information 1915-2000*, AMERICAN ANTITRUST INSTITUTE, [http://www.antitrustinstitute.org/Antitrust\\_Resources/FTC\\_Staff\\_and\\_Budget\\_Information.ashx](http://www.antitrustinstitute.org/Antitrust_Resources/FTC_Staff_and_Budget_Information.ashx) (charting the decline in staff from 1980 to 2000 of the Federal Trade Commission, one of the U.S. Government’s designated antitrust agencies).

54. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 155 (D.C. Cir. 2002).

55. In 1998, the United States joined with several individual states and brought antitrust action under Section 1 of the Sherman Act. *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001). The plaintiffs in the case alleged that Microsoft tried to “unseat Netscape Navigator as the preeminent internet browser.” *Id.* On November 2, 2002, the Department of Justice reached a settlement with Microsoft Corp., requiring it to allow programming interfaces with third parties’ applications. *Microsoft Corp.*, 231 F. Supp. 2d at 144.

56. Mike J. Mandel & Mike France, *The Great Antitrust Debate: Focus on Innovation? Or Stick to Pricing Issues? The Outcome is Critical*, BUS. WK., June 26, 2000, [http://www.businessweek.com/2000/00\\_26/b3687080.htm](http://www.businessweek.com/2000/00_26/b3687080.htm). The Chicago School of antitrust, which dominated policy during the 1980s, taught that there was rarely economic justification for aggressively pursuing antitrust policy. *Id.* Subscribers to the Chicago School believe that monopoly price increases, while they hurt customers, have relatively little effect on productivity or economic growth. *Id.*

57. See *id.* (commenting that antitrust enforcers were relegated to a peripheral role under the Chicago School); Thomas B. Leary, *Antitrust Economics: Three Cheers and Two Challenges*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/speeches/leary/learythreecheers.shtm> (last visited Mar. 19, 2011) (stating that many people were uncomfortable with the restricted role for antitrust that the Chicago School of economics seemed to suggest).

markets have successfully defended multiple antitrust suits brought by competitors and consumers.

In the landmark case *Campos v. Ticketmaster*, ticket purchasers filed suit against Ticketmaster Corporation for violations of the Clayton Act, alleging that the company controlled a monopoly of the ticket distribution market and used their monopoly power to levy excessive service and handling fees on the consumer.<sup>58</sup> The Eighth Circuit held that the plaintiff ticket purchasers lacked standing and thus granted Ticketmaster's motion for summary judgment.<sup>59</sup> The effect of this ruling was to prevent any future cases from being brought by consumers against Ticketmaster in the Eighth Circuit.<sup>60</sup>

Likewise, in 2008, both the NFL and MLB prevailed in two major antitrust claims that allowed both leagues to retain monopolies on the intellectual property of all their member teams.<sup>61</sup> A decade prior, in *Chicago Professional Sports Ltd. v. National Basketball Ass'n*, the Seventh Circuit upheld the defendant NBA's exclusive broadcasting rights against an antitrust claim brought by the Bulls organization and a cable television network.<sup>62</sup>

As a result of these and other cases upholding the monopoly status of corporations in the live entertainment industry,<sup>63</sup> such companies have been able to flourish in a competition-free market.

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58. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1168 (8th Cir. 1998).

59. *Id.* at 1166. As "indirect purchasers," the plaintiffs in *Campos v. Ticketmaster Corp.* lacked standing to sue under Section 4 of the Clayton Act. *Id.*; see also *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272 (E.D. Mo. 1996) (holding that if there was an injured party that was a victim of Ticketmaster's alleged antitrust violations, it was the concert venues as consumers of Ticketmaster's ticket handling service). *But see Campos*, 140 F.3d at 1175 (Arnold, J., dissenting) (arguing that the monopoly product at issue is ticket distribution services, not tickets-thus Ticketmaster supplies the product directly to concert goers).

60. See *id.* at 1175 (discussing the "unhappy result" of the case barring any future Section 4 suit against Ticketmaster in the Eighth Circuit).

61. See generally *Am. Needle Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008) (approving an exclusive licensing contract for NFL headgear); see also *Salvino*, 542 F.3d at 290, (holding that MLB had the exclusive right to control use of all team logos). Both *Salvino* and *American Needle* applied the single entity defense and were able to escape antitrust scrutiny. James T. McKeown, *Antitrust Developments in Professional Sports: to the Single Entity and Beyond*, 19 MARQ. SPORTS L. REV. 363, 369-76 (2009).

62. *Chicago Prof. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 593 (7th Cir. 1996) [hereinafter *Bulls II*].

63. See *Salvino*, 542 F.3d at 290 (upholding MLB's exclusive licensing agreement for intellectual property against a Sherman Act claim); *Am. Needle*, 538 F.3d at 736 (upholding NFL's exclusive licensing agreement for team's intellectual property against a Sherman Act claim); see generally *Ticketmaster v. Tickets.com*, 127 Fed. Appx. 346 (9th Cir. 2005) (ruling for Ticketmaster in suit brought by competitor under the Sherman Act).

For example, in 2008, Ticketmaster sold 141 million tickets for a profit of over \$8.9 billion.<sup>64</sup> Similarly, Live Nation, Inc., the largest producer of concerts in the world, produces over 16,000 concerts each year—including Madonna, Jay-Z, and U2—and sells 45 million tickets annually.<sup>65</sup> Moreover, as of 2009, the New York Yankees, the New York Knicks, and nineteen of the thirty-two NFL teams were individually worth more than \$1 billion.<sup>66</sup>

#### D. The Merger of Live Nation and Ticketmaster

On February 10, 2009, Live Nation and Ticketmaster shocked the music world by announcing plans to merge.<sup>67</sup> One year later, on January 25, 2010, despite an elongated investigation<sup>68</sup> and popular uproar against the deal,<sup>69</sup> the United States Justice

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64. *About Ticketmaster a Live Nation Entertainment, Inc. Company*, TICKETMASTER, [http://www.ticketmaster.com/h/about\\_us.html?tm\\_link=tm\\_link=tm\\_home&tm\\_abouttm](http://www.ticketmaster.com/h/about_us.html?tm_link=tm_link=tm_home&tm_abouttm) (last visited Mar. 19, 2011).

65. *Live Nation—About Us*, LIVE NATION, <http://www.livenation.com/company/getCompanyInfo> (last visited Mar. 19, 2011).

66. Tom Van Riper, *Most Valuable Teams in Sports*, FORBES.COM, Jan. 13, 2009, [http://www.forbes.com/2009/01/13/nfl-cowboys-yankees-biz-media-cx\\_tv\\_r\\_0113values.html](http://www.forbes.com/2009/01/13/nfl-cowboys-yankees-biz-media-cx_tv_r_0113values.html). Seven of the top ten most valuable sports franchises in the world are American: Dallas Cowboys, Washington Redskins, New England Patriots, New York Yankees, New York Giants, New York Jets, and Houston Texans. *Id.* As of January 2009, the net worth of the National Football League, Major League Baseball, and National Basketball Association combined was \$59.1 billion. *Id.*

67. Daniel Kreps, *Live Nation and Ticketmaster Announce Merger*, ROLLINGSTONE.COM, Feb. 10, 2009, <http://www.rollingstone.com/music/news/15765/92395>. Live Nation and Ticketmaster propose to combine their ticketing, marketing, data centers, and back-offices. *Id.*

68. See 15 U.S.C.A. § 18a (2006) (dictating that no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons file notification and the waiting period has expired); see Kreps, *supra* note 67 (commenting that the proposed merger between Ticketmaster and Live Nation will “garner a long look from both the Justice Department and Federal Trade Commission,” since the companies will be absorbing their only competition and likely forming a ticketing monopoly).

69. The Ticketmaster merger with Live Nation has caused such a public outcry so as to generate a letter signed by fifty United States Senators, condemning the merger. See Alfred Branch Jr., *Ticketmaster/Live Nation merger: Pascrell letter to Justice Department yields impressive numbers*, TICKET NEWS, July 29, 2009, <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-Pascrell-letter-to-Justice-Department-yields-impressive-numbers7092917> (noting that there has not been this much Congressional interest in a merger since the Microsoft conflict with the Department of Justice in the 1990s). Authored by United States Rep. Bill Pascrell, Jr. of New Jersey, the letter urges the Justice Department “to analyze this proposed transaction closely and with great skepticism. Such scrutiny is critical to ensure that consumers are not harmed by the creation, entrenchment, extension, or undue exploitation of market power in an industry that affects every state, and virtually every congressional district, in the country.” Alfred Branch Jr., *Ticketmaster / Live Nation merger: 50 members of the House oppose the deal*,

Department approved the merger between the two juggernauts of the concert industry.<sup>70</sup> Together Ticketmaster and Live Nation now own more than 140 concert venues globally, sell around 140 million tickets a year, and promote 22,000 concerts annually.<sup>71</sup> The new conglomerate has adopted the name "Live Nation Entertainment."<sup>72</sup> Though certain stipulations were attached to the merger<sup>73</sup> and Assistant Attorney General Christine Varney promised that the Antitrust Division of the Department of Justice will be "vigilant" in its continued oversight of the merged entity,<sup>74</sup> the merger approval was hailed by the leaders of the two companies as a major victory.<sup>75</sup> The consequences of this merger are yet to be fully understood. However, the next section of this Comment will display the pre-merger antitrust immunity from

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TICKET NEWS, July, 27 2009, <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-fifty-members-of-the-House-oppose-the-deal7029279>. The Antitrust Division of the Justice Department under the Bush administration was not very aggressive in pursuing antitrust claims. Branch, *Ticketmaster/Live Nation merger: Pascrell letter to Justice Department yields impressive numbers*. As part of his political platform, President Obama has promised to reinvigorate antitrust enforcement. *Id.* Many Democratic leaders of the Obama Administration, however, have become weary of the Division's newfound strength. *Id.* This suggests that there will be much future debate between pro-business politicians, both Democrat and Republican, and those who favor a stronger enforcement of antitrust laws.

70. Elliot Van Buskirk, *DOJ Approves Modified Ticketmaster, Live Nation Merger*, WIRED, Jan. 25, 2010, [http://www.wired.com/epicenter/2010/01/doj-ap-proves-modified-ticketmaster-live-nation-merger/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wired%2Findex+%28Wired%3A+Index+3+%28Top+Stories+2%29%29&utm\\_content=Google+Reader](http://www.wired.com/epicenter/2010/01/doj-ap-proves-modified-ticketmaster-live-nation-merger/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wired%2Findex+%28Wired%3A+Index+3+%28Top+Stories+2%29%29&utm_content=Google+Reader).

71. Jeremy Pelofsky and Yinka Adegoke, *Live Nation Ticketmaster Merge; Agree to U.S. Terms*, REUTERS, Jan. 25, 2010, <http://www.reuters.com/article/idUSTRE60O4E520100126>.

72. Kreps, *supra* note 67.

73. Some of the stipulations include forcing Ticketmaster to license ticketing software to competitors and sell off certain ticket-selling entities. Van Buskirk, *supra* note 70. In addition, to prevent Ticketmaster from abusing its position by withholding Live Nation artists from venues who do not use Ticketmaster's service, the settlement stipulates that "the merged firm will be forbidden from retaliating against any venue owner that chooses to use another company's ticketing services or another company's promotional services, including restrictions on anti-competitive bundling." *Id.*

74. Varney assured the public that the Division's strict enforcement of the stipulated agreement "should give AEG, Comcast-Spectacor, and others in the industry the confidence they need to make business decisions that maximize competition on the merits without fear of retaliation." *Id.* Furthermore, several Department of Justice employees will be assigned to investigate allegations of anti-competitive behavior by Live Nation Entertainment, the new name of the merged company. *Id.*

75. Live Nation boasted that "this is a good and exciting day for the music business, and we are close to finalizing the creation of a new company that will seek to transform the way artists distribute their content and fans can access that content." *Id.*

private suit that Live Nation and Ticketmaster previously enjoyed. Thus, regardless of the precautions taken by the Antitrust Division, the consequences of the union on consumer power in the concert industry will be severe. What little influence the average consumer had on the price of attending a concert is likely to diminish further.

### III. ANALYSIS

There are several important cases outlined below that have led to the current state of antitrust law in the live entertainment industry.<sup>76</sup> In each of these holdings, certain defenses have been applied and technicalities exploited, such that the defendants were able to escape antitrust scrutiny.<sup>77</sup> The “single entity” defense has allowed the NFL and the NBA to emerge victorious in recent antitrust suits.<sup>78</sup> Additionally, as “America’s pastime,” MLB has historically enjoyed lax antitrust enforcement in its endeavors.<sup>79</sup> Both Ticketmaster and Live Nation have been able to avoid antitrust scrutiny through a variety of technicalities, as well as by means of insufficient pleadings on the part of plaintiffs.<sup>80</sup> These holdings have the effect of curtailing competition in the live entertainment industry thereby hurting the American consumer.

#### A. Antitrust Deficiencies in Sports Entertainment

##### 1. The Single Entity Defense: Protective Gear for America’s Sports Entertainment Industry

The “single entity” defense was developed by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*<sup>81</sup> In that case, the Court found that a parent and its wholly owned subsidiary have complete unity of interest; thus, if they “agree” to a course of action, there is no sudden joining of economic resources

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76. See discussion *infra* Part III.A-C.

77. *Id.*

78. *Am. Needle*, 538 F.3d at 736; *Bulls II*, 95 F.3d at 593.

79. See Mitchell Nathanson, *The Sovereign Nation Of Baseball: Why Federal Law Does Not Apply To “America’s Game” And How It Got That Way*, 16 VILL. SPORTS & ENT. L.J. 49, 75-76 (2009) (discussing the development of antitrust exemption for MLB).

80. See discussion *infra* Parts III.B-C.

81. See generally *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that a parent corporation and its wholly owned subsidiary are legally incapable of violating Section 1 of the Sherman Act). In *Copperweld*, the plaintiff brought an antitrust action under Section 1 of the Sherman Act against a competing corporation and the competitor’s wholly owned subsidiary. *Id.* The Supreme Court found the competitor and its subsidiary to be a single entity for purposes of antitrust scrutiny. *Id.* at 771. As such, Section 1 did not penalize their conduct. *Id.*

that had previously served different interest.”<sup>82</sup> Without a collusion of separate interests, there is no violation of Section 1 of the Sherman Act, which prohibits restraints of trade that result from conspiracies or combinations of two firms.<sup>83</sup> In short, because a parent and its subsidiary are considered to be essentially one company, any joint action taken by the two would fall outside the scope of Section 1.

One of the first cases that applied the “single entity” concept to sports leagues was *Chicago Professional Sports Ltd. v. National Basketball Ass’n* [hereinafter *Bulls II*].<sup>84</sup> In that case, the Chicago Bulls organization and WGN, a cable network, brought suit against the NBA seeking to broadcast more Bulls games over WGN.<sup>85</sup> The plaintiffs there claimed that the NBA’s limitation on the number of televised games that franchises could sell to cable networks violated the Sherman Act.<sup>86</sup> Though the NBA prevailed against the antitrust claim, Judge Easterbrook stated that the defense established in *Copperweld* could not be applied universally to professional sports leagues in every action under Section 1 of the Sherman Act.<sup>87</sup> The court must instead determine whether each league is acting as a single entity in a particular endeavor.<sup>88</sup> Thus, the Seventh Circuit concluded that a case-by-case analysis is appropriate when determining if a sports league could assert the single entity defense.<sup>89</sup>

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82. *Id.* at 772.

83. *Id.* at 768; 15 U.S.C. § 1. Within the Sherman Act, there is a “basic distinction between concerted and independent action.” *Copperweld*, 467 U.S. at 767. Section 2 of the Sherman Act punishes the actions of single firms who “monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize.” *Id.* at 768; 15 U.S.C. § 2. Section 1, on the other hand, only prohibits restraints of trade that result from a conspiracy or combination. *Copperweld*, 467 U.S. at 768; 15 U.S.C. § 1.

84. *Bulls II*, 95 F.3d at 593.

85. *Id.* at 595. The NBA had a broadcasting contract with the National Broadcasting Company that allowed the league to limit the number of telecasts teams may sell on their own. *Id.* at 595-96. Since 1991, the Bulls and WGN were authorized by an injunction to broadcast twenty-five to thirty games per year. *Id.* at 595. However, litigation ensued as the NBA wished to limit this number to fifteen or twenty games, while the Bulls wanted to broadcast forty-one games per year on WGN. *Id.*

86. *Id.*

87. *Bulls II*, 95 F.3d at 593.

88. *Id.* at 600. Judge Easterbrook noted that “sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*’s functional question one league at a time—and perhaps one facet of a league at a time.” *Id.* The court analyzed the different facets of the NBA, determining that in some aspects the League acts as a single entity, while in others it looks more like a joint venture. *Id.* at 599. Judge Easterbrook concluded that “when acting in the broadcast market, the NBA is closer to a single firm than to a group of independent firms.” *Id.* at 600.

89. *Id.*

Twelve years later, the Seventh Circuit applied the “single entity” concept to the NFL when it dismissed American Needle, Inc.’s action for alleged violations of Section 1 of the Sherman Act.<sup>90</sup> American Needle’s claim arose when NFL Properties, a corporate entity comprised of all thirty-two NFL teams,<sup>91</sup> granted exclusive headwear licenses for its intellectual property to Reebok.<sup>92</sup> In response, American Needle filed suit under Section 1 of the Sherman Act, alleging that the agreement was a conspiracy to restrict other vendor’s ability to obtain licenses for NFL teams’ intellectual property.<sup>93</sup> Using *Bulls II* as a framework, the court held that, in this “facet,” the NFL was a “single entity.”<sup>94</sup> Judge Kanne explained that “the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the team’s intellectual property.”<sup>95</sup> However, the Seventh Circuit refused to recognize that sports leagues should always be considered single entities, which would have expanded the holding in *Bulls II*.<sup>96</sup> Rather, the court found that the issue of

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90. *Am. Needle*, 538 F.3d. at 744.

91. *Id.* at 737. The NFL itself is an unincorporated association of thirty-two separately owned football teams. *Id.* In 1963, the NFL teams formed NFL Properties for the purpose of “(1) developing, licensing and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia; and (2) ‘conduct[ing] and engag[ing] in advertisement campaigns.’” *Id.* (alteration in original).

92. *Id.* at 738. For years after its establishment, NFL Properties granted licenses for using team logos on headgear to multiple vendors. *Id.* American Needle, Inc. held a license for twenty years. *Id.* However, in 2000, NFL properties decided to grant an exclusive license to a single vendor. *Id.* Reebok emerged victorious from a bidding war and was granted an exclusive license for ten years. *Id.*

93. *Id.*

94. *Id.* at 742-44.

95. *Id.* “The product that the teams produce jointly-NFL football-requires extensive coordination and integration between the teams.” *Id.* at 737. A game of professional football is produced only when two teams play a football game. *Id.* “Thus, although each team is a separate corporate entity or partnership unto itself, no team can produce a game-the product of NFL football-by itself, much less a full season of games or the Super Bowl.” *Id.* The court went on to determine that the United States Supreme Court in *Copperweld* did not hold that only “conflict-free enterprises could be treated as single entities.” *Id.* at 743. Therefore, “though the several NFL teams could have competing interests regarding the use of their intellectual property that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity.” *Id.* Further, nothing in Section 1 of the Sherman Act prohibits the NFL teams from cooperating to compete against other live entertainment providers. *Id.* at 744.

96. *Id.* at 742. Due to the many conflicting characteristics professional sports leagues exhibit, the court expresses skepticism that *Copperweld* could be used to provide a single-entity determination for all sports-leagues alike. *Id.* Thus, the court limited its decision to “(1) the actions of the NFL, its member teams, and NFL Properties; and (2) the actions of the NFL and its member teams as they pertain to the teams’ agreement to license their

whether sports teams are to be considered single entities is still to be considered "one league at a time" and "one facet of a league at a time."<sup>97</sup>

## 2. Major League Baseball: "Safe" from Antitrust Scrutiny

Since the 1922 Supreme Court holding in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,<sup>98</sup> there has been an understanding that as "America's game," baseball exists outside the reach of federal antitrust laws.<sup>99</sup> Over the course of the century, the justice system has continued to deem baseball to be "special" and granted it deference above and beyond any other professional sports league.<sup>100</sup> Recently, in *Major League Baseball Properties v. Salvino*, the Second Circuit affirmed Major League Baseball Properties' (MLBP) right to act as the exclusive licensing agent for all thirty MLB clubs.<sup>101</sup> Since 1987, MLBP has controlled the sale of any products bearing an MLB club's name or logo, "even if the products are sold at a concession stand inside a club's stadium."<sup>102</sup> Salvino violated this agreement

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intellectual property collectively via NFL Properties." *Id.*

97. *Id.*

98. In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), an independent baseball club brought suit against a national league of clubs. The Supreme Court held that the conduct of the defendants was not an interference with interstate commerce and therefore that the defendants' actions were not within the Sherman Act. *Id.* at 208-09. Justice Holmes reasoned that:

[T]he business is giving exhibitions of base-ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But . . . the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words . . . personal effort, not related to production, is not a subject of commerce.

*Id.*

99. See *id.* at 208-09 (upholding an appellate court ruling that "baseball exhibitions" did not fall within the scope of the Sherman Act because the teams did not engage in interstate commerce); Nathanson, *supra* note 79, at 75 (cataloguing the history of major unsuccessful antitrust cases against Major League Baseball). Though in *Flood v. Kuhn* 407 U.S. 258, 282 (1972), the Supreme Court acknowledged that "baseball is a business engaged in interstate commerce," it upheld baseball's exemption from federal antitrust laws as an "anomaly."

100. Nathanson, *supra* note 79, at 75. See also *Flood*, 407 U.S. at 266 (noting that "Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business." (quoting *Flood v. Kuhn*, 309 F.Supp. 793, 797 (N.Y. 1970))).

101. *Salvino*, 542 F.3d at 294.

102. See *id.* at 297 (tracking the development of MLBP from its creation in 1966). MLBP controls the retail sale of MLB products through agency agreements created every three to five years. *Id.* Additionally, each of the

by obtaining a license from an individual club.<sup>103</sup> In response, MLBP filed suit against Salvino for violation of trademark laws.<sup>104</sup> Salvino's counterclaim argued that MLBP's activities violated Section 1 of the Sherman Act.<sup>105</sup> In affirming the dismissal of Salvino's counterclaim,<sup>106</sup> the Second Circuit implemented the "rule of reason" test<sup>107</sup> to determine that, under the circumstances, MLBP's exclusive licensing agreement did not have an adverse effect on competition.<sup>108</sup>

*B. Judicial Sell-out of Antitrust Enforcement in the  
Live Concert Industry*

For several reasons, private enforcement of antitrust laws with respect to Ticketmaster and Live Nation has been unsuccessful. Due to the approval of the merger, consumers and competitors will inevitably feel the effects of the combined monopoly powers of the two companies. Therefore, both rival businesses and purchasers of Live Nation Entertainment's<sup>109</sup>

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current MLB clubs owns equal interest in MLBP and shares equally in its profits. *Id.*

103. In 1999, Salvino sold "Bammers" (bean-filled bears) to the Arizona Diamondbacks. *Id.* at 294-95. Though Salvino had not yet obtained a license to use club logos from MLBP, the Bammers he sold had Diamondback logos on them. *Id.*

104. After receiving a letter to cease the sale of Bammers with unlicensed Diamondback logos on them, Salvino brought a suit in California, alleging that MLBP's activities violated Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act. *Id.* Subsequently, MLBP commenced an action against Salvino arising from his unauthorized use of MLB marks. *Id.* Salvino's original claim was then transferred to the Southern District of New York and consolidated as a counterclaim to MLBP's complaint. *Id.*

105. *Id.*

106. *Id.* at 334.

107. See discussion *supra*, Part II.A.

108. *Salvino*, 542 F.3d. at 304. The court compared Salvino's claim with that of the plaintiffs in *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*. *Id.* at 323-28. In that case, the members of the National Collegiate Athletic Association (NCAA) brought suit against the NCAA for its plan to restrict the games that would be televised and prohibit the individual colleges from entering into broadcast agreements. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 91-95 (1984). The court in *Salvino* noted that the NCAA plan was not responsive to consumer demand, in that the most popular games were not necessarily the ones that were broadcast. *NCAA*, 468 U.S. at 107 n.34; *Salvino*, 542 F.3d at 326. In comparison, the MLBP licensing agreement directly reflected consumer preference because "the dollar amounts of the license fees received by MLBP with respect to the intellectual property of the various Clubs . . . are plainly responsive both to the relative quality of the various Major League Baseball teams and to the preferences of the buyers." *Salvino*, 542 F.3d at 326-27.

109. "Given the dismal associations of the Ticketmaster brand, it should come as no shock that the new company will be called 'Live Nation

services must understand how and why private antitrust suits against Ticketmaster and Live Nation have failed in the past in order to combat the enormous influence that the newly formed entity will undoubtedly enjoy.

1. *The Indirect Purchaser Exemption—The Concert Industry's Virtual Immunity from Antitrust Actions Initiated by Ticket Purchasers*

Section 4 of the Clayton Act allows private persons who are injured by violations of antitrust laws to sue for treble damages.<sup>110</sup> In *Illinois Brick Co. v. Illinois*, the United States Supreme Court limited the class of persons who have standing under Section 4 to “direct purchasers” from a monopoly supplier.<sup>111</sup> “Indirect purchasers”<sup>112</sup> generally lack standing under antitrust laws and thus cannot bring a suit for treble damages under Section 4.<sup>113</sup>

In *Campos*, the Eighth Circuit applied the “indirect purchaser” classification to persons who bought tickets from Ticketmaster.<sup>114</sup> The plaintiffs in *Campos* alleged that Ticketmaster violated antitrust laws by engaging in price fixing practices with various concert venues and monopolizing the ticket distribution market.<sup>115</sup> The plaintiff concertgoers claimed that they had standing to sue based on their “payment of monopoly overcharges, in the form of service and handling fees, for Ticketmaster’s ticket distribution services.”<sup>116</sup> The court disagreed, however, holding that the venues who contracted for Ticketmaster’s ticket distribution services were the direct purchasers and that the injury that the plaintiffs suffered was

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Entertainment.” Van Buskirk, *supra* note 70.

110. See 15 U.S.C. § 15 (2006) (providing that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained.”).

111. *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 725 (1977).

112. The Supreme Court defined an indirect purchaser as one who is not the “immediate buyer from the alleged antitrust violator.” *Campos*, 140 F.3d at 1169 (quoting *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990)). While an indirect purchaser bears some portion of a monopoly overcharge, that overcharge is the result of an antecedent transaction between the monopolist and another independent purchaser. *Id.*

113. *Id.*

114. *Campos*, 140 F.3d at 1169-72. The court found that it did not matter that the plaintiffs paid directly to Ticketmaster, as billing practices are not determinative of indirect purchaser status. *Id.* at 1171. Ticket buyers only purchased Ticketmaster’s services because concert venues had purchased Ticketmaster’s services (bringing concerts to the venues) first. *Id.* The court explained that “such derivative dealing is the essence of indirect purchaser status, and it constitutes a bar under the antitrust laws to the plaintiffs’ suit for damages.” *Id.*

115. *Id.* at 1168.

116. *Id.*

simply the result of the preceding transaction between Ticketmaster and the individual venues that host events.<sup>117</sup> Thus, as indirect purchasers, the plaintiffs were barred from seeking damages under Section 4.<sup>118</sup> The court went on to determine, however, that the indirect purchaser status did not bar the plaintiff ticket purchasers from seeking injunctive relief under Section 16 of the Clayton Act.<sup>119</sup> Further, it is worth noting that Judge Arnold strongly opposed the indirect purchaser classification for the plaintiffs in his dissent.<sup>120</sup>

## 2. Importance of Proper Pleadings in Antitrust Suits by Competitors of Live Nation and Ticketmaster

The ruling in *Campos* and the costs of filing an action against corporations such as Ticketmaster have dissuaded many individual ticket purchasers from filing lawsuits. But, competitors within the concert industry as well as others with similar interests have continued to bring suits against Ticketmaster and Live Nation for violations of Federal Antitrust Laws. These plaintiffs

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117. Simply because the plaintiffs in *Campos* paid directly to Ticketmaster does not mean that they were direct purchasers. *Id.* at 1171. Rather, the court found that the ticket purchaser's "injury" was due to the venue's exclusive contracts with Ticketmaster, and thus was the product of derivative dealing. *Id.* "[T]icket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first." *Id.* Additionally, the excessive fees which the plaintiffs complained of were not separate from the "actual purchase price of" the tickets, but rather the "actual purchase price and the cost of the service fees amount to the single cost of attending the concert." *Id.* Furthermore, since cost of attending the concert is obviously a price that the market will bear (as consumers have continued to purchase tickets), "a venue free from Ticketmaster's domination of ticket distribution would be able to charge that price itself." *Id.* at 1172. Thus, even if the venues themselves provided ticket distribution services, the plaintiffs would still pay the same price (and thus incur the same "injury"); the only difference would be who received the profits.

118. *Id.* at 1171.

119. See 15 U.S.C. § 26 (2006) (entitling injunctive relief under Section 16 of the Clayton Act against any threatened loss or damage by a violation of the antitrust laws). The concerns of the direct purchaser rule have mainly to do with the complexities of determining damages. *Campos*, 140 F.3d at 1172. A suit in equity, however, "neither threatens duplicative recoveries nor requires complex tracing through the distribution chain. There are no damages to be traced, and a defendant can comply with several identical injunctions as readily as with one." *Id.* (quoting Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* § 371d, at 259 (1995)).

120. See *Campos*, 140 F.3d at 1174 (Arnold, J., dissenting) (arguing that, contrary to the majority holding, "Ticketmaster supplies the product [ticket distribution services] directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert goers."); *Id.* at 1175 (discussing the "unhappy result" of the holding, in that it bars any future private antitrust suits against Ticketmaster by ticket purchasers in the Eighth Circuit).

have not been stopped by the courts, but rather have been victims of their own unsatisfactory pleadings.

In *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, the Federal District Court for the Central District of California found that the plaintiff, RMG Technologies, failed to define a relevant product market in which the defendant, Ticketmaster, exercised a monopoly.<sup>121</sup> Antitrust law requires a plaintiff to allege both a product market and geographical market in which the defendant has monopolized or is attempting to monopolize.<sup>122</sup> The plaintiff in *RMG* “hopelessly muddled” what exactly was the relevant product market at issue;<sup>123</sup> at times, the plaintiff referred to the product market as “ticket distribution services,” while in other instances to the sale of tickets themselves.<sup>124</sup> The plaintiff’s subdivision of each category into “primary” and “secondary” markets further confused the court.<sup>125</sup>

These inconsistencies doomed the plaintiff’s claims. The court found that, while the markets for tickets and for ticket distribution services may affect one another, “ticket distribution services” are not a substitute for tickets themselves because there is no “interchangeability of use” or “cross elasticity of demand” between tickets and ticket distribution services.<sup>126</sup> The court bolstered Ticketmaster’s position against future, well pleaded claims by suggesting in dicta that defining the market for tickets as “tickets which have already been sold at retail” and establishing the geographic market as “the United States” could give rise to numerous issues:

RMG should be aware that defining the market in this way will undoubtedly give rise to numerous problems in the future, with both the ‘product’ definition and the ‘geographic’ definition of this market. Is any and every resale ticket in the country really a substitute for every other such ticket? Will the average Raiders fan in Oakland be satisfied with a ticket to see ‘Disney on Ice: Princess Wishes’ in Miami? Will the 12-year-old Hannah Montana fan in Seattle (and her parents) find that tickets to see Marilyn Manson perform in Philadelphia are an acceptable substitute?<sup>127</sup>

A similar situation was presented in *Gurvey v. Cowan, Liebowitz & Latman, PC*, in which Live Nation was the defendant

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121. *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 536 F. Supp. 2d 1191 (C.D. Cal. 2008).

122. *Id.* at 1195. The geographical market encompasses the area of “effective competition” or that area “where buyers can turn for alternative sources of supply.” *Id.* The product market includes the “pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.” *Id.*

123. *Id.*

124. *Id.* at 1195-96.

125. *Id.*

126. *Id.* at 1196.

127. *Id.* at 1197.

in an antitrust claim.<sup>128</sup> In an action under Section 2 of the Sherman Act,<sup>129</sup> the Federal District Court for the Southern District of New York found that the plaintiff failed to adequately plead the elements of her claim. The court noted that the plaintiff only vaguely referred to the defendant's supposed admissions of "monopoly" control.<sup>130</sup> Further, the plaintiff made an insufficient attempt to define the product market, alleging only that the defendant made efforts to operate within the "relevant live concert market in the United States" or the "US pop concert venues and radio markets."<sup>131</sup>

Unfortunately for the consumer in the live entertainment market, antitrust law seems unable to assist in fostering competition. Due to the Eighth Circuit's holding in *Campos*, future suits by those affected by high ticket prices are unlikely to be successful without a circuit-split, nor can the consumer rely on the competitive nature of the market to vary ticket costs. While it is widely believed that Ticketmaster and Live Nation separately had vastly superior control of their respective product markets,<sup>132</sup> the inequities of the cases filed against them allowed both companies to dominate the marketplace.<sup>133</sup>

*C. The Tragic Effects of the Live Entertainment Monopolies:  
Consumer Woes and Lack of Competition*

The failure of private antitrust lawsuits against businesses in the live entertainment industry has hindered competition in that market. The injury to the average consumer is even more prevalent during an economic recession. Without a drastic change in this area of law or a radical increase in the amount of disposable income in the near future, it is foreseeable that the entire market for live entertainment will take a turn for the worse.

In the live concert industry, ticket prices have skyrocketed

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128. *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, No. 06 CV 1202, 2009 WL 1117278, at \*1 (S.D.N.Y. April 24, 2009). The plaintiff in *Gurvey* was employed by Cowan, Liebowitz & Latman, P.C., who in turn is affiliated with Live Nation through Clear Channel Communications, all of whom were named defendants in the case. *Id.* The plaintiff brought antitrust claims against the defendants as part of her action for misappropriated trade secrets. *Id.*

129. *See id.* at \*3 (stating that a valid claim under Section Two of the Sherman Act requires the plaintiff to allege: (1) monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power through unlawful means).

130. *Id.*

131. *Id.* at \*4.

132. *See RMG*, 536 F. Supp. 2d at 1196 (alleging that Ticketmaster's market share for primary ticket distribution services purchased by major venues is "somewhere between 60% and 90%."); LIVE NATION, *supra* note 65 (stating that Live Nation is the world's largest concert promoter).

133. *See* about TICKETMASTER, *supra* note 64 (displaying Ticketmaster's \$8.9 billion profit from ticket sales in 2008); LIVE NATION, *supra* note 65.

without any indication that they will subside.<sup>134</sup> In the absence of a valid competitor in the ticket industry, Ticketmaster has no incentive to lower prices. Live Nation also has adversely affected the consumer, not only through increased ticket prices, but also through non-economic methods that deny consumers a meaningful choice in deciding which live event to attend.<sup>135</sup> Though in the past Live Nation and Ticketmaster competed in various aspects of their business,<sup>136</sup> with the approval of their merger, any hope of real competition in the concert-going industry has faded.<sup>137</sup> The same monopoly effects result from the actions of the major American sports leagues. In both *Salvino* and *American Needle*, the parties that brought antitrust actions correctly argued that by granting exclusive licensing agreements, consumers were denied the positive effects of a competitive market.<sup>138</sup>

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134. See Damien Cave, *Inside Clear Channel: How the Company's Domination Has Made the Airwaves Blander and Tickets Pricier*, ROLLINGSTONE.COM, Aug. 13, 2004, [http://www.rollingstone.com/news/story/6432174/inside\\_clear\\_channel](http://www.rollingstone.com/news/story/6432174/inside_clear_channel) (stating that "in 1999, the average concert ticket cost \$36.56; four years later, the price skyrocketed to \$50.35, an increase of thirty-eight percent."). "Service charges" have also nearly doubled in a decade. *Id.* Additionally, performing artists themselves are hurt by the domination of the market by a select few companies. *Id.* One year after Damien Cave detailed the market abuses of Clear Channel Communication, Michael Rapino founded Live Nation as a spinoff of Clear Channel. Paul Sloan, *Live Nation Rocks the Music Industry*, CNN.COM, Nov. 30, 2007, [http://money.cnn.com/2007/11/30/news/companies/live\\_nation.fortune/index.htm](http://money.cnn.com/2007/11/30/news/companies/live_nation.fortune/index.htm).

135. Laura C. Howard notes that, though Live Nation's policies result in higher ticket prices, there are several non-economic antitrust injuries that flow from Live Nation's domination of the concert promotion market. Laura C. Howard, *Live Alienation: One Super-Promoter Eliminates Competition, Concert Fans Pay The Price, and The Sherman Act Waits in the Wings*, 41 J. MARSHALL L. REV. 527, 555 (2008). Specifically, there are three types of non-economic injuries that consumers incur due to Live Nation's monopoly power. *Id.* at 555-57. First, there is a lack of consumer choice, in that "fans have no freedom to participate in independent concert communities that local promoters foster and cater to with customized concert experiences." *Id.* at 555-56. Second, consumers are disenfranchised from the concert experience because "some of the entrance fees are so high that fans are unable to attend." *Id.* at 556. Finally, the consumer is denied the ability to independently discover new artists due to the replacement of the regional approach to concert promotion, which catered to a local fan base, with mainstream promotion, which only promotes artists that receive radio exposure. *Id.* at 554-57.

136. In early 2009, Live Nation began its own ticketing operation, thus putting it in direct competition with Ticketmaster. Live Nation and Ticketmaster subsequently announced their merger. Petrina Crockford, *Ticketmaster/Live Nation Merger: Customers are Competitors, Azoff says*, TICKET NEWS, May 19, 2009, <http://www.ticketnews.com/Ticketmaster-Live-Nation-merger-Customers-are-competitors-Azoff-says509198>.

137. See discussion *supra* Part II.D.

138. See generally *Am. Needle*, 538 F.3d 736 (complaining that the NFL's exclusive licensing agreement denied a competitive market for NFL team's headgear); *Salvino*, 542 F.3d 290 (alleging MLB's exclusive licensing denied

Competition is the cornerstone of American capitalism. When competition is stifled, it needs to be rigorously protected by the government or by the private sector. Until this point, there has been a failure by both to actively promote competition in the live entertainment industry.

#### IV. PROPOSAL

This proposal sets forth several ways to cure the inequities that have hampered private enforcement of antitrust law in the live entertainment industry. First, the “single entity” defense is subjected to scrutiny to determine in which facets a sports league acts as a joint venture and thus is subject to Section 1 of the Sherman Act.<sup>139</sup> Second, this section explores limitations to baseball’s unbounded exemption from antitrust laws. Finally, with regard to antitrust suits against Ticketmaster and Live Nation, the “indirect purchaser” exemption is analyzed and suggestions for future complaints are put forth.

##### A. *How to Scheme an Offense That Successfully Challenges the “Single Entity” Defense*

The Seventh Circuit in *Bulls II* and *American Needle* found that there are certain “facets” in which sports leagues could be considered “single entities” for the purposes of Section 1 of the Sherman Act.<sup>140</sup> However, Judge Easterbrook<sup>141</sup> was especially cautious when applying the single entity defense to the NBA’s exclusive broadcast contract.<sup>142</sup> The court could have applied the single entity defense as a blanket protection for sports leagues, but instead found that “sports are sufficiently diverse” so as to justify the limited application of the defense outlined in *Copperweld*.<sup>143</sup> In

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opportunity for individual teams to choose most efficient business to manufacture products with its intellectual property).

139. The diverse characteristics of sports leagues make the determination of whether the league is a joint venture or single entity difficult. *Am. Needle*, 538 F.3d at 741. “In some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1 [of the Sherman Act].” *Id.*

140. See discussion *supra* Part III.A.1.

141. *Bulls II* 95 F.3d at 595. Judge Easterbrook wrote the majority opinion in *Bulls II*. *Id.*

142. See *id.* at 600 (showing Judge Easterbrook taking pains to constrain the application of the single entity defense by limiting the applicability of *Copperweld*’s rule to when the NBA acted as a single firm by selling its broadcast rights to a television network). See also *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248-49 (holding that a league may be characterized as a “single bargaining employer” for some, but not all purposes); *Bulls II*, 95 F.3d at 599 (applying the Supreme Court holding in *Brown* to determine that more than one characterization for sports leagues is possible).

143. *Bulls II*, 95 F.3d at 600.

*American Needle*, Judge Kanne<sup>144</sup> also had the opportunity to expand the previous holding in *Bulls II*, but instead chose to adhere to the “one facet at a time” approach.<sup>145</sup>

In the Seventh Circuit decisions, the key determination in finding that the specific “facets” of the leagues under review were subject to the single entity defense was that the leagues functioned as a “single source of economic power.”<sup>146</sup> Though individual teams participate in intra-league competition when on the field of play, the product of the competition is a game, without which the teams would have nothing to offer their fans.<sup>147</sup> Therefore, in order for private suits against professional sports leagues to prevail, it is necessary to determine aspects of sports leagues in which they *do not function* as a “single source of economic power.” The circumstances of such a case would have to indicate that the league is not competing with other forms of entertainment, but simply using their control of the market to unreasonably restrain trade and thus injure the consumer.

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144. Judge Kanne authored the holding in *American Needle*. *Am. Needle*, 538 F.3d at 737.

145. *Id.* at 741-43.

146. *Id.* at 744. The NFL promotes its product—the game of football—by collectively licensing its intellectual property. *Id.* at 738-39. It makes no difference that several NFL teams could have competing interests regarding the use of their intellectual property, those interest do not necessarily keep the teams from functioning as a single entity. *Id.* at 743. Likewise, when the NBA markets the game of basketball through broadcast contracts, it is more like a “single bargaining employer” than a multi-employer unit. *Bulls II*, 95 F.3d at 599-600. Televised NBA games are a single 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.” *Id.* at 599. The Seventh Circuit supported its reasoning in both *Bulls II* and *American Needle* by finding that, when acting as a single entity, the leagues were in competition with other forms of entertainment for an audience of “finite (if extremely large) size.” *Am. Needle*, 538 F.3d at 743, *Bulls II*, 95 F.3d at 600. “The loss of audience members to alternative forms of entertainment necessarily impacts the individual teams’ success.” *Am. Needle*, 538 F.3d at 743.

147. *Id.* “Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?” *Id.* With regard to the merger of intellectual property rights, the courts have succumb to the league’s arguments that such an action is necessary to necessary to foster competition in large and small markets:

Teams operating in large markets, such as the [New York] Rangers, believe that they can generate greater profits through independent control of their various property rights. In contrast, sports leagues seek to protect the collective interests of the league, as well as smaller market teams that predominantly benefit from having a league effort that generates fan interest and revenue that these teams could not accomplish individually.

Michael Huntowski, *Blades of Steel? The Fight for Control of Sports Clubs’ Websites and Media Right in Madison Square Garden*, *L.P.V. National Hockey League*, 16 VILL. SPORTS & ENT. L.J. 123, 124 (2009).

Recently, the NFL has provided such conditions by creating the NFL Network.<sup>148</sup> In 2006, the NFL decided to broadcast regular season games on the NFL Network.<sup>149</sup> The NFL retracted a number of games that it had originally sold to other networks and placed them on the NFL Network, forcing a number of fans to purchase or subscribe to the NFL Network if they wanted to watch the games.<sup>150</sup> The NFL Network hurts consumers and violates Section 1 of the Sherman Act by attempting to monopolize viewership and raising prices for NFL games previously available to consumers on free television.<sup>151</sup> An antitrust suit in this instance would likely prevail over a single entity defense because the consumer is directly injured by the NFL,<sup>152</sup> and the NFL teams are not acting in concert to promote a single product, but rather is using “[t]he NFL’s undisputed monopoly over its own football games . . . [t]o ensure the channel’s success.”<sup>153</sup>

Furthermore, with regard to the suits pertaining to other “facets” of other leagues, it is vitally important to understand that expansion of the single entity defense to sports leagues is relatively groundbreaking and has (thus far) been limited to the Seventh Circuit.<sup>154</sup> In the three decades preceding the rulings in *Bulls II* and *American Needle*, federal courts held that “independent ownership of, and competition between, teams within a league prevent single-entity status.”<sup>155</sup> Therefore, cases

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148. See Ross C. Paolino, *Upon Further Review: How NFL Network is Violating the Sherman Act*, 16 SPORTS LAW. J. 1, 5 (2009) (noting how the NFL Network using its monopoly power to take games away from networks and forcing consumers to subscribe may have violated the Sherman Act. The NFL Network was launched in 2003 and is exclusively owned and operated by the NFL. *Id.* at 5.

149. *Id.* at 3.

150. *Id.* “The NFL actually ‘pruned’ eight games away from CBS, Fox, and ESPN to create its NFL Network programming. The NFL’s apparent siphoning of these games away from CBS, Fox, and ESPN is quite significant.” *Id.* at 28.

151. See *id.* (noting that the NFL decreased viewership by taking games off of free television).

152. Not only is the NFL Network an additional cost under most cable packages, but many large cable companies do not even offer the Network. *Id.* at 3. This has led to a “blackout” of certain prime time games. In the 2007 season, several games were not broadcast in their local markets, but rather transferred over to the NFL Network. *Id.* at 3-4. “NFL Network’s live telecast of the game[s] alienated roughly sixty percent of the NFL fan base.” *Id.*

153. *Id.* at 4-5.

154. See *id.* at 30-32 (noting that a “clear majority” of courts considering the NFL’s single entity status have denied the applicability of the defense and listing the line of cases in other circuits which came to the opposite conclusion of the Seventh Circuit in *American Needle*).

155. Clifford Mendelsohn, *Fraser v. Major League Soccer: A New Window of Opportunity for the Single-Entity Defense in Professional Sports*, 10 SPORTS LAW. J. 69, 83 (2003).

against sports leagues that injure consumers outside the Seventh Circuit have a fair chance of holding America's sports leagues accountable.

*B. Initiating a Review of Baseball's Unhindered Monopoly*

Currently, the American public is witnessing what happens when Major League Baseball is left without regulation. The steroid scandals of the 2000s have proven that MLB may not be the best supervisor of its own activities.<sup>156</sup> Though professional baseball is an ingrained tradition, it is precisely *because* it is America's pastime that it should be held to a higher standard. This applies to violations of substance abuse laws as well as violations of antitrust regulations. Mitchell Nathanson correctly highlights the trend which led to baseball's recent legal troubles:

It is this atmosphere of de facto sovereignty that has led to the culture of corruption identified within the recently released Mitchell Report, which . . . quietly and systematically details MLB's decades-long disregard for federal law. Such disregard eventually provided a fertile breeding ground for the corporate malfeasance that permitted MLB to ignore both federal law and the overwhelming evidence of illegal drug use taking place within its locker rooms and to, in fact, encourage it throughout the 1990s and 2000s.<sup>157</sup>

There is no longer a need for the exemption afforded to Major League Baseball. As shown in the Seventh Circuit holdings with regard to the NBA and NFL, there are reasonable means to defend against antitrust claims without blanket exceptions for the entire industry.<sup>158</sup> Moreover, the premise of the holding in *Federal Baseball Club of Baltimore*, upon which Major League Baseball's antitrust exemption has been built, is clearly no longer valid.<sup>159</sup> The Supreme Court's 1922 holding severely limited the application

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156. In a February 2005 survey of MLB players, seventy-nine percent said "they believed steroids played some role in record-breaking performances by high-profile players." Chris Jenkins, *Players Admit Steroids Changed Baseball*, USA TODAY, Mar. 17, 2005, [http://www.usatoday.com/sports/baseball/2005-03-15-steroids-mlb-cover\\_x.htm](http://www.usatoday.com/sports/baseball/2005-03-15-steroids-mlb-cover_x.htm). Furthermore, many believe that the sport's leaders did not do enough to stop the problem. *Id.* This led to a report authored by former Senator George J. Mitchell which summarized his investigation of steroid abuses in MLB and led to congressional hearings on the subject. See generally George J. Mitchell, *Report to the Commissioner of Baseball of an Independent Investigation to the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball*, OFFICE OF THE COMMISSIONER OF BASEBALL (Dec. 13, 2007), <http://files.mlb.com/mitchrpt.pdf>.

157. Nathanson, *supra* note 79, at 49.

158. See discussion *supra* Part III.A.1 (explaining the single entity defense and the Seventh Circuit's conclusion that it should be applied on a case-by-case basis).

159. See Nathanson, *supra* note 79, at 76 (explaining that baseball's antitrust exemption began with *Federal Baseball Club of Baltimore, Inc.*).

of the Commerce Clause, even under the prevailing conservative interpretation.<sup>160</sup> Given the Supreme Court's present Commerce Clause analysis and the expansion of MLB over the past century,<sup>161</sup> it would be even more absurd to consider baseball an intrastate activity. Because of these changes, it is time the federal courts reevaluate baseball's antitrust exemption. The exemption for the sport of baseball is no longer necessary or advantageous, thus it should be eliminated.

*C. Restructuring Antitrust Actions against Ticketmaster and Live Nation*

*1. Redefining "Direct Purchasers"*

The Eighth Circuit's reasoning in *Campos* was flawed. The analysis reflected in Judge Arnold's dissenting opinion is the preferable method for reviewing Ticketmaster's policies. Distancing himself from the majority's view of *Illinois Brick*, Judge Arnold argued that in order to avoid suit from an indirect purchaser, "the antecedent transaction must have been one in a direct vertical chain of transactions, and it must have resulted in the "passing on" of monopoly costs from the direct purchaser to the indirect purchaser."<sup>162</sup> Applying this analysis, he found that there was no vertical chain that distributed tickets from Ticketmaster to the venues, who then resold the tickets to the concert goers.<sup>163</sup> Rather, the "product"<sup>164</sup> at issue was sold directly to the concertgoers from Ticketmaster. Furthermore, unlike cases that have found indirect purchaser status to prohibit recovery under Section 4 of the Clayton Act, there is no "passing on" of any "portion" of the monopoly costs.<sup>165</sup> Rather, the concertgoers bear

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160. "[T]he Supreme Court skirted around the obvious—that MLB was a business not unlike any other, engaging in interstate commerce—and held that it was somehow different, transcendent, above such mundane acts of legislation as the Sherman Act." *Id.*

161. See generally *Gonzalez v. Raich*, 545 U.S. 1 (2005) (extending the commerce power to include the power to prohibit the local cultivation of marijuana for personal use); see also *Wickard v. Filburn*, 317 U.S. 111 (1942) (defining the U.S. CONST. art. 1, §8, cl. 3, the Commerce Clause, broadly to allow Congress to regulate the growth crops on private land).

162. *Campos*, 140 F.3d at 1174. Judge Arnold, dissenting, determined that the holdings in *Illinois Brick Co.* and its progeny were premised on judicial economy. *Id.* The federal courts do not have the capacity to review cases brought by both indirect purchasers and direct purchasers. *Id.* Furthermore, the federal courts have a strong interest in preventing duplicative recovery. *Id.* at 1170.

163. *Id.* at 1174.

164. Judge Arnold found the product at issue in the case to be ticket distribution services, not the tickets themselves. *Id.*

165. *Id.*

the entirety of the monopoly overcharge.<sup>166</sup>

Given Judge Arnold's sound reasoning, plaintiffs may have success against Ticketmaster or its successor, Live Nation Entertainment, in a different circuit. Additionally, the majority in *Campos* also made note of other ways in which the plaintiffs could obtain relief.<sup>167</sup> Nothing about indirect purchaser status would bar plaintiffs obtaining injunctive relief against Live Nation Entertainment to prohibit the continued use of "service fees."<sup>168</sup>

## 2. *Better Lawyering to Solve the Problem of Live Nation*

Live Nation has thus far escaped antitrust scrutiny due in large part to sloppy lawyering.<sup>169</sup> Federal courts have not been opposed to the idea of submitting the issue of whether Live Nation engages in anticompetitive conduct to the finder of fact.<sup>170</sup> However, many of the cases that have been brought against the promoter failed to reach trial.<sup>171</sup> Should future plaintiffs properly define the relevant market and support complaints with enough facts, there is a strong indication that Live Nation Entertainment could be subject to private enforcement of antitrust laws.

## V. CONCLUSION

The effect of the above proposals will be to lessen the burden on the consumer in the live entertainment market. These proposals will not cause an upheaval of the industry, but rather a much needed modernization. Both Ticketmaster and Live Nation have abused their market powers for long enough to call for a reconsideration of their policies by the consumers of their services. Moreover, with the recent merger, consumers should be aware of the ways in which to hold Live Nation and Ticketmaster accountable separately, as those strategies will be even more useful now that the two have combined.<sup>172</sup> Likewise, American

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166. *Id.* Judge Arnold notes that the venues receive a percentage of the overcharge that Ticketmaster collects. *Id.* This further undermines the majority analysis which bars the concert goers from recovery. According to the majority, the venues are the "direct purchasers," and thus they are the only persons with standing under Section 4. *Id.* However, if they benefit from Ticketmaster's monopoly practices, then they have no motive to enforce the antitrust laws. Ticketmaster is therefore allowed to perpetuate its stranglehold of the market.

167. *Campos*, 140 F.3d at 1172.

168. *Id.* at 1172; 15 U.S.C. § 22.

169. See generally, discussion *supra* Part. III.B.2.

170. Howard, *supra* note 135, at 554.

171. See Howard, *supra* note 135, at 545-54 (discussing several dismissed complaints against Live Nation's former parent, Clear Channel Communications); discussion *supra* Part. III.B.2.

172. See generally, discussion *supra* Part II.D. It also should be noted that in October, 2009, the U.K. Competition Commission came out against the

sports leagues have proven incapable of handling a monopoly market share without abusing their power. Because governmental enforcement of antitrust seems to be nonexistent for the time being, consumers and competitors alike would do well to take matters into their own hands.

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merger, stating its concern over the effects on competition within the industry. *Live Nation-Ticketmaster Deal Vote Set for Jan. 8*, ASSOCIATED PRESS, Nov. 6, 2009, [http://www.google.com/hostednews/ap/article/ALeqM5joR6qEJ1M45EUdpddxoN\\_p34EhzwD9BQC5K81](http://www.google.com/hostednews/ap/article/ALeqM5joR6qEJ1M45EUdpddxoN_p34EhzwD9BQC5K81).

