4-1-1987

A Critical Look at Professional Tennis Under Antitrust Law

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I. INTRODUCTION

Professional sports have enjoyed unique legal treatment since their entry into the business community. Examples of such treatment range from reticent enforcement of a contract between two

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† The authors wish to thank Alan Swan, University of Miami School of Law, for his comments and suggestions.

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boxers to baseball's blanket exemption from the antitrust laws.[1] The rationale for such favored treatment appears inconsistent: "[baseball's exemption] is an aberration that has been with us now for half a century. . . [and] rests on a recognition and an acceptance of baseball's unique characteristics and needs."[2] This inconsistent approach to sports industries creates confusion as to the legal status of the various leagues.[3]

A current area of legal dispute is in professional tennis. Since 1968, when prize money was first openly awarded to players, professional tennis has grown into a 100 million dollar enterprise with an ever-increasing entertainment market share.[4] This rapid growth caused the evolution of professional tennis to be chaotic and created a power vacuum.[5] Increased audiences, prizes, television revenue and sponsorship contracts[6] created the need for some form of representational framework. The structure came in the form of two management companies, ProServ and International Management Group (IMG).[7] These two organizations initially operated as agents for athletes and eventually expanded into all aspects of the tennis and sports industries. Ultimately, ProServ and IMG began promoting and televising tournaments.

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1. *Compare* Machen v. Johansson, 174 F. Supp. 522 (S.D.N.Y. 1959) (Boxing) *with* Flood v. Kuhn, 407 U.S. 258 (1972) (Baseball). The accommodating posture taken by the courts and Congress produces legal inconsistencies such as decisions holding an owner's agreement not to allow franchises to shift locations an antitrust violation while that same owner's agreement forming the league is not. *See Professional Sports Community Protection Act of 1985, Hearings on S. 259 and S. 287 Before the Senate Committee on Commerce, Science, and Transportation*, 99th Cong., 1st Sess., [hereinafter *Hearings*].

2. Flood v. Kuhn, 407 U.S. 258, 282 (1972).

3. *Hearings*, *supra* note 1, at 66-67 (statement of Pete Rozelle, Commissioner of the National Football League).

4. Women's International Tennis Association Media Guide at 4 (1987) [hereinafter WITA Media Guide]. Today's tennis industry involves over 15 million adult American tennis players and spectators, with the penetration of equipment, apparel, clubs, and endorsements affecting many facets of the American and world economies.

5. Lawyers Donald Dell and Mark McCormack positioned themselves on both sides of the tennis bargaining table and propelled tennis into a dominant force in professional sports.

6. Men's and women's professional tennis comprises 3,000 individuals playing in over 200 tournaments world-wide and competing for over 35 million dollars in prize money. Men's International Professional Tennis Council, Official Yearbook at 5 (1987) [hereinafter MIPTC Yearbook]; WITA Media Guide, *supra* note 4, at 4. Certain players, such as Jimmy Connors, are capable of earning over five million dollars a year from endorsements alone. Agins, *Grudge Match: Big Tennis Has Turned Against Operator, and He Returns Favor*, Wall St. J., March 20, 1986, at 1, col. 1. Furthermore, although attendance at the U.S. Open has doubled in the last eleven years, the broadcast rights to the tournament have generated 250 times the fees generated at the beginning of that period. TENNIS WEEK, Oct. 3, 1985, at 2.

7. Donald Dell founded ProServ and Mark McCormack founded IMG.

A problem arose because these companies represented players with whom they would contract to appear in their own tournaments, which were then broadcast by the companies' television production divisions.[8] Concern over this problem was raised by several tennis organizations.[9] Ultimately, the Men's International Professional Tennis Council (the Council) passed a conflict of interest rule which restricted concurrent representation of players while promoting, managing or broadcasting tournaments.[10] The implementation of this rule was challenged in a lawsuit by ProServ and IMG. The action alleged that the regulation was an agreement in restraint of free trade and accordingly violated the Federal Antitrust laws. In response, the Council charged both ProServ and IMG with monopolistic practices.[11]

This article will critically examine the legal structure supporting the business of sports. This analysis will first detail the evolution of the sport of tennis and will then outline the antitrust laws and their specific application to sports industries. The application of these antitrust principles to professional tennis will reveal certain inconsistencies in the current analytical model. Finally, this article will proffer a framework for future analysis using an internally consistent and legally sound paradigm.[12]

II. THE EVOLUTION OF THE GAME

A. *Early History*

In 1874, Major Walter Clopton Wingfield of Great Britain applied for a patent, the subject of which would come to be known as

8. Interestingly, Dell was also the founder of and legal counsel for the men's players association, the Association of Tennis Professionals (ATP), placing him truly on all sides of the table; a financially beneficial position for Dell, yet a legally suspect one from the player's perspective.

9. Alfano, *Control of Men's Tennis at Issue in Suits*, N.Y. Times, Nov. 10, 1985, at § 5, p. 6, col. 3.

10. Supplement #1, MIPTC Yearbook, *supra* note 6.

11. Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD)(S.D.N.Y. filed April 17, 1985).

12. This article does not purport to examine the broad philosophical underpinnings of the Critical Legal Studies (CLS) movement. It does utilize CLS mechanisms to address the tennis antitrust issue and determine the soundness of continuted application of traditional antitrust issues to this issue. For deeper discussions of the CLS movement, *see generally* Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L. J. 461 (1984); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); *Symposium on Critical Legal Studies*, 6 CARDOZO L. REV. 693 (1985); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987).

"lawn tennis."[13] The sport grew in popularity among the elite. In 1900, in an effort to foster international competition, Dwight Filley Davis created the Davis Cup.[14] The International Tennis Federation (ITF) was formed shortly thereafter with twelve countries as charter members, with each sending a delegate to the federation.[15] During the years that followed, four major international tournaments developed, collectively known as the Grand Slam.[16] These major tournaments, as well as most other tournaments, were amateur events and continued to be until 1968, when the ITF created open events where both amateurs and professionals could compete.[17] This change produced an increase in the number of tournaments with prize money, and enhanced the development of the World Championship Tennis (WCT) tour, which a year earlier had staged a series of smaller professional events.[18]

In 1970, the ITF created its own professional tour called the Grand Prix circuit, which included the Grand Slam events.[19] Similarly, the WCT developed its own smaller tour out of its original events with a championship in Dallas.[20] Although these tours were independently operated at various times in the past, the WCT events are currently integrated within the Grand Prix circuit.[21]

In 1972, the players formally organized as the Association of Tennis Professionals (ATP). At approximately the same time, the ITF formed a committee, consisting of three members each from the ITF and ATP, to operate its growing Grand Prix circuit. The enormous task of running the professional circuit overwhelmed the committee, and the Council was formed to provide an independent, democratic, international body for the administration of pro-

13. MIPTC Yearbook, *supra* note 6, at 6. Major Wingfield labeled his new game "Sphairistike," a Greek term meaning "ball game". This term never did catch on.

14. *Id.*

15. *Id.* Originally named the International Lawn Tennis Federation, "Lawn" was deleted from the name in the late 1960's.

16. The four Grand Slam events are the Australian Open, the French Open, Wimbledon, and the U. S. Open.

17. MIPTC Yearbook, *supra* note 6, at 7. In these open events, a player could accept prize money without jeopardizing his standing to compete in the Grand Slam events.

18. *See id.* at 6-7. The WCT was the vision of Dave Dixon and Lamar Hunt, who signed the "Handsome Eight" to exclusive professional contracts. The "Handsome Eight" were Butch Buchholz, Pierre Barthes, Cliff Drysdale, John Newcombe, Nikki Pilic, Tony Roche, Dennis Ralston and Rodger Taylor. *Id.*

19. Pepsi-Cola was the first overall sponsor of the Grand Prix circuit and was followed by Commercial Union Assurance, Colgate-Palmolive, and Volvo. The current Grand Prix sponsor is Nabisco. The present litigation among the MIPTC, IMG, and ProServ was actually commenced by Volvo when the MIPTC chose Nabisco to sponsor the circuit.

20. MIPTC Yearbook, *supra* note 6, at 7.

21. *Id.*

fessional tennis.[22] The original council had six members. In 1976, the addition of three representatives of tournament owners increased the size of the council to nine.[23]

B. *Current State of the Game*

The Council currently sanctions and schedules tournaments, drafts and administers rules, provides tournament supervisors and trains officials.[24] From the Council's inception, there has been an overall circuit sponsor for the Grand Prix. Sponsorship money is paid to the Council in exchange for having the sponsor's corporate name and product associated with each event. The players receive the bulk of this sponsorship revenue through a bonus point system for participating in Grand Prix events.[25]

Professional tennis events are either sanctioned by the Council or are special events outside the Council's jurisdiction. Special Events can vary from a one-night exhibition match to a two week multi-player eliminations tournament.[26] In 1986, there were seventy-five sanctioned Grand Prix events and even more special events scheduled world-wide.

From an organizational point of view, the typical tennis event has many nonplaying participants giving the event a hybrid structure. The first participant is the owner, who undertakes the financial risk and makes the decision whether to seek Council sanctioning.[27] The manager of each event is responsible for the operational components of the tournament, including the sale of tickets, advertising, housing players, scheduling matches, hiring officials, and se-

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22. *Id.* at 7-8. The ITF was created as a governing body to provide for uniform play in the game of tennis. The operation of a professional circuit proved to be beyond the scope of the organization. *Id.*

23. *Id.* Although the focus of this article is on men's professional tennis, the issues addressed herein are identical for women's tennis as well. The histories of men's and women's professional tennis parallel one another. The formation of the Women's Players Association and later the Women's International Tennis Players Association (WITA) (formerly called the Women's Tennis Association) exemplify this similarity. Additionally, there is a Women's International Professional Tennis Council (WIPTC) structured similarly to the MIPTC.

24. Answer and Counterclaim, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. filed November 6, 1985).

25. *Id.* at 12.

26. *Id.*

27. MIPTC sanctioning of an event allows players to receive bonus points for their play in the event. When totalled at the end of the year, the players with the highest total points receive further prize monies from the MIPTC. Thus, sanctioning is sought by tournament owners to attract name players to their tournaments. MIPTC Yearbook, *supra* note 6, at 88.

lecting wild card player entries. There is also a merchandising agent who is responsible for soliciting merchandisers and securing the title sponsor, the presenting sponsor, and the various sub-sponsors.[28] Finally, there is a television agent responsible for negotiating broadcast rights on a nation by nation and market by market basis,[29] as well as securing a production company to handle the telecast and commentary.

Players enter tournaments either by qualification or invitation. The ATP is responsible for the computer ranking of individual players, which permits players ranked at a certain level direct entry into tournaments. Lower ranked players may be required to play in preliminary qualification rounds. As a player becomes successful he will sign with an agent who is traditionally responsible for negotiating the player's appearances, endorsements and providing financial consultation.[30]

As professional tennis evolved, agent organizations became involved with the promotion and management of tournaments. As a consequence, legal questions arose from the intertwined relationship involving ProServ's representation of players appearing in tournaments owned and broadcasted by ProServ. As a result, the Council passed a "conflicts of interest" rule, precluding the owner, manager, or broadcaster of a tournament from representing players.[31] The Council also proposed a "special event" rule which would require all owners or managers of Grand Prix events to refrain from promoting any exhibitions during the same week as any Grand Prix event.[32] Because Grand Prix events occupy forty-eight of the fifty-two weeks of the year, and exhibitions are primarily promoted by Grand Prix event owners, exhibitions would be virtually eliminated.[33]

These two rules formed the basis for ProServ's antitrust action against the Council. The Council counterclaimed asserting anti-

28. Answer and Counterclaim, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. filed Nov. 6, 1985), at 15.

29. The size and scope of international television's influence on the sports industries raises such issues as the difficulty of partitioning pay television home video from syndicated television from over-the-air broadcasts, because each of these generates identifiable revenue. *See generally* Cryan, Crane & Marcil, *The Future of Sports Broadcasting: An International Question*, 10 SETON HALL LEGIS. J. 213, 215, (1987).

30. Answer and Counterclaim, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. filed Nov. 6, 1985), at 18.

31. Supplement #1, MIPTC Yearbook, *supra* note 6.

32. *Id.*

33. *See* Parcelle, *ProServ's Center Court Conflict*, AM. LAW., Oct. 1985, at 132.

trust violations inherent in the dual roles of agent and owner.[34] An interesting legal issue arises as to whether this area will receive such special treatment as baseball because this is the first application of antitrust law to the tennis industry.

III. Development of Sports Antitrust Law

A. *Origin and Application of the Sherman Act*

Since its enactment in 1890, the Sherman Act (the Act)[35] has been the basic antitrust legislation in this country.[36] The Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states,"[37] as well as limiting attempts and efforts to extend a monopoly.[38] Though heavily debated, the overall goal of the Act was to maximize consumer welfare by producing the most economically efficient marketplace.[39] The stated purpose of the Act is the promotion of competition and the inhibition of restraints upon freedom of trade.[40]

When Congress passed the Act, it left determination of the meaning and scope of the language to the courts.[41] The initial judicial reaction to the Act can only be described as extreme. The Act was first emasculated by an unrealistically narrow reading;[42] subsequently, it was applied so rigidly as to render it unworkable unless broad exceptions were allowed.[43]

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34. The counterclaim also alleges a multitude of conflict of interest questions. *See infra* note 199 and accompanying text.

35. 15 U.S.C. § 1 (1982).

36. L. Sullivan, Antitrust 13 (1977).

37. 15 U.S.C. § 1 (1982).

38. *Id.* at § 2.

39. Graver, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1, 7 (1983).

40. Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958). The Court stated that

> [t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4.

41. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897).

42. In United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), the United States Supreme Court interpreted the language of the Sherman Act literally, holding both reasonable and unreasonable restraints of trade illegal.

43. United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

The Supreme Court recognized that the Act "cannot mean what it says."[44] Congress could not have intended the courts to declare unlawful "every" contract that restrains competition.[45] Aware of the practical difficulty in literal application of the Act, Justice Brandeis noted that "the legality of an agreement or regulation cannot be determined by so simple a test."[46] Every agreement concerning trade, every commercial contract, every regulation of trade, could be viewed as a restraint of trade. The true test of legality is whether the imposed restraint only regulates and thereby possibly promotes competition or whether it may suppress or even destroy competition.[47] The evolution of the Act reflects the understanding that only unreasonable restraints of trade are illegal.[48]

1. THE RULE OF REASON

In 1911, the Supreme Court expanded the analysis of the Act in the landmark case of *Standard Oil Co. of New Jersey v. United States*[49] by establishing the "rule of reason." In *Standard Oil*, common stockholders of a number of petroleum companies affiliated with Standard Oil sought to consolidate their holdings under

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44. National Soc. of Prof. Engineers v. United States, 435 U.S. 679, 687 (1978).

45. This gradual evolution away from a literal reading of § 1 of the Sherman Act began with United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). The court struck down a railroad cartel and distinguished between arrangements that directly and immediately reduced competition and those arrangements that only indirectly or incidentally affected competition. *Id.* at 568. The latter were not intended to be covered by the Sherman Act under the Court's analysis at that time.

In United States v. Addyston Pipe and Steel Co., 85 F. 271 (6th Cir. 1898) *aff'd*, 175 U.S. 211 (1899), a literal reading of § 1 was further qualified, but reasonableness was still rejected as a standard. 85 F. 271, 284-93 (6th Cir. 1898). *Addyston Pipe and Steel* involved the cartelization of the iron pipe trade. In an opinion affirmed by the Supreme Court, the Court of Appeals for the Sixth Circuit declared that it would recognize the validity of certain restraints which were merely ancillary to agreements that were otherwise economically beneficial. *Id.* at 282. The court of appeals reasoned that when a restraint was truly ancillary its competitive benefits were likely to outweigh the losses. *Id.* at 282-83.

46. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

47. *Id.*

48. Section 1 focuses on agreements considered restrictive due to their wrongful purposes or effects, while § 2 examines exclusionary actions characterized by the accumulation or misuse of monopoly power. Both sections ultimately seek the same curtailment of practices resulting in market control, but § 2 requires a threshold finding of monopoly power. Even though the two sections approach the monopoly problem differently, it is clear that the prohibited means by which markets are controlled or competition dampened is a matter of some indifference. Ultimately, it is irrelevant whether a trade restraint was accomplished by a contract, some lesser form of agreement, or even by the sheer aggregation of market power.

49. 221 U.S. 1 (1911).

one corporation.[50] The court determined that while the consolidated corporation would technically have a much larger share of the market, the commonly owned individual corporations had long been functioning jointly and therefore the transfer would have no real effect on the market. Recognizing that only combinations and contracts that "unreasonably" restrain trade violated the Act,[51] the Court found the restraint to be reasonable, and allowed the consolidation.

Although *Standard Oil* was a step forward from the literal interpretation of Section One, the rule of reason created in that case was not clearly enunciated.[52] In the years immediately following *Standard Oil*, the Supreme Court reaffirmed but did not expound upon this new standard of review.[53]

In 1918, the Court finally added dimension to the rule of reason. *Chicago Board of Trade v. United States*[54] set forth the basic guidelines for examining the challenged market restraints. The Board of Trade passed a rule prohibiting its members from purchasing or offering to purchase grain between sessions of the board at a price other than the closing bid. This regulation would guarantee a common price for all transactions made before the market opened the next morning.

In analyzing the Board's "call rule," the Court suggested a list of factors relevant in determining whether a restraint on competition was unreasonable. The Court's rule of reason analysis required consideration of the particular business to which the restraint is applied, the market conditions before and after the restraint was imposed and the effect of the restraint, whether actual or probable.[55] Additional factors included in the new analysis were the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained.[56] This is not because good intentions could save an otherwise objectionable regulation; rather, understanding of intent was thought to help the court interpret facts and predict consequences.[57] After weighing these factors, the Court upheld the

50. *Id.* at 9.

51. *Id.* at 63.

52. The "reasonableness" standard employed by the Court lacked specific definition and was of neccessity subsequently interpreted.

53. *E.g.*, United States v. American Tobacco Co., 221 U.S. 106, 180 (1911).

54. 246 U.S. 231 (1918).

55. *Id.* at 238.

56. *Id.*

57. *Id.*

Board's "call rule" as necessary to the conduct of business.

Chicago Board of Trade remains the leading Supreme Court case outlining the rule of reason.[58] In analyzing whether a particular arrangement tends to suppress competition unreasonably, courts will still apply the *Board of Trade* factors.[59] However, lower courts have had difficulty applying these factors because the Supreme Court never assigned them relative weights.[60] Moreover, the Court did not determine if any of the factors were dispositive of the issue of unreasonable restraints.[61] Thus, early critics complained that under a rule of reason analysis, everything was relevant and nothing was dispositive.[62]

Great difficulties resulted from these vague judicial declarations of the rule of reason. The lack of a cogent analytical framework for applying the rule of reason makes the analysis often complicated and prolonged, involving a broad inquiry into both the business practice of the defendant and the status of the surrounding industry.[63] As a result of this extended factual inquiry by the court, antitrust cases under the rule of reason are extremely costly.[64] Furthermore, both judges and juries find it difficult to analyze antitrust issues because they lack the expert understanding of a market's economy which is needed to determine a practice's overall effect on competition.[65]

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58. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 14 (1981).

59. *Id.*

60. *Id.* at 14-15. "This passage [from Chicago Board of Trade] invites an unlimited, free-wheeling inquiry . . . [t]he trier of fact is left in the dark as to how to decide whether a challenged practice is substantially anticompetitive." *Id.*

61. *Id.*

62. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L. J. 135, 155 (1984).

63. Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 343 (1982) (describing the rule of reason as an "elaborate inquiry").

64. The Supreme Court noted that "[t]he elaborate inquiry into the reasonableness of a challenged business practice entails significant cost." *Id.* at 343.

65. Easterbrook, *supra* note 62, at 154-55. It should also be noted that the period from 1977-1979 initiated a new phase in judicial contribution to antitrust. This phase reinforced the principle that courts should use strong economic analysis. During this time, the courts established an abbreviated rule of reason analysis which suggested a departure from the traditional rule. Five cases frame this new school of antitrust thought: Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); National Soc. of Prof. Engineers v. United States, 435 U.S. 679 (1978); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) and Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

2. THE PER SE DOCTRINE

In an effort to avoid the complicated and prolonged rule of reason analysis required by *Standard Oil* and *Chicago Board of Trade*, the judiciary created a new standard of review for certain antitrust cases. Under this new standard, certain agreements are conclusively presumed to be unreasonable and illegal because of their pernicious effect on competition and lack of redeeming virtue.[66] Thus, the new standard became known as the per se doctrine. This avoided the necessity for an economic investigation into the history of the subject industry, that had so often proved fruitless.[67]

When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court may hold that the restraint is per se illegal.[68] The decision to declare a practice per se illegal usually rests on two criteria: (1) the anticompetitive harm outweighs any possible benefit, and (2) the attempt to identify possible procompetitive benefits will waste judicial resources and inject elements of uncertainty to the law.[69] A number of arrangements are conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious negative effect on competition.[70] Once the existence of such an arrangement has been established, no evidence of actual public injury is required,[71] and no evidence of the reasonableness of a defendant's conduct will be considered to justify the actions.[72] The rule of per se illegality has been applied to horizontal and vertical price fixing arrangements,[73] divi-

66. Northern Pacific Ry. v. United States, 356 U.S. 1, 4-5 (1958).

67. *Id.*

68. *E.g.*, United States v. Topco Associates, Inc., 405 U.S. 596 (1972) (grocery store chain limiting competition among its member franchises was per se violation of the Sherman Act).

69. *See generally*, Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L. J. 655, at 665 (1978).

70. *See, e.g., Northern Pacific*, 356 U.S. at 5.

71. Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656 (1961).

72. *See, e.g., Northern Pacific*, 356 U.S. at 5.

73. *See* United States v. Socony Vacuum, 310 U.S. 150 (1940) (horizontal price-fixing among oil companies per se illegal); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (horizontal price-fixing among manufacturers and distributors of pottery fixtures per se illegal); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (horizontal price-fixing among liquor producers per se illegal); Arizona v. Maricopa County Medical Society, 457 U.S. at 334 (doctors could not agree to set maximum prices); Catalano, Inc., v. Target Sales, Inc., 446 U.S. 643 (1980) (elimination of extension of credit to retailers per se violative of the Act); Albrecht v. Herald Co., 390 U.S. 145 (1968) (vertical price-fixing between newspaper publishers and carriers per se illegal).

sion of markets between competitors,[74] tying arrangements,[75] and certain collective refusals to deal, or "group boycotts."[76]

The policy behind the per se rule is twofold. First, it is an attempt to provide stability and predictability in the marketplace. The per se rule's clear enunciation of the reach and application of the Act provides ready parameters for market decisions.[77] Second, it promotes judicial efficiency. Application of the per se rule frees a court from the complicated and prolonged economic investigation required by the rule of reason.[78] The per se rule assumes the illegality of the restraint without regard to the market power of the defendant.[79]

3. ELEMENTS OF A VIOLATION

As courts filtered through the sea of antitrust opinions, liability in Section One actions came to rest on three indispensible criteria: (1) an agreement among two or more persons or distinct business entities which (2) was intended to harm or unreasonably restrain competition, and (3) did in fact cause injury to competition.[80]

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74. In Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), the division of markets among competitors was ruled per se illegal. The Court condemned a cooperative allocation of territories throughout world-wide markets between the dominant American producer of tapered roller bearings and British and French firms. The French firms were also controlled by Timken and its British competitor.

75. The *Northern Pacific* Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." 356 U.S. at 5-6.

76. *See* Klor's Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959) (conspiracy by large stores and distributors not to sell to a retailer, or to sell only at high prices or on unfavorable terms, constituted a group boycott in violation of the Sherman Act); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (agreement by members of the Guild to refuse to sell to retailers who also sold garments copied from a Guild member's design constituted a group boycott in violation of the Sherman Act). In Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914) horizontal combinations were found among traders at one level of distribution, which excluded direct competitors from the market. Thus, a group of retail lumber dealers black-listed lumber wholesalers who sold directly to the retailer's customers. The obvious purpose of the combination — eliminating competition from the wholesalers — placed it within the prohibited class of undue and unreasonable restraints.

77. United States v. Topco Associates, Inc., 405 U.S. 596, 609 (1972). Without the per se rule, businessmen would be left with little aid in predicting in any particular case what courts would find to be legal or illegal under the Sherman Act.

78. *Northern Pacific*, 356 U.S. at 5.

79. *See* Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 322.

80. *See generally* Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation In The Sports Industry*, DUKE L.J. 1013 (1984) [hereinaf-

Assuming that an agreement between two separate entities in the market has been established, the next step of the analysis of whether the restraint on competition is unreasonable requires a two-step determination. In order to identify an unreasonable restraint, the court will first ask whether the suspect action is so inherently anticompetitive as to be subject to per se condemnation. If not deemed a per se violation a court will then determine whether the alleged restraint is unreasonable and violates the rule of reason by balancing all positive and negative effects on the market.[81] Under this analysis, the court must balance the anticompetitive effects of the restraint against any claimed procompetitive justifications. This type of balancing requires an understanding of the competitive conditions of the relevant market. For a restraint to be allowed, the affected market must be more competitive as a result of the questioned restraint, or at least the limitation upon competition must have legitimate procompetitive components.[82] Ultimately, the balancing test depends largely upon how one defines and comprehends the relevant market.

The bulk of antitrust analysis has historically focused upon Section One. In recent years, however, Section Two has evolved as dramatically as its predecessor. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several states is considered to be in violation of Section Two."[83] Section Two requires the existence of market domination by a single actor. The fundamental notion underlying this clause is that the abuse of monopoly power must be checked through legal mechanisms because the normal market forces will not be powerful enough to guarantee maximum consumer welfare.[84]

Modern cases applying Section Two add the further requirement that the suspect conduct must present a real threat of monopolization in order to be illegal.[85] Inherent in this threat is some degree of actual or potential market domination.[86] Market power

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ter *Cooperation in the Sports Industry*].

81. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Gerhart, *supra* note 79, at 322.

82. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984); Broadcast Music Inc. v. CBS, 441 U.S. 1 (1979); National Soc. of Prof. Engineers v. United States, 435 U.S. 679 (1978); Northern Pacific Ry. v. United States, 356 U.S. at 4-5.

83. 15 U.S.C. § 2 (1890).

84. *Cooperation in the Sports Industry*, *supra* note 80, at 1036.

85. United States v. Grinnell Corp., 384 U.S. 563 (1966).

86. *Id.*

has been defined as the ability to raise prices above those that would be charged in a competitive market.[87] In a broader sense, it is the capacity to alter the interaction of supply and demand in the market.[88] The determination of market power is "[a]n incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries."[89] The question ultimately turns on whether the suspect entity is misusing its market power in an attempt to either monopolize or extend an existing monopoly. In order to determine if a misuse of market power has occurred, the essential questions become what the relevant market is and what its parameters are.[90]

4. DEFINING THE MARKET

At once the most crucial and misunderstood issue within antitrust analysis is the accurate and precise determination of the relevant market. Though market definition is the linchpin in the finding of restraint on competition, courts fail to set forth the necessary equations to complete a market-definition calculus, leaving the legal community in a practical quandary.

Through the muddied waters, however, some elements have emerged. To begin at a fundamental level, the alleged violation is viewed from the perspective of the relevant market because it provides the basis upon which competitive harms and benefits are balanced.[91] As a result, any antitrust policy divorced from market considerations will lack an objective benchmark.[92]

When examined practically, taking into account the logical relationship between an alleged restraint and its market, a restraint within a large market will rarely be unreasonable, while a restraint within a small market will always appear unreasonable.[93] It has been the inability of the courts to make the proper empirical de-

87. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); United States Steel Corp. v. Fortner Ent., 429 U.S. 610 (1977); United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

88. *E.g.*, NCAA v. Oklahoma, 465 U.S. 85 (1984).

89. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1957).

90. United States v. Grinnell Corp., 384 U.S. 563 (1966).

91. Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979).

92. Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

93. Imagine that Coke and Pepsi entered into a price fixing conspiracy. If the court determined the relevant market to be cola soft drinks in the United States, a violation would almost certainly be found because the actions would be an unreasonable restraint on the market. However, if the market is defined to be all beverages, including soft drinks, carbonated drinks, coffee, juices, milk, beer, wine, liquor, etc., for the entire world, then it would be far more difficult to find an unreasonable restraint.

termination of the relevant market which created the chaos present in sports antitrust law. More specifically, it has been the court's failure to provide the jury undertaking the market definition as a question of fact a comprehensible guideline by which to make such a decision. Therefore, the resulting inconsistent market determinations have produced legal opinions based on internally inappropriate legal reasoning, which in turn has compounded its damage when used as precedent for second generation legal analyses. Unfortunately, the bedrock issue of examining competition in light of the proper relevant market has not been recognized.[94]

The first threshold in undertaking an antitrust analysis under either Section One or Section Two is an inquiry into the relevant market, determining whether the trade or commerce within the market is affected unreasonably by the alleged restraints.[95] Just which criteria are to be used in determining the market, however, is not abundantly clear. In fact, there is precious little common law, and much less statutory guidance for the court trying to discover the proper relevant market. Generally, the fuzzy boundaries of the market can be brought into focus by asking three questions:

> (1) what are the market strategies for the good or service under attack,
> (2) what are the effects of the strategy in the marketplace, and
> (3) who are the competitors of the good or service in the marketplace.

The answers to these questions will begin to disclose the parameters of the relevant market. However, these concepts have been convoluted by the courts in an attempt to define dispositively the elusive relevant market. This tortured analysis bifurcated the issue, giving rise to the relevant *product* market and the relevant *geographic* market, both of which are components of the overall market definition.

a. The Product Market

A product market definition is based in part upon a description of those groups of similar product producers who have the actual or potential ability to take significant amounts of business away from one another.[96] The crux of the product market issue is

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94. *Cooperation in the Sports Industry*, *supra* note 80, at 1027.

95. American Aloe Corp. v. Aloe Creme Laboratories, Inc., 420 F.2d 1248 (7th Cir. 1970); Mercantile Nat'l Bank of Chicago v. Quest, Inc., 303 F. Supp. 926 (N.D. Ind. 1969).

96. Eli Lilly & Co. v. SmithKline Corp., 587 F.2d 1056, (3d Cir. 1978), *cert. denied*, 439 U.S. 838 (1979).

the determination of whether that group of goods or services is so closely related so that substitutions or interchangeability by the consumer is possible.[97] The outer boundaries of a product market can be based upon the reasonable interchangeability of use; in economic argot, the cross-elasticity of demand.[98] Additionally, only when all relevant sources of supply, including actual rivals and potential market entrants, have been examined may the product market be fully determined.[99]

The product market analysis quickly becomes complicated when the investigation unearths several viable product substitutions which match most, if not all, aspects of the subject product. Thus, within a larger relevant product market, well defined smaller and interrelated markets may exist, which in themselves may constitute product markets for antitrust purposes.

An example of such a matrix is professional golf. Within the larger product market of professional golf, which competes against other forms of sports and entertainment, exist smaller, interrelated markets. These interrelated markets compete for: (1) golf tournaments sanctioned by the Professional Golf Association (PGA), (2) professional golf player's services, i.e., appearances or endorsements, and, (3) the television broadcast of those events.

Each of these interrelated markets could be the relevant product market in an antitrust suit, depending on the plaintiff's allegations. The boundaries of each smaller market may be determined by several factors: the smaller market as a separate economic entity, the peculiar characteristics of the product, distinct customers, and separate prices.[100] Each allegation will ultimately focus on a particular market which then requires demarcation. Unfortunately, clear allegations regarding discrete markets are rarely the norm when there are numerous violations within an interrelated market.

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97. *See* United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

98. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962). While a complete analysis of these important issues is beyond the scope of this article, simply stated, cross-elasticity turns on the price, use and quality of the commodity. Such a problem arose in the *duPont* case, where the Court struggled to decide whether cellophane could be part of the market including aluminum foil, wax paper, "Saran wrap", and polyethylene. This becomes a crucial factor in the sports industry analysis when considering intraleague economic competition because, the price cross-elasticity of demand among games played in different home parks is virtually non-existent, making a narrow determination of the market impossible. *See Cooperation in the Sports Industry*, supra note 80, at 1030.

99. *See generally SmithKline*, 587 F.2d 1056.

100. Traditional case law labeled these smaller markets as submarkets. *See generally duPont*, 351 U.S. 294, and Brown Shoe Co. v. United States, 370 U.S. 294 (1962). However, because the term submarkets has confusing and inaccurate connotations, the more precise term interrelated market will be used.

Absent such precise pleadings, the burden devolves on the court to identify the correct product market. It is the failure of the courts to draw a bright line of demarcation in identifying interrelated product markets that has caused antitrust jurisprudence the most problems.[101]

b. The Geographic Market

Though the geographic market may appear simpler than the product market, upon closer examination it is just as intricate. On a basic level, if goods are sold across all state lines, courts will hold the geographic market to be the entire nation.[102] Alternatively, if the product has limited availability due to restricted geographic scope, the general rule has been to define the geographic market as that particular area of availability.[103] A geographic market determination becomes nebulous, however, when no clear distribution pattern emerges. Courts then begin to inquire into price relationships, hoping to find geographic and economic parameters for the market based on the cost a consumer is willing to pay, and where the consumer is willing to pay it. In other words, the geographic market is that area where there is competition for customers.

Thus, a correlation between price and its movement will begin to draw the boundaries of the geographic market. Such an analysis

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101. This problem is highlighted when one takes into account the various professional sports leagues in the United States. When considering the National Football League (NFL) from a product market perspective, the question becomes whether there are 28 product markets in the 28 cities with franchises, i.e., the product as Miami Dolphins Football in the Greater Miami market and as Buffalo Bills Football in the Greater Buffalo market, or whether there is simply one product, NFL Football, competing nationwide. *See generally* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

102. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

103. An example of the confusion that can arise when examining the geographic market is seen when two franchises exist in the same city. The resolution of the issue will turn on whether the market for the sport is defined to be nationwide with competition against all other entertainment, or local competition against each other (e.g., the NFL and the Los Angeles Rams & Raiders). Under a geographic market determination, the main question becomes one of competition for customers. Such competition will typically be reflected in a war over ticket prices. In reality, ticket prices remain on par because the price cross-elasticity of demand among games played in different home parks is virtually zero. In fact, ticket prices and availability are not determined by competition with other clubs, but by competition with other uses of the consumers leisure time, such as TV, movies, or the beach. Furthermore, club revenues are more a product of its own and the visiting team's league standing as opposed to any independent competitive commercial strategy it may adopt against the other team in its city, or other teams in the league. All these factors point to the reality that professional sports compete on a national level, though recent courts have failed to admit this. *See generally* J. MARKHAM & P. TEPLITZ, BASEBALL ECONOMICS AND PUBLIC POLICY, 89-93 (1981); and *L.A. Coliseum*, 726 F.2d 1381.

is fraught with inexactness, however, and often results in legal nightmares. Courts have seemingly settled on the simplistic notion that the geographic market is that section of the country where the firm can increase its price without losing many customers to alternative suppliers outside that area.[104] Unfortunately, the case law does not provide a clear basis for such an analysis. Despite the critical nature of the market determination, the courts continued to miss the issue of defining the market. Thus, future analysis must be cognizant of the existing state of confusion in market definition.

5. MARKET POWER THRESHOLD TEST

Aware of the importance of market determination for Sherman Act analyses, courts developed the Market Power Threshold Test (MPTT). Based upon the more structured rule of reason analysis, the MPTT stipulates that when the alleged restraining defendant does not clearly possess substantial market power, the court must dismiss the Section One claim without further examination.[105] Though the Supreme Court has not embraced the MPTT, several circuits have adopted the analysis.[106]

Market power is the economic thread woven into the fabric of market definition. A party possessing market power has the ability to alter supply and demand within the market, e.g., the power to raise the price of a commodity above competitive levels without losing sales. Alternatively, if the alleged defendant were to raise prices but lose sales, there would be no power to affect adversely the market, and thus there could not be a Section One violation.[107] Regardless of the MPTT results, the crucial determination again rests on the ever-elusive market definition.

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104. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981). A detailed look at the many components to the antitrust market determination is beyond the scope of this work. Specific to the geographic market, for example, many questions arise as to whether it should be looked at from the supply or demand perspective. *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563 (1966).

105. *E.g.*, NCAA v. Oklahoma, 465 U.S. 84 (1984).

106. *See* George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292 (5th Cir. 1981). *See also*, Note, *Did the Supreme Court Fumble? The Supreme Court's Failure to Endorse a Market Power Threshold Test to the Application of the Rule of Reason for Cases Under Section One of the Sherman Act in NCAA v. Board of Regents*, 27 B.C.L. REV. 579 (1986) [hereinafter *Supreme Court Fumble*].

107. *See Supreme Court Fumble*, *supra* note 106, at 592.

6. SINGLE ENTITY

Having generally examined Sherman Act violations, it is now necessary to examine the entity accused of such violations. Section One requires that an alleged restraint must be the product of an agreement between two or more separate entities. Correspondingly, antitrust law mandates that a "single entity" cannot conspire with itself to restrain trade, and therefore such a single entity is immune from Section One proscription. The threshold determination is whether such a single entity exists.

In many respects, the definition of a single entity is as confused as the market definition. The basic premise of the single entity defense centers on the theory that the entity's individual components are so interrelated that they can justifiably be expressed as united elements of a co-venture pursuing a common end.[108]

Courts have outlined several criteria for defining a single entity.[109] The most important is the "Unity of Economic Interest."[110] This test determines whether the several units are in reality working together as a whole, promoting a single economic interest. Such a notion can only be defined in view of the market in which it acts with common economic interests; therefore, the single entity analysis also arrives at a crucial and difficult determination of the market.

This market determination is particularly difficult when examining a professional sports league. If it is held that the sports league as a whole competes in the entertainment market, e.g., NFL football competing nationwide with baseball, movies and the beach, then the league must be a single entity. Alternatively, if the product is the franchise's events in the local city, e.g., L.A. Rams football against other forms of football in Los Angeles, then the league is a collection of entities, not a single entity. Regardless, this factual determination requires a full-blown market analysis. The courts have refused to embrace this reality and have instead,

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108. *See Cooperation in the Sports Industry, supra* note 80, at 1038.

109. A strict constructionist approach would require that a single entity fall within the fixed parameters of a formal partnership, with control retained over all basic decisions of strategy and managerial policy, joint ownership of assets and sharing of profits or losses. A more enlightened perspective, aware of the changing and intricate economic forms necessary for our society to advance its dynamic marketplace, would realize that such a rigid vision is blind to the purpose of the Single Entity provision. *See* Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); Perma Life Muffler Inc., v. International Parts Corp., 392 U.S. 134 (1968).

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

quite inappropriately, relied on a more formalistic approach.[111]

B. *Antitrust Application to Sports Leagues*

The legal history of professional sports has been relatively short; the antitrust history, even shorter. Only since the late 1950's have the courts applied the Act to sports. Prior to that, the sports industry was generally considered beyond the reach of the Act. This was due to the dubious 1922 Supreme Court opinion in *Federal Baseball Club v. National League of Professional Baseball Clubs*,[112] holding baseball exempt from antitrust liability.

Courts continued to misapply the Act in other sports, creating a pernicious and illusory veil in many judicial analyses. Having struggled from the onset with sports, courts improperly granted exemptions for several decades.[113]

In 1958, however, the Supreme Court finally held that there was nothing inherent in a sports organization meriting an exemption from liability under the Act.[114] From that legal springboard, the courts, though perplexed and confused by the market components of the emerging industry, began attacking sports associations and leagues. Unfortunately, the courts' new-found application of antitrust laws to leagues implemented suspect legal reasoning.

1. CURRENT LEGAL STATUS

In the past thirty years, the allegations against leagues fell into two basic categories. Primary, and critical to the leagues very existence, are attacks upon intra-league rules.[115] Secondary are attacks on sports associations for conspiring with other entities in the market.[116] In both instances the challenges have been brought by outside entities or league members.

Leagues and suspect intra-league rules have always fallen into a rule of reason analysis.[117] The reason for this is unclear.[118] However, some courts have found that a sports league is a collection of

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111. *See generally* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir.), *cert denied*, 469 U.S. 990 (1984).

112. 259 U.S. 200 (1922).

113. *See generally* Kempf, *The Misapplication of Antitrust Laws to Professional Sports Leagues*, 32 DE PAUL L. REV. 625 (1982).

114. International Boxing Club v. United States, 358 U.S. 242 (1959).

115. Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974); *L.A. Coliseum*, 726 F.2d 1381.

116. United States Football League v. NFL, 634 F. Supp. 1155 (S.D.N.Y. 1986); NCAA v. Oklahoma, 465 U.S. 85 (1984).

117. *See* Flood v. Kuhn, 407 U.S. 266 (1972).

118. *L.A. Coliseum*, 726 F.2d 1381.

separate entities and not a single entity.[119] This determination, in turn, logically requires that the intra-league rules may be attacked under Section One.

Under Section One, such rules may be analyzed as *per se* illegal, or put through the rule of reason balancing test. Courts have almost exclusively held that intra-league rules are not *per se* violations, stating that due to the unique nature of the sports industry they must be viewed in light of all relevant factors. With the unpredictable rule of reason analysis, courts have ruled with tremendous inconsistency, sometimes holding the sports league in violation,[120] sometimes holding no violation[121] and sometimes granting exemption to certain sports.[122]

With the courts clearly capable of finding similar league rules to fall anywhere on the antitrust continuum, the sports industry is left in a state of total unpredictability. It is apparent that the courts have failed to undertake the proper market analysis in computing their calculus for an antitrust violation.[123] This critical omission has precipitated many improper antitrust holdings.[124] Without looking at and accurately determining the market, it is impossible to decide whether there is a conspiracy, whether that conspiracy restrains free trade, or whether there is an extension of a monopoly. Consequently, much of the controlling precedent governing sports law is fundamentally suspect.

The courts use several reasons to justify holding leagues as pluralities. One source of support has been the "intraenterprise conspiracy" doctrine.[125] This theory stipulates that a Section One

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119. *Id.*

120. Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1974).

121. *See* Deesen v. Professional Golfer's Ass'n of Am., 358 F.2d 165 (9th Cir. 1966); and Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F. Supp. 1103 (D. Neb. 1981).

122. Flood v. Kuhn, 407 U.S. 258, 266 (1972).

123. An example of this failure occurred in *L. A. Coliseum* where although the court stated that "to a large extent the market is determined by how one defines the entity" in fact, the exact opposite is true. Basic antitrust principles mandate that in order to determine the entity, one must first define the market. Understandably, such misapplication can only cause confusion and erroneous holdings.

124. *E.g., L.A. Coliseum*, 726 F.2d 1381; Flood v. Kuhn, 407 U.S. 258 (1972).

125. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82-83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). On the doctrine generally, *see* L. SULLIVAN, ANTITRUST, § 114 (1977); Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 73 (1981); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661 (1982).

conspiracy will be found even when the two entities are commonly owned corporations, if they are separate legal entities. Another argument for plurality has been simple precedent. Here, courts have argued that since negotiations between a league and players have violated Section One, it can then be inferred that the league is subject to Section One for all its actions.[126]

Regardless of the claimed reasoning, it is insufficient to overcome the reality that courts to date have failed to properly consider the market in analyzing a league's single entity defense. The market investigation is instrumental to a single entity decision. Only when seen in light of a proper market definition can one decide whether or not a league is a single entity within that market.[127] If courts fail to properly recognize the league as a single entity, then any per se or rule of reason analysis must also be improper.

The recent Ninth Circuit opinion in *Los Angeles Memorial Coliseum Commission v. NFL*[128] involved the legality of an intra-league rule prohibiting the shifting of a league franchise without a three-fourths vote of approval by the league members. The court continued to deny the applicability of the single entity defense.[129]

The *L.A. Coliseum* court analyzed the franchise shifting rule under a rule of reason framework, holding that the league rule was illegal under Section One. In both the single entity determination and the rule of reason balancing test, the court failed to examine all the elements of a proper market determination. Holding the intra-league rule as illegal on this basis raises questions as to the jurisprudential foundation of sports antitrust decisions. Nevertheless, *L.A. Coliseum* stands as the newest brick in the wall of confusion which surrounds sports antitrust law.

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126. *See L.A. Coliseum*, 726 F.2d 1381, 1388; North Am. Soccer League v. NFL, 670 F.2d 1257 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). Under earlier reasoning, courts held that leagues were analyzed under the rule of reason because the court lacked experience with the sports industries. Later courts, realizing that this was a false premise under which sports leagues were attacked, attempted to cover the improper tracks of the earlier decisions by saying that the attached rule of reason analysis was *not* because of a lack of experience, but rather because leagues are horizontal restraints. *See* NCAA v. Oklahoma, 465 U.S. 85 (1984). This reasoning is faulty because if leagues were in fact horizontal restraints (which they are not) then they would be a per se violation, and not analyzed under the rule of reason.

127. *See supra* note 91 and accompanying text.

128. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

129. *Id.* at 1388.

2. FORGOTTEN ANTITRUST LOGIC

Virtually lost within the plethora of sports antitrust cases lie two properly decided opinions: *San Francisco Seals, Ltd. v. NHL*[130] and *Levin v. National Basketball Association.*[131] Though both opinions are relatively short, they offer guideposts from which to direct the proper application of antitrust principles to leagues.

In addressing whether a single entity existed, and alternatively if a Section One violation occurred, the *Seals* court was aware of the threshold requirement of a proper market determination. The court accurately considered the express criterion of reasonable interchangeability of use, and the implied criterion of identifying the competitors in the marketplace.[132]

Having decided that the relevant product market was professional hockey, with the relevant geographic market as North America, the *Seals* court held that two entities must exist for there to be a Section One violation. Based upon a defined relevant market,[133] the court found that the league was a "single unit competing as such with other similar professional leagues,"[134] and consequently removed it from Section One exposure. The *Levin* court further supported this notion by holding that league members are "just venturers dependent upon one another as partners."[135]

In a dissent to a denial of certiorari in *National Football League v. North American Soccer League,*[136] Justice Rehnquist elucidated the failure of the courts in sports antitrust cases to examine properly the market. As a consequence, the courts produced erroneous precedent. Rehnquist found that individual sports leagues produce a product, e.g., professional football, that competes with other forms of entertainment in the entertainment market. Implicit therein is the conclusion that the league is a single entity and is thus removed from Section One scrutiny.

Further support for the improper application of antitrust law to the sports industry can be found in the powerful dissent of Judge Williams in *L.A. Coliseum.*[137] Reinforcing the notion that in order to have a Section One violation the entities must compete

130. 379 F. Supp. 966 (C.D. Cal. 1974).
131. 385 F. Supp. 149 (S.D.N.Y. 1974).
132. *San Francisco Seals*, 379 F. Supp. at 967.
133. *See supra* note 95 and accompanying text.
134. *San Francisco Seals*, 379 F. Supp. at 970.
135. Levin v. NBA, 385 F. Supp. at 150.
136. 459 U.S. 1074, 1075 (1982).
137. Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1404-05 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

economically, despite the reality that individual franchises within a league never compete economically, Judge Williams held that leagues must therefore be single entities.[138] Moreover, opines Williams, to hold that a league is not a single entity, but an aggregation of economic competitors is tantamount to ruling that the league is itself per se illegal.[139] This notion is based on the numerous regulations attendant to the league's fundamental structure. These include the draft, scheduling of meetings between teams, and the system of pooled and shared revenues among franchise owners. If viewed as agreements among a collection of entities rather than a single entity, these regulations must violate Section One.[140] Furthermore, Judge Williams points out the lack of standing of a league member to attack an intra-league rule to which the league member is contractually bound.

IV. An Alternative Model

Having criticized the manner in which courts analyze sports, it is necessary to offer an alternative legal framework. This structure will hopefully penetrate the fog generated by erroneous precedent and in turn hold sports leagues and associations up to a progressive, rather than reactionary, light.

Creating a touchstone from which sports organizations can be measured for antitrust purposes, the structure, a Cooperative Sports Authority (CSA), must first be clearly defined. Simply stated, a CSA shall consist of the following elements: (1) a formal agreement outlining procedures and obligations, voluntarily adhered to, (2) a structure coordinating the scheduling of public exhibitions of the sport, (3) a common identity in the marketplace, and (4) an economic interdependence in establishing and promoting its particular product in the marketplace.

The threshold elements, when met, would establish a CSA as a single entity for Section One exemption purposes. Such a determination by the courts would properly situate a league within the antitrust framework, setting up an accurate and precise legal analysis. The four elements to be considered in determining the existence of a CSA must be examined in light of the market in which the particular sport competes. It is only upon a legitimate interpretation of the market that a proper CSA analysis can be conducted.

Upon analysis of the first element, requiring a voluntary for-

138. *Id.* at 1405.
139. *Id.* at 1408.
140. *Id.*

mal agreement among the members, it is evident that most leagues operate under such a contract. This is usually in the form of an owners agreement. This type of agreement is indispensable if the sport or league is going to prosper in the marketplace. Without it, the sport could never develop the framework to produce the events necessary for its existence.

The second element, focusing on necessary scheduling and rulemaking, has historically been one of the bedrock responsibilities of a league. Quite obviously, without such formality, most sports would not exist in the marketplace. Courts have recognized that such action is acceptable within a single entity framework.[141]

Crucial to a single entity determination is the third requirement that the CSA have a common identity in the marketplace. This will often surface in terms of the league competing within the market of its particular sport, for example, the NHL within the larger market of professional hockey. When the league establishes its identity in the marketplace the support for single entity determination is great. This determination becomes more likely as the relavant market expands.[142]

Intertwined with the common identity in the market is the fourth element requiring economic interdependence in the promotion of the common identity. This element is manifested in several ways, including the sharing of television revenues on both a national and local level, gate receipts, and balancing the flow of talent into the CSA, usually through a draft. The foundation to this element comes from the premise that franchises or units within a CSA do not economically compete among themselves, but rather compete with other products in the market. These other products include events in that sport, other sports, and other forms of entertainment.[143]

Assuming that the CSA has met the preceding four criteria and is thus viewed as a single entity, then several antitrust equations are triggered. First, in regard to intra-authority decisions, the CSA would be properly held immune from Section One attack. It should not be forgotten, however, that even if a CSA's intra-league rules are exempt from Section One, the CSA's possible conspiracies with other entities in the market, e.g. television networks, are still

141. San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 966 (C.D. Cal. 1974).

142. *Id.*

143. *See generally* Judge Williams' dissenting opinion in *L.A. Coliseum*, 726 F.2d 1381, 1401, and Justice Rehnquist's dissent in NFL v. North Am. Soccer League, 459 U.S. 1074 (1982).

open to attack.[144] The CSA's intra-authority rules may still be attacked under Section Two.[145]

Additional checks on the actions of a CSA under a single entity determination include the forces working within the collective bargaining framework. Under collective bargaining, management and labor often agree to terms based upon their relatively balanced powers. Without such balance, their agreements would appear lopsided and suspect under the antitrust laws.[146]

With an alternative framework in place, many conflicts specific to professional tennis may be examined. This must be done with both the existing case law and the CSA model in mind. We will first look at the men's professional tennis "league",[147] and then the infrastructure of men's professional tennis as a sport to determine the legality of all the relevant actions and markets in tennis.

V. ANTITRUST ANALYSIS OF THE COUNCIL

In the current litigation surrounding professional tennis, ProServ and IMG assert that the Council violated Sections One and Two in promulgating a "conflict of interest" rule.[148] The thrust of these allegations focuses upon the manner in which the court should view the Council within the context of sports antitrust. As outlined, the case law is confused and often illogical, leading to inconsistent judicial determinations. Regardless of which direction a court might turn, be it single entity or multi-entity, *per se* or rule of reason, Section One or Two illegality, the first question to be examined in deciding these issues is the relevant market. Only after the market is identified may the court properly implement an antitrust analysis.

Amidst the confusion of *L.A. Coliseum* and the controlling case law, the *Volvo* court will be troubled from the start. The *L.A. Coliseum* court established a very small restrictive market for professional football in an action challenging intra-league rules. The Court held that the market was only L.A. Raider football in Los

144. *See generally* United States Football League v. NFL, 634 F. Supp. 1155 (S.D.N.Y. 1986).

145. *See generally* Judge Williams' dissenting opinion in *L.A. Coliseum*, 726 F.2d 1381, 1401.

146. Collective bargaining agreements provide the impetus for advancements including increased salaries and benefits for players in many sports leagues. See also Kennedy & Williamson, *Money: The Monster Threatening Sports*, (pts. 1-3), SP. ILLUSTRATED, July 17, 1978, at 29, SP. ILLUSTRATED, July 24, 1978, at 34 and SP. ILLUSTRATED, July 31, 1978, at 34.

147. The Men's International Professional Tennis Council (the MIPTC).

148. *See infra* note 199 and accompanying text.

Angeles.[149] The court in the Southern District of New York is compelled, to some degree, to find a correspondingly restrictive relevant market for tennis. If such a determination is made, the next step is to find the Council a multi-party entity. By defining the market as the local tournament, the product becomes local tennis, the Council becomes a collection of local entities, and is therefore subject to Section One attack.[150]

Following *L.A. Coliseum*, the Southern District court will determine whether the Council's rules are per se violations or whether the rules should be analyzed under the rule of reason. Perpetuating the misplaced logic that courts are not familiar with the sports industry, the court would presumably bump the Council's rules out of a *per se* and into a rule of reason analysis. Under this elaborate balancing test, the court will then weigh all the anti-competitive and pro-competitive effects of the rules within the market.

Once into such an analysis, the direction the court might turn is unpredictable. The judge has great latitude, for there are no strict guidelines once into the rule of reason analysis. This complete lack of predictability may be the most harmful aspect of the ruling because it leaves the sports industry without guidance for the future.

The Council will most likely satisfy all the elements of a CSA analysis. Specifically, the Council operates with a formal agreement exemplified by its constitution and by-laws.[151] The Council is the scheduling and rulemaking body with respect to all sanctioned tennis.[152] The Council has an overall sponsor, Nabisco, which gives its Grand Prix circuit a common identity in the market.[153] The Council also shares revenue with the players, thus demonstrating the necessary common economic interest.[154] Collectively, these facts qualify the Council for CSA status.[155]

Assuming the Council is found to be a CSA, and thus a single entity in the market, then under the model outlined, it would be exempt from Section One for all intra-authority rules. Although immune from Section One, the rule would still be susceptible to attack under Section Two.

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149. *See generally L.A. Coliseum*, 726 F.2d 1381.

150. *Id.*

151. MIPTC Yearbook, *supra* note 6.

152. *Id.*

153. *Id.*

154. *Id.*

155. See Cryan, Johnson & Metanias, *Tennis Giants Volley For Control Under Antitrust Attack*, N.Y. L.J. March 27, 1987, at 5.

A Section Two analysis requires that there be no attempt to monopolize or extend an existing monopoly. Thus, inquiry into the Council's actions must question whether the Council's conduct is exclusionary, and if it is, whether that justifies an inference of illegal purpose and intent.[156]

In order to properly analyze this issue, the first question is what is the relevant market. In determining the product market, the investigation must center on an effort to locate all substitutes available to buyers of the seller's product. It is important to determine the competitors of the Council in the relevant product market, and the market strategies that the Council implements in promoting its product in the market.

Under such an analysis, the product market may be defined broadly so as to encompass the entertainment industries,[157] or narrowly, to consist only of sanctioned men's professional tennis.[158] If the product market is defined to be the entertainment industries, then the sheer size of the product market would indicate that the Council lacks any market power, and therefore would not violate Section Two. If the market is narrowly construed, then the Council would possess the market size necessary to be open to Section Two attack, and the question becomes whether the Council is attempting to monopolize the market.

The Council is in the business of producing a "tennis" product, or more specifically one form of a tennis product, Council-sanctioned tennis. The next threshold question becomes what products may be reasonably interchangeable with Council tennis. Is the answer football, baseball, movies and the beach, or is the answer simply other professional tennis events? Ultimately, the product market should be defined as men's professional tennis, in which the Council can be characterized as one entity within the product market.

With reference to the geographic component of the relevant market, the nature and participation of professional tennis is international because tournaments are played on every continent and televised to a global audience. Thus, the geographic component to the equation would be world-wide.

Viewing the Council in the context of a world-wide market for professional tennis, its market power is dominant only in terms of

156. *Cf.* United States v. Grinell Corp., 384 U.S. 563, 570 (1966).

157. *See* Justice Rehnquist's dissent in NFL v. North Am. Soccer League, 459 U.S. 1074 (1982).

158. *See* San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 966 (C.D. Cal. 1974).

Council-sanctioned tennis. Although the Council has absolute control over sanctioned events, it does not have a monopoly on worldwide professional tennis. The conflict of interest regulation is initiated only to promote and protect Council-style professional tennis. Consequently, analysis of the regulation under the CSA model and Section Two would establish the promulgation of intra-league rules as sound business practice and therefore non-monopolistic.

Beyond attacking the conflict of interest rule, ProServ has raised several other antitrust allegations, all stemming from Council requirements upon players. These allegations center on the Council's "Commitment Agreements" with players. The top players who want to compete in the Grand Prix events must sign a "Commitment Agreement" with the Council.[159] The basic terms of the contract require the athlete to play in certain events "produced" by the Council, as well as in an additional fourteen events "sanctioned" by the Council.[160] Moreover, the contracts insulate those events from other tennis competition by limiting the players' freedom to participate in other tennis events. As a by-product of participating in Council events, players earn "bonus points" which may translate into dollars at the end of the year.

ProServ and IMG argue that if they decide to produce a non-sanctioned event they are severely limited by the terms of the Commitment Agreements.[161] ProServ and IMG contend that the Commitment Agreements provide sanctioned events a total monopoly for approximately one-third of the year. This is evidenced by the fact that the Commitment Agreements prohibit the top 100 men's singles players from playing in any non-sanctioned and non-recognized event during sixteen weeks of the year.[162] Additionally, ProServ and IMG assert that it is not feasible for them to produce a non-sanctioned event during the four weeks that the Council and the ITF have reserved for Davis Cup events.[163] Therefore, a total of 20 weeks exist during which the Council and affiliated events permit no competition with their tournaments.[164]

ProServ and IMG further state that the Council, in addition

159. MIPTC Yearbook, *supra* note 6, at 150.

160. *Id.*

161. Memorandum in Opposition to the Council's Motion to Dismiss the Complaint, at 13, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. 1985).

162. MIPTC Yearbook, *supra* note 6, at 60.

163. *Id.*

164. Memorandum in Opposition to the Council's Motion to Dismiss the Complaint, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. 1985).

to monopolizing twenty weeks of the year through the Commitment Agreements, requires all the top players to spend another twenty weeks playing in events produced by the Council and its affiliated members.[165] Consequently, ProServ and IMG claim that the Council has succeeded in monopolizing the essential input of player's services to such an extent that they have eliminated the possibility of any stable competition developing.[166]

The Council argues that a player who chooses to sign a Commitment Agreement obtains certain benefits and in turn is obligated to enter a certain number of Grand Prix tournaments. Additionally, the player is to obey certain restrictions in regard to the "special events" they can enter.[167] The Council further maintains that the Commitment Agreements are not exclusive contracts and do not require a player to play only in Council-sanctioned events, nor is the player obligated to sign a Commitment Agreement to participate in Grand Prix events.[168]

Moreover, the Council insists that the Commitment Agreements successfully induce players to sell their services to producers of sanctioned events and thus, ProServ and IMG, as producers of special events are forced to compete by offering players competitive incentives to appear in their events. ProServ and IMG assert this action by the Council constitutes a barrier to entry into the market of event production. The Council protests that the alleged injury, if any, is not an antitrust injury, but is a consequence of competition.[169]

Through the Grand Prix Bonus Pool the Council forces sanctioned events and the Grand Prix sponsor to contribute money to a fund that is distributed based not on the players' performance in individual events, but rather on the number of points the players accumulate for their performance each year. ProServ and IMG contend this arrangement conditions payment for the bonus points earned in an event on the players participation in additional events. This system requires players to participate in as many of the events controlled by the Council as possible and correspondingly inhibits their participation in competing events.

The Council maintains that the bonus pools are by analogy

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165. *Id.*

166. *Id.*

167. Defendant's Memorandum in Support of Motion to Dismiss the Complaint, at 36. Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. 1985).

168. *Id.*

169. *Id.*

nothing more than price competition. As a result, the sponsors of "special events" are forced to offer economic incentives to induce professionals to play non-Council-sanctioned events. If the Council is found to be a multi-entity organization subject to Section One, the Commitment Agreements and Bonus Pool monies would be analyzed under the rule of reason. Unfortunately, there are no guidelines to predict the judicial outcome with any certainty.

Analyzed under a CSA framework, however, it appears these agreements would be considered intra-league rules, since the players are a one-third component of the Council. Thus, the rules would be exempt from Section One when promulgated by a CSA. The analysis would then shift to Section Two.

This inquiry must center on whether the Council is attempting to create a monopoly in the world-wide men's professional tennis market with the promulgation of the Commitment Agreements and the Bonus Pool. A potential violation of Section Two becomes evident when the Council attempts to restrict players to only sanctioned events. The Council is allowed to control where and to what extent its style of tennis is exhibited, but when it tries to control the entire market by excluding competitors through various rules and regulations, a Section Two violation may exist.

The Bonus Pool standing alone should not be violative of antitrust laws because it is not an attempt to control the market but only an economic incentive to players. Thus the finding of Section Two illegality for the Commitment Agreements would open a completely free market in tennis to the players since they would no longer be restricted to only Council-sanctioned events.

VI. ANTITRUST ANALYSIS OF PROSERV AND IMG

A. *The Council's Standing to Sue*

ProServ and IMG challenge the Council's ability to maintain its counterclaim. They assert that such an action must be brought derivatively on behalf of the Council membership: the players, owners, and the ITF. ProServ and IMG point out that membership in the Council constituencies is not tantamount to support of the Council's actions and therefore, the Council does not necessarily have the mandate of its membership to bring the counterclaim.[170] Furthermore, ProServ and IMG assert that the claims brought by the Council fail to allege any significant damages to its members,

170. MIPTC Yearbook, *supra* note 6, at 8.

and thus the Council has no standing to counterclaim against them.[171]

ProServ and IMG also argue that the membership of the Council is rife with conflict over the very issues raised in this suit. Recalling that one-third of the Council is comprised of tournament owners (including ProServ and IMG), ProServ and IMG allege it would be preposterous for the Council to have standing to curtail the business activities of part of its own membership. In fact, ProServ and IMG conclude that since the Council purports to represent both the players (sellers) and tournaments (buyers), the inherent conflict prevents the Council from fairly representing those groups in this action.

What ProServ and IMG overlook is that the Council represents *tennis*, which by its very nature is comprised of competing interests. It is alleged by the Council that ProServ and IMG have intentionally employed anti-competitive tactics to the detriment of the Council, and therefore tennis, evidencing true injury. As a fair and impartial representative of the sport, it seems that the Council's "interest" and "antitrust injury" thresholds for standing have been satisfied.[172]

In *Warth v. Seldin*,[173] the Supreme Court recognized that an association has standing to sue on its own behalf for injuries it has sustained, and not merely as a representative of its members. Moreover, the standing of professional sports associations, in an antitrust context, to sue in their own right has been repeatedly and uniformly confirmed in such cases such as *North American Soccer League v. National Football League*.[174] There, for example, two professional sports leagues asserted antitrust claims and counterclaims stemming from the NFL's ban on simultaneous ownership of football and soccer teams.[175] Both the district court and the Second Circuit Court of Appeals addressed the merits of the claims, implicitly recognizing that the leagues were the proper parties to

171. Motion to Dismiss at 7, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85-2959 (KTD) (S.D.N.Y. 1985).

172. An antitrust plaintiff must allege that he has suffered an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. Associated Gen'l Contractors of California, Inc. v. California St. Council of Carpenters, 459 U.S. 519, 538-40 (1983); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 293 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

173. 422 U.S. 490, 511 (1975).

174. 505 F. Supp. 659 (S.D.N.Y. 1980), *modified*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982).

175. 505 F. Supp. 659, 662, 670 F.2d 1249, 1250.

conduct the suit.[176] Each court also adopted the characterization of the leagues as competing with each other in the entertainment industry and that damage to any professional sports league member has some effect on the stability, success and operations of both the league and its individual members.[177]

Some form of an economic joint venture is essential for a professional sports association to attract fans, sponsors and athletes to the sport.[178] The organization of a professional sports association for promotion and supervision of the game necessarily entails the ability to advance claims, as the Council has done, to protect the competitive processes within the relevant markets.

The Council, as the body responsible for the structure, scheduling and administration of the Grand Prix Circuit, has enumerated both economic and non-economic interests in its regulations. ProServ and IMG have challenged the very rules the Council has enacted to carry out its directive. Since the Council is the only entity in a position to advance and enforce such rules, it is essential to the sport that its position be fully considered.

B. *Claims Against ProServ and IMG*

This antitrust litigation addresses many issues of first impression, including an attack on ancillary sports service simultaneously acting as mainline sports operators.[179] This shift away from the old view of sports antitrust which examined sports leagues or associations to a new perspective emphasizing the discrete business entities involved appears to be a novel judicial undertaking. This allows the court to apply the Sherman Act to sports businesses not involved within the league structure.

For purposes of this work, it will be assumed that the factual allegations against ProServ and IMG are true. Regardless of which antitrust allegation against ProServ and IMG is initially analyzed, one must begin with a proper market determination. The market determination is critical with regard to the claims against ProServ and IMG because it is "control" within the market of a tennis event which may ultimately determine the issues. In order to decide upon the relevant market, the court will examine who are competitors and what are their market strategies. Furthermore, the

176. 505 F. Supp. 659, 662, 670 F.2d 1249, 1250.

177. 505 F. Supp. 659, 664 670 F.2d 1249, 1252-53.

178. 670 F.2d 1249, 1252.

179. In this context, a mainline sports operator would be analogous to a franchise owner in the NFL or a tournament owner with the Council.

court will look to see which products may reasonably be interchanged, all in an effort to make the proper market determination.

With reference to ProServ, their corporate activities under attack include representing players, owning and managing tournaments, and producing the television broadcast of tennis tournaments. These activities center around a tennis event or tournament, which is the relevant product market at issue. Determining which market a tennis event functions within will first become clear when it is analyzed in light of who its competitors are. In this instance the question becomes who competes with Council-sanctioned tennis events owned by ProServ. One possible response to this issue is other professional tennis events.

Due to the inherent international aspects of tennis, it appears the geographic market is the world. Taking all these components into account, the relevant market for ProServ and IMG appears to be professional tennis world-wide. This determination is to some degree complicated by the smaller interrelated markets of: (1) professional tennis services, (2) professional tennis tournaments, (3) television broadcasts of these tournaments which operate within the relevant market.

Examination of the relevant market will also require questioning whether products exist which are sufficiently close substitutes. In regard to tennis tournaments, the product required for the tournament to function is tennis players. Correspondingly, only tennis players can be substituted and still allow a tennis tournament to function. As a result, the demarcation around the relevant market appears to end with professional tennis since other types of athletes or entertainers will not be adequate to make a tennis tournament a reality.

1. SECTION ONE

Under a Section One analysis, ProServ and IMG's concerted actions may be characterized as: (1) a "division of markets" agreement, where they refrain from scheduling events opposite one another, and exchange the services of each other's players, and (2) group boycotts where they do not allow their players to participate in certain independent events in which ProServ and IMG have no financial interest. These are traditional per se violations in light of the relevant market of professional tennis and thus violate Section

One.[180]

The court may determine that the industry, however, requires a more in-depth analysis and subject these actions to the rule of reason. In this respect, the court would have to inquire into whether ProServ and IMG's actions provide any pro-competitive effects which would outweigh their anti-competitive effects on the market. Once placed into a rule of reason analysis, the court is again functioning with few parameters due to the nature of the sports antitrust case law. With the egregious nature of these actions, however, even a rule of reason analysis is likely to hold ProServ and IMG's conduct illegal. This contention is supported by recent case law where courts conduct industry inquiries as well as pro and anti-competitive balancing tests; yet still ruling on a per se basis.

2. SECTION TWO

Despite the claims under Section One, the main thrust of the allegations against ProServ and IMG are the individual attacks against them under Section Two. Prior to undertaking such an analysis, courts must first determine whether the suspect firm possesses the requisite dominant market share to trigger Section Two.

An investigation of the two firms in the player-agent field indicates that approximately eighty percent of the world's leading men's professional tennis players are represented by either ProServ or IMG.[181] Additionally, ProServ and IMG also represent the majority of junior and senior tennis players.[182] In the aggregate, these statistics indicate the necessary market share to proceed with a Section Two analysis. If these facts can be established as true, the test created in *U.S. v. Grinnell Corp.*[183] would be applicable. In *Grinnell*, the Court defined the essential elements of monopolization as: the possession of monopoly power in the relevant market, and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Applying the *Grinnell* test for Section Two monopolization activities, ProServ and IMG have monopoly power in that they con-

180. *E.g.*, United States v. E.I. duPont deNemours & Co., 351 U.S. 377 (1956).

181. Answer and Counterclaim, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. filed Nov. 6, 1985), at 21.

182. *Id.* at 20, 22.

183. 384 U.S. 563 (1966).

trol, in whole or in part, 24 of the 37 major Grand Prix tournaments.[184] Moreover, the facts adequately illustrate that ProServ and IMG have willfully attempted to extend their monopoly power, a Section Two violation.

Aware that Section Two of the Sherman Act does not on its face condemn the mere possession of monopoly power,[185] the courts have focused on the monopolist's purpose and intent: a positive drive to seize or exert monopoly power.[186] Distinguishing monopolistic intent from permissible business activity is not easy where the suspect firm possesses massive market power, because an unlawful purpose is generally inferred from the conduct of the monopolist. Thus, inquiry into a firm's actions must occur at two levels: whether the conduct is in fact exclusionary, and, if it is, whether an inference of illegal purpose and intent is justified.[187]

It is specifically alleged that ProServ and IMG each have violated Section Two as to player representation and the television markets as follows: (1) by offering financial guarantees and wildcard spots (i.e., automatic qualification into a tournament) in order to induce promising young players to sign agency contracts with them, (2) threatening to blacklist promising young players if they do not sign with them, (3) extending loans or other financial benefits to tennis coaches to enlist their support in signing promising young players, and (4) possessing dominant control in the other product markets (tournaments and television rights) which further pressures tennis players to sign with them.[188]

ProServ and IMG also violate Section Two in the tennis tournament market by: (1) leveraging their star clients to obtain financial concessions from tournament owners, (2) coercing financial concessions from tournament organizers by threatening to hold a "special event" at the same time as their tournament, (3) acting in concert to promote their own interests, (4) pressuring their players to participate in tournaments from which they profit,[189] and (5)

184. Answer and Counterclaim, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y. filed Nov. 6, 1985), at 24.

185. *See* P. ASCH, ECONOMIC THEORY AND THE ANTITRUST DILEMMA 240 (1970).

186. *See* United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), aff'd except as to the decree, 384 U.S. 563 (1966).

187. E. GELLHORN, ANTITRUST LAW AND ECONOMICS 122 (1987).

188. Complaint, Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council, No. 85 Civ. 2959 (KTD) (S.D.N.Y filed Apr. 17, 1985), at 55-57.

189. ProServ admitted that Jimmy Connors appeared in the D. C. National Bank Tennis Classic in 1985 (managed by ProServ) as a personal favor to Mr. Dell. Volvo had an "understanding" that Jimmy Connors (a ProServ client) would play at Fort Myers, and Volvo had a contract that Ivan Lendl would play there in 1986.

scheduling their events to favor their players.

Ascertaining whether these allegations are evidence of ProServ and IMG's attempt to monopolize the relevant market again turns on market definition. Determining the market to be professional tennis, the relative power of these firms in the market makes illegality likely. Individually, these allegations could constitute a Section Two violation and collectively they are tantamount to a guilty verdict.

The most flagrant of all the Section Two violations is ProServ and IMG's attempt to create vertical restraints through tying arrangements.[190] Here, ProServ and IMG use tennis players they represent (the tying product) to gain control of tennis tournaments (the tied product). It is quite evident that through vertical restraints of competition, these two firms are attempting to parlay their control of the component markets of player services, tennis tournaments, and broadcasting to monopolize the entire market of men's professional tennis. Through their control of the players, ProServ and IMG control the smaller interrelated markets to such a degree that their dominance of the relative market becomes absolute.

VII. International Antitrust Issues

In light of the worldwide operations of all parties, it is possible that in addition to U.S. antitrust vulnerability they may also be open to international attack. The body of international antitrust law is not well developed, nor is the notion of a free market uniformly agreed upon by the many nations. Our inexorably shrinking world makes the marketing of truly global products a reality. As our global economic paradigm becomes more intricate, the protection of goods and services in the international marketplace becomes an increasing dilemma. With respect to professional tennis, the penetration of the world market is accepted, and thus, the possibility of antitrust violations exists on several levels. The only formal body of law that may be effective in undertaking an antitrust attack on either the Council, ProServ, or IMG is the antitrust law of the European Economic Community (EEC).

The EEC was formed by several treaties binding the nations

190. *See* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50 (1959); Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985); Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235 (1980).

on the continent, culminating in the Treaty of Rome.[191] The goals of the EEC, as stated in the Treaty, are "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States."[192]

Realizing that working together for common economic goals could lead to anti-competitive behavior, the Community included important antitrust provisions in the Treaty, namely Articles 85 and 86.[193]

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191. Treaty of Rome, Jan. 1, 1958, 298 U.N.T.S. 11.

192. *See Treaty of Rome*, Art. 2.

193. *Treaty of Rome*, Art. 85:

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerned practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

(a) The direct or indirect fixing of purchase or selling prices or of any other trading conditions;

(b) The limitation or control of production, markets, technical development, or investment;

(c) Market sharing or the sharing of sources of supply;

(d) The application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

(e) The subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:

—any agreement or classes of agreements between enterprises;

—any decisions or classes of decisions by associations of enterprises; and

—any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:

(a) Neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

(b) Nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Art. 86 provides:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited. Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

(b) the limitation of production, markets or technical development to the prejudice of consumers;

(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

Application of these provisions to the parties would not aid interests outside of the EEC, such as tournament owners in the United States, because these articles have never been construed to protect non-EEC resident entities.[194] However, many of the restraints caused by Council activity directly affect EEC interests, such as private tournament owners in Europe. While the antitrust provisions of the Treaty of Rome do not prohibit the formation of cartels or monopolies, they do prohibit the abuse of concentrated economic power.[195] Therefore, the parties may not abuse their position as a cartel and remain in compliance with EEC antitrust law. However, it is impossible for the parties to meet this obligation. ProServ effectively controls 100 percent of the tennis market within the EEC. This places ProServ in what the European Court of Justice of the European Communities would call a position of market dominance. The Court has recently indicated that an organization controlling a mere forty percent share of the market can be considered dominant.[196] Therefore, any anti-competitive actions committed by ProServ would be held in violation of the Treaty.

The likelihood of using EEC antitrust laws[197] to thwart abuses by ProServ, however, is lessened by the leniency the European Commission and the European Court have demonstrated towards activities which they feel have enhanced "intra-member trade and fortune." It is possible, however, that as tennis trade in Europe increases, these bodies will hold that the EEC's goal of economic growth will be better served by a stronger stance against ProServ's anti-competitive actions.

Beyond the EEC, there are few, if any, antitrust proscriptions in operation on the world market. An international antitrust accord, however, should be developed by the United Nations, similar to the draft principles of its Committee on Trade and Development which facilitate control of restrictive business practices.[198] An excellent enforcement mechanism for such principles would be the International Court of Justice. However, because many of the con-

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(d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

194. *See* A. CROTTI, TRADING UNDER EEC AND U. S. ANTITRUST LAWS (1977).

195. *See* Myers, *EEC Antitrust Law: Its Development and Philosophy with Special Attention to Intellectual Property Rights*, 5 N.C.J. INT'L. AND COM. REG. 41 (1979).

196. United Brands Co. v. Commission of the European Communities, 21 COMMON MKT. L. REV. 429 (1978).

197. Myers, *EEC Antitrust Law*, *supra* note 195, at 46.

198. *See* A. HERMANN, CONFLICTS OF NATIONAL LAWS WITH INTERNATIONAL BUSINESS ACTIVITY: ISSUES OF EXTRATERRITORIALITY, BRITISH-NORTH AMERICAN COMMITTEE 56 (1982).

flicts which would arise under such an international antitrust accord would involve transnational enterprises, there should also be United Nations legislation which grants multinational corporations standing before the court, a right which presently only sovereign nations presently enjoy.

VIII. Conflict of Interests

Above and beyond the antitrust attacks upon ProServ and IMG, the Council raised allegations of gross conflicts of interest. This claim stems from the pervasive reach of ProServ and IMG, wherein they represent players, function as their attorneys, own and manage tournaments, and broadcast those tournaments.

As attorney/agents also involved in the business dealings of their principles, ProServ and IMG are open to attack under the American Bar Association Code of Professional Conduct (Code). Canon Five of the Code requires that an attorney exercise independent judgment on behalf of a client.[199] The Code's ethical considerations implement Canon Five's directive that an attorney exercise his professional judgment "solely for the benefit of his client . . . free of compromising influences and loyalties."[200] In order to avoid a conflict of interests,

> [a] lawyer should not accept proffered employment if his personal interests or desires will . . . affect adversely the advice to be given or services rendered the prospective client. . . . [A] lawyer carefully should refrain from . . . assuming a position that would tend to make his judgment less protective of the interests of his client.[201]

The Code's disciplinary rules back up the ethical considerations with standards by which the attorney's conduct will be measured if his conduct is questioned. Disciplinary Rule 5-103 forbids an attorney from acquiring a "proprietary interest in the cause of action or subject matter of litigation he is conducting for a client."[202] Rule 5-104 requires full disclosure and client consent to any matter in which the attorney has "differing interests" to those

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199. Model Code of Professional Responsibility Canon 5 (1980).

200. Model Code of Professional Responsibility EC 5-1 (1980). *See also* Grievance Comm. v. Ratner, 152 Conn. 59, 203 A.2d 82 (Conn. 1964), where the court held that a client "is entitled to feel that, until that business [that the attorney has been retained to handle] is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion." 152 Conn. at 62, 203 A.2d at 84.

201. Model Code of Professional Responsibility EC 5-2 (1980).

202. *Id.* DR 5-103(A).

of his client.[203] If an attorney/agent were the owner of a tennis tournament and the legal representative of players therein, it would appear unlikely that EC 5-2 (or more importantly, DR 5-103 and 104) could still be met.

It is important to realize that where an attorney/agent represents numerous interests involved in competitive events, the likelihood of favoritism and thus selective application of the "best efforts" rule increases.[204] In essence, the attorney/agent invites violations of Canons 5 and 7[205] when he represents so many interests that he cannot provide proper representation for any of them.

Most important is the duty to avoid "even the appearance of professional impropriety."[206] The attorney/agent should appear to the public, as well as his clients, as willing and able to represent the individual client while not injuring or ignoring any other client. Where the attorney/agent obtains or possesses the power to exert significant influence in the marketplace, the appearance of impropriety may exist. For example, owners of Council-sanctioned Grand Prix tournaments are allowed to select players to fill "wild-card" spots in the tournament draw. This is intended to provide flexibility to owners, allowing top-ranked juniors to compete and otherwise benefit the sport. If the attorney/tournament owner uses the wild card for his own benefit (e.g., to lure a potential client) rather than the benefit of his existing clients, he has violated the

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203. *Id.* DR 5-104(A). *See also* MODEL RULES OF PROFESSIONAL CONDUCT rule 1.7(b) (1980):

> A lawyer shall not represent a client if the representation of that client *may* be materially limited . . . by the lawyer's own interests, unless
> (1) the lawyer reasonably believes the representation will not be adversely affected; *and*
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. (emphasis added). Both conflict of interests rules impose the same strict test: if an attorney's representation may be materially limited by prior interests, he should not represent a new client. If a reasonable belief exists that the multiple representation will not adversely affect the client, and the client gives consent after being fully informed, then the rule will not be offended. *See* Maryland St. Bar Ass'n Committee on Ethics, Informal Opinion 82-45, 801 Law. Man. on Prof. Conduct (ABA/BNA) 4319 (1982); State Bar of Michigan Committee on Professional and Judicial Ethics, Informal Opinion CI-584, 801 Law. Man. on Prof. Conduct (ABA/BNA) 4814 (1980).

204. In any given tennis event, ProServ or IMG will usually represent many tennis players. The likeliness is great that their capacity as tournament managers as well will result in some manner of favoritism for one of their athletes.

205. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 requires the attorney to exert best efforts on behalf of a client, while Canon 7 mandates zealous representation.

206. *Id.*, Canon 9.

interests of his existing client and clearly given the appearance of impropriety to the public.

The attorney who is simultaneously an agent for players and the owner of a tournament in which they play is inviting conflicts of interest.[207] In response to this dilemma, the Council promulgated the conflict of interest rule scheduled to take effect in December, 1989.[208]

On one hand, the regulation can be viewed as an attempt by the Council to restrict competition among or between sports agency firms such as ProServ or IMG. This is essentially the position taken by these firms. On the other hand, the regulation can be seen as a mere recitation of the existing agency and antitrust law, promulgated for the good of the sport and necessitated only by the failure of certain sports agents to voluntarily abide thereby.[209] This is the position of the Council. Because the regulation would require agent/tournament owners to choose between the two alternatives, something that ProServ is apparently unwilling to do, both sports agency firms have contested the regulation in court.

This action in itself raises the most blatant conflict of interest issue yet. Ostensibly, the regulation is designed to allow more players access to more tournaments, and thus, more prize money within the marketplace for their services. The regulation was approved by the player's representatives who also comprise one-third of the Council. ProServ and IMG, therefore, are contesting a regulation which was approved by and benefits the very players whose "best interests" they supposedly represent. This inconsistency violates not only any attorney/client relationships that may exist, but also appears to violate the athlete/agent relationship as defined by *Detroit Lions and Billy Sims v. Argovitz*.[210]

Normally, a fiduciary duty is created by an undertaking to act primarily for another's benefit, in matters connected with such un-

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207. In no manner may either ProServ or IMG allege that they are not representing their athletes in their capacity as attorneys. An alibi to this effect is fruitless.

208. *See* MIPTC Yearbook, *supra* note 6, at Supplement No. 1:

Prohibited Conflicts. No Player Agent shall be a Tournament Owner, Defacto Tournament Owner or Tournament Manager/Director for any MIPTC sanctioned tournament. No tournament in violation of this Article shall be sanctioned by the MIPTC and any tournament sanctioned by the MIPTC that is later found to be in violation of the Article shall have such sanction withdrawn.

209. ProServ and IMG have seemingly blinded themselves to the reality of the laws regarding their actions, and believe that due to their powerful position, their actions are valid.

210. 580 F. Supp. 542 (E.D. Mich. 1984).

dertaking.[211] A sports agent has a fiduciary duty to the athlete, requiring loyalty, good faith, and fair, honest dealing by the agent.[212] This duty requires that the agent not have a personal financial stake that conflicts with the interests of the athlete. "Once it has been shown that an agent had an interest in a transaction involving his principal [and] antagonistic to the principal's interest, *fraud on the part of the agent is presumed.*"[213]

Where an agent is an owner or operator of a tournament in which his client/athlete competes, the presumption of fraud rears its head. Where the agent/owner then seeks redress in the courts to protect his already questionable status as both agent and owner, the application of the *Argovitz* presumption is inescapable.

Interestingly, the Council's regulation is in actuality nothing more than a precise application of *Argovitz* to the tennis world. As such, it should be moot, because the law should already require ProServ and IMG to refrain from conflicts of interest and/or antitrust violations. Apparently, the existing law was an insufficient deterrent, and an economic sanction (the Council regulation) was required to make ProServ and IMG toe the line. Instead of capitulating, ProServ and IMG have asserted that the regulation (and thus the existing law) impinges on their right to compete and operate freely in the marketplace. This in itself can be interpreted as an expression of excessive monopolistic power. More surprisingly, ProServ and IMG argue that this regulation, designed to prevent conflicts of interest, is in fact a restraint on their ability to compete. This position, when viewed concomitantly with the necessity of the regulation as an economic application of the existing law, is virtually an admission by ProServ and IMG of their market power. The conclusion that Section Two has been violated is inescapable.

IX. Conclusion

To date, sports antitrust courts have failed to implement a proper antitrust analysis when examining the validity of league rules. Recent cases, including *L.A. Coliseum*, fall short on several fronts when applying the Sherman Act to sports industries. The courts fail to consider the relevant market in a proper fashion, in that they do not place the market determination in the linchpin position as they should. This is due in great part to the failure of courts to ascertain the relevant market of a professional sport, in

211. *Id.* at 547.
212. *Id.*
213. *Id.* at 548.

the context of competition with other similar professional sports. Rather, they apply the improper determination of intra-league economic competition.

These imperfect market definitions are utilized by the courts when undertaking both Section One and Two analyses, and when considering the existence of a single entity. The confusion created by this ill-applied bedrock determination results in a legal house of cards. Anticipating the impending collapse, a new model is offered, with the hope that such an analytical application to and determination of a CSA, will suggest a clear and sounder approach to sports antitrust cases.

The status of the Council, ProServ, and IMG is difficult to determine in light of the confused state of current antitrust law after wading through the sea of antitrust considerations. It appears the Council and its conflict of interest rules will stand. The validity of the Council's Commitment Agreement is far less certain and in fact they are highly suspect. Though they are likely to fall, the Bonus Pool may possibly withstand the attack. Alternatively, under a classic corporate antitrust analysis, ProServ and IMG seem to be very vulnerable. It is surprising the Justice Department has failed to inquire into these apparently blatant violations.

In the final analysis, only such a powerful antitrust problem, as that found within professional tennis, would unearth the weaknesses in such a well developed body of case law. Many years from now, jurisprudential leaders will look back upon the quagmire which engulfs current sports antitrust and recognize that only through the piercing nature of a critical analysis could reform and improvement have been possible. By exposing these misplaced legal doctrines and offering a solution, it is hoped that enough firepower is supplied to achieve the whole-shift needed to free this bound paradigm, setting it upon a fresh course — conceived in a progressive vision, unchained by historical baggage, and firmly placed in a proper framwork to allow for a natural evolution.