



Putting Hurdles in a Marathon: Why the Single-Entity Defense Should Not Apply to Disputes Between Athletes and Non-Team Sport Leagues

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I. INTRODUCTION

In April 2014, the USA Track and Field (USATF) organization signed a twenty-three-year-long extension with Nike, Inc. (Nike), valued between \$450 and \$500 million, that starts in 2018.¹ The extension makes Nike the exclusive outfitter for USATF in the World Championships and Olympic Games until 2040.² As the exclusive outfitter, Nike benefits from USATF's enforcement of its Statement of Conditions (Statement) against every USATF team athlete.³ The Statement says each athlete understands that he or she must wear the official team uniform during competition, at award ceremonies, at team press conferences, and at "other Team functions."⁴ The athlete cannot wear a logo of any competitor to the exclusive sponsor—Nike—during these events.⁵

¹ See Darren Rovell, *Nike Extends Deal with Team USA*, ESPN (Apr. 18, 2014), http://espn.go.com/olympics/story/_/id/10791755/nike-extends-sponsorship-deal-usa-track-field-team, {<https://perma.cc/268P-54LZ>}.

² See *id.*

³ See Jeré Longman, *Runner Nick Symmonds Faces Ban over Gear*, N.Y. TIMES, Aug. 7, 2015, http://www.nytimes.com/2015/08/08/sports/olympics/dispute-over-uniforms-may-keep-nick-symmonds-from-the-worlds.html?_r=0, {<https://perma.cc/8PVX-7UDT>} (noting that Symmonds received a letter from USATF stating that he should only bring "Team U.S.A., Nike or nonbranded apparel' to the world championships").

⁴ See USA TRACK & FIELD, 2015 GOVERNANCE HANDBOOK 175 (2015) ("I understand that USATF's sponsor contract for uniforms depends upon athletes wearing the uniform and using the uniform items at competitions, award ceremonies, 'official' Team press conferences, and other 'official' Team functions, and that I shall not participate in any of these activities with a logo of any competitor of USATF's sponsor affixed to me in any manner whatsoever.")

⁵ See *id.* However, this provision does not extend to sunglasses, watches, or shoes. See *id.*

The Statement became a focus of attention when runner Nick Symmonds decided to forego the 2015 World Championships in Beijing as a protest to the ambiguous condition.⁶ Symmonds, who is sponsored by Brooks Running, said the Statement is unclear about what is considered an “official function,” and he did not want to potentially compromise his relationship with Brooks by signing the Statement.⁷ The ambiguous definition, coupled with heavy enforcement of the provision by USATF officials, means that on the sport’s biggest platforms, non-Nike athletes could only occasionally, or never, display their personal sponsors’ names.

The crux of the sponsorship issue comes down to adequate compensation for the USATF athletes. According to a study commissioned by the Track and Field Athletes Association, Smith College economics professor Andrew Zimbalist found that USATF only shares roughly 8 percent of its revenue with its athletes.⁸ The athletes make their living by retaining sponsors that will pay them a salary for wearing the sponsors’ gear during competitions or making appearances while wearing the sponsors’ logos.⁹ These deals, however, are not very lucrative, as more than half of the top professional track athletes make less than \$15,000 a year from all of their sources of income, including sponsorship.¹⁰ Therefore, the strict rules on sponsorship are severely detrimental to an athlete’s livelihood.¹¹

USATF’s relationship with Nike combined with the aggressive enforcement of the Statement leads to a cluster of competing interests. Athletes want to be able to take advantage of their peak marketability with

⁶ See Darren Rovell, *Nick Symmonds to Miss Worlds After Failing to Sign USATF Contract Release*, ESPN (Aug. 10, 2015), http://espn.go.com/olympics/trackandfield/story/_/id/13407856/runner-nick-symmonds-miss-15-world-championships-clothing-contract-language, {<https://perma.cc/7YE6-QTU3>}.

⁷ See *id.*

⁸ See *id.* (citing to a study that found of the \$42.92 million in revenue that USATF accrued in 2015, only \$3.46 million was expected to be paid to the athletes).

⁹ See *id.*

¹⁰ See David Woods, *Pro Track Athletes Make as Little as \$5,000*, INDYSTAR (June 23, 2014), www.indystar.com/story/sports/2014/06/23/pro-track-athletes-make-little/11282551/, {<https://perma.cc/T5E4-9Y29>}; Tim Marcin, *How Much Do Track Stars Make? Why Your Favorite Olympian Probably Earns Less than \$15K a Year*, INT’L BUS. TIMES (July 6, 2016), www.ibtimes.com/how-much-do-track-stars-make-why-your-favorite-olympian-probably-earns-less-15k-year-2388710, {<https://perma.cc/YYM4-3RGN>}.

¹¹ See Tim Layden, *Nick Symmonds vs. USA Track and Field is Far Bigger Than Just One Runner*, SPORTS ILLUSTRATED (Aug. 11, 2015), <http://www.si.com/olympics/2015/08/11/nick-symmonds-usa-track-and-field-team-usa-nike-olympics>, {<https://perma.cc/4X7F-HPDS>}.

multiple sponsorships, whereas USATF needs to cater exclusively to Nike's needs, which include limiting competitors' exposure in the sport.¹² Unfortunately for the athletes, they wind up on the losing end of the conflict. With USATF's long-term relationship with Nike firmly in place and no sign of the Statement changing anytime soon,¹³ the prospects of making track and field a profitable career seem bleak.¹⁴ There is very little that these athletes can do to remedy their situation because there are no unions for non-team sports.¹⁵ With no union in place, there is no collective-bargaining relationship between the athletes and the governing body.¹⁶ With no collective-bargaining agreement (CBA), athletes are unable to effectively challenge governing-body decisions through labor law.¹⁷

One possible solution for the athletes is to bring an antitrust suit against USATF under § 1 of the Sherman Act for creating an unreasonable restraint on trade with its Statement of Conditions bylaw.¹⁸ However, as a non-team sport governing body, USATF could be considered as a single entity and subsequently immune from § 1 liability, which bans conspiracies only between two or more entities.¹⁹ A business that asserts that it is a single entity utilizes the single-entity defense.²⁰ This defense allows a defendant to claim that its corporate structure and actions were unilateral, or made within the business alone, making it impossible to conspire in re-

¹² See Longman, *supra* note 3 ("Many athletes have their own endorsement deals with apparel companies. The national federation has its own deal. Sometimes those collide.").

¹³ See Layden, *supra* note 11 (noting that the Statement has been unchanged for a number of years and that it is a part of USATF's bylaws that cannot be amended without the organization's judicial process).

¹⁴ See Woods, *supra* note 10 (noting that there are very few track athletes who make the National Basketball Association league minimum contract amount, yet track and field is still considered a professional sport).

¹⁵ See Rovell, *supra* note 6.

¹⁶ See Cyntrice Thomas, Thomas A. Baker III & Kevin Byon, *The Treatment of Non-Team Sports Under Section One of the Sherman Act*, 12 VA. SPORTS & ENT. L.J. 296, 307 (2013).

¹⁷ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 130 (2d Cir. 2004) (stating the collective-bargaining relationship between players and leagues is promoted by federal labor law).

¹⁸ See Sherman Antitrust Act, 15 U.S.C. § 1 (2016). ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

¹⁹ See Thomas, *supra* note 16, at 308 (noting that without the cooperation element found in team sport leagues, a non-team sport governing body is more apt to be considered as a single entity).

²⁰ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984).

straint of trade.²¹ Federal courts, however, have had a difficult time finding the right way to apply the single-entity defense to a variety of non-team sport governing bodies.²²

If the federal courts were to grant a broad single-entity defense for non-team sport governing bodies, that would severely limit the professional athletes' ability to challenge their governing body's decisions through the legal system.²³ As stated earlier, labor laws do not protect non-team sport athletes because they lack a union. Being locked out from § 1 of antitrust law would force the athletes to develop a case under § 2 of the Sherman Act, which governs monopolies.²⁴ It can hardly be said that any single stipulation, such as Nike's vague sponsorship stipulation, shows a governing body's intent to form a monopoly, making § 2 of the Sherman Act an unrealistic avenue for change in these situations.²⁵

Even though the single-entity defense has not been litigated in the context of athletes and league relationships, the relationship is so delicate that the issue needs to be discussed before an athlete chooses to sue his or her league. The single-entity defense should be narrowly tailored so that these non-team sport governing bodies are not exempt from antitrust challenges brought by their athletes. The easiest way for courts to implement this type of system would be to categorically include athlete challenges against their governing body under § 1 scrutiny. The courts would then be able to bypass any litigation necessary to prove or rebut a league's single-entity status whenever an athlete had a grievance against his or her league.

²¹ See *id.* (noting that an internal agreement that implements a policy for one single firm does not trigger the type of activity § 1 was designed to prohibit).

²² See Thomas, *supra* note 16, at 312–13 (noting that federal courts have not done an in-depth analysis for non-team sport leagues and the single-entity defense, and that these type of league structures will vary substantially, unlike the more uniform team sports).

²³ See Chris Sagers, *Why Copperweld Was Actually Kind of Dumb: Fury and the Once and Still Missing Antitrust Theory of the Firm*, 18 VILL. SPORTS & ENT. L.J. 377, 378 (2011) (noting that a grant of the single-entity defense leads to summary dismissal of a case).

²⁴ See 15 U.S.C. § 2 (2016) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .”).

²⁵ See *United States v. Grinnell Corp.*, 384 U.S. 563, 567, 576 (1966) (holding that because Grinnell owned three businesses that controlled 87% of the protective services business, it eliminated any potential competition and was therefore an unlawful monopoly); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (noting that having a monopoly power is not enough to violate § 2, the company must also engage in exclusionary conduct).

Part I of this Note discusses how the single-entity defense has been developed and used in the sports world. Part II discusses how the single-entity defense applies in non-team sport cases and the problems with its use. Part III analyzes why the single-entity defense should be narrowly tailored so as not to preclude athlete issues from antitrust protection. The Note will then offer a brief conclusion.

II. ANTITRUST AND ITS ROLE IN SPORTS

The antitrust laws have served an important role in how athletes and leagues interact on a business level for a number of years. The very nature of professional sports as a competitive industry leads to multiple areas being vulnerable to antitrust litigation. It is no wonder that when the Supreme Court implemented the single-entity defense in 1984, it became a popular tool for sports leagues to utilize in antitrust litigation. Before delving into the intricacies of antitrust law in the sporting world, it is critical to understand the antitrust basics.

A. *Antitrust Law and the Development of the Single-Entity Defense*

The Sherman Act governs federal antitrust law in the United States.²⁶ The Act is designed to regulate how businesses interact and compete in the marketplace.²⁷ It was first implemented to constrain the power that manufacturing companies obtained during the Industrial Revolution.²⁸ Moreover, the antitrust laws are closely tied to the economic marketplace under the theory that corporations' anticompetitive behavior would be detrimental to economic efficiency.²⁹

There are two main sections of the Sherman Act that govern this anticompetitive behavior.³⁰ Section 1 prevents two or more businesses or entities from colluding together in an effort to restrain trade or commerce.³¹

²⁶ See 15 U.S.C. §§ 1–7 (2016).

²⁷ See Thomas, *supra* note 16, at 298.

²⁸ See *Sherman Antitrust Act*, 2 ENCYCLOPEDIA OF AMERICAN BUSINESS, 697, 697 (W. Davis Folsom ed., rev. ed. 2011).

²⁹ See *id.* at 698 (As a basic principle of antitrust law and capitalism in general, fostering competition between corporations prevents price fixing agreements and gives consumers the power of choice. This power gives corporations the incentive to manufacture better products at a fair price, thus creating economic efficiency).

³⁰ See 15 U.S.C. §§ 1–2.

³¹ See *id.* at § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

Section 2 covers any attempt to monopolize by a single firm or by a firm in combination with any other entity.³² The key difference between the two sections is that § 1 does not reach unilateral conduct but rather governs colluding actions between separate entities.³³ Furthermore, § 2 only focuses on attempts to monopolize,³⁴ which is when one entity is the sole provider of a good or service in the marketplace and utilizes that power to actively reduce competition.³⁵ As a result, § 1 covers a much broader scope of potential misconduct than § 2.³⁶ Though the language of § 1 implies potentially expansive coverage, the section is only relevant when there is concerted action between separate entities.³⁷ Consequently, courts will not focus on independent business decisions under a § 1 antitrust challenge, and will instead consider only those actions between two or more entities that “actually threaten[] to chill competition.”³⁸

In an effort to reduce § 1 claims against single firms, the Supreme Court created the single-entity defense in its *Copperweld Corp. v. Independence Tube Corp.* decision.³⁹ In 1927, Copperweld purchased Regal Tube from Leer Siegler.⁴⁰ Copperweld then made Regal into a wholly owned subsidiary of its company.⁴¹ When one of Leer Siegler’s corporate officers formed Independence Tube to compete within Regal’s market,⁴² Copperweld and Regal sent letters to potential Independence customers that said that Copperweld would take the steps necessary against Independence to protect the trade

³² See *id.* at § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .”).

³³ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

³⁴ See 15 U.S.C. § 2.

³⁵ See *United States v. Grinnell*, 384 U.S. 563, 576 (1966) (holding that Grinnell’s significant hold on the marketplace was enough to be a monopoly power).

³⁶ See 15 U.S.C. §§ 1, 2; see also *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (holding that the § 1 provision did not define the types of contracts under its authority, so theoretically the classes of acts covered could be “broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce”).

³⁷ See Barak Orbach, *The Durability of Formalism in Antitrust*, 100 IOWA L. REV. 2197, 2211–12 (2015) (establishing the difference between concerted action and independent action and what is permissible conduct by such entities).

³⁸ Nathaniel Grow, *American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 476 (2011).

³⁹ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 776–77 (1984).

⁴⁰ See *id.* at 755–56.

⁴¹ See *id.* at 756.

⁴² See *id.*

secrets it purchased within the Regal deal.⁴³ Independence subsequently sued Copperweld and Regal, claiming that the two companies had conspired together in violation of § 1 of the Sherman Act.⁴⁴ The Supreme Court held that the actions of a parent company and its wholly-owned subsidiary must be viewed as a single enterprise under § 1.⁴⁵

The reason that the two entities were not considered to be separate was that the parent and its wholly-owned subsidiary had a “complete unity of interest.”⁴⁶ The majority denied the dissent’s opinion that Congress intended § 1 to have a broad reach,⁴⁷ and determined that Congress limited § 1 to concerted conduct only.⁴⁸ Therefore, a single firm’s decisions are governed under § 2 and are only unlawful when those actions threaten actual monopoly.⁴⁹

The distinction between the number of entities described in § 1 and § 2, as detailed above, allows for corporations to assert the single-entity defense whenever a § 1 challenge is brought against their allegedly restraining activity.⁵⁰ The logic behind keeping a single entity out of § 1 challenges is that a single entity is technically unable to conspire with itself. In practice then, the single-entity defense will act as a rule that allows for summary dismissal at the onset of litigation. Furthermore, the Supreme Court stated in *Copperweld* that Congress intentionally left a gap in the § 1 language so that antitrust challenges could not reach independent businesses.⁵¹ The

⁴³ See *id.* at 756–57.

⁴⁴ See *id.* at 757–58.

⁴⁵ See *id.* at 771–73, n. 21 (noting that “substance, not form should determine whether a[n] . . . entity is capable of conspiring under § 1”).

⁴⁶ See *id.* at 771 (asserting that the companies’ “objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one”).

⁴⁷ See *id.* at 785 (Stevens, J., dissenting) (“This Court has long recognized that Congress intended this language to have a broad sweep, reaching any form of combination . . .”).

⁴⁸ See *id.* at 776 (Majority opinion).

⁴⁹ See *id.* at 767–69 (noting that “an internal agreement to implement a single, unitary firm’s policies does not raise the antitrust dangers that § 1 was designed to police”).

⁵⁰ See Thomas, *supra* note 16, at 299.

⁵¹ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984) (“Subjecting a single firm’s every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.”).

Sherman Act leaves a single firm's potential anticompetitive activities or decisions free from judicial interference.⁵²

After the *Copperweld* decision, team sport leagues started to consistently assert that they were single entities immune from § 1 litigation.⁵³ Courts, however, had a difficult time determining how exactly these leagues would fit under a single-entity analysis.⁵⁴ The issue has necessarily required courts to do fact-intensive analyses of leagues' economic relationships, which often lead to mixed determinations of whether the defense applies.⁵⁵

B. An Overview of How Courts Handle Team Sport Leagues' Use of the Single-Entity Defense

To get a full understanding of how courts determine whether a league is a single entity, this section will review such cases from the team sports context. Courts have only ruled a team sport league to be a single entity once. In *Chicago Professional Sports Ltd. v. National Basketball Ass'n*,⁵⁶ the Chicago Bulls sued the National Basketball Association (NBA), claiming that the NBA's broadcasting rules and subsequent tax on games broadcasted to a national audience were a violation of the antitrust laws.⁵⁷ The Seventh Circuit ruled that in the realm of broadcasting rights the NBA acted more like a single firm than like independent actors of individual teams.⁵⁸ The court noted that each sports league was unique, and that there was no single formula to determine exactly how a single entity needs to be structured to receive the *Copperweld* treatment.⁵⁹ Furthermore, the court said that a league could operate as a single entity in one specific area, free from § 1 scrutiny, but then act more like a joint venture in another area, thus subjecting it to

⁵² See *id.* (interpreting the statute as allowing a single firm's restraints of trade that do not come from a "contract, combination or conspiracy" even if that anticompetitive conduct is indistinguishable from conduct by two firms that would be subject to § 1 scrutiny).

⁵³ See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002); *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996); see also Thomas, *supra* note 16, at 301.

⁵⁴ See Thomas, *supra* note 16, at 301 (noting that courts disagreed whether teams' cooperation was enough to deem the entire league as a single entity).

⁵⁵ See, e.g., *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Fraser*, 284 F.3d at 56; *Chi. Prof'l Sports Ltd.*, 95 F.3d at 597.

⁵⁶ 95 F.3d 593 (7th Cir. 1996).

⁵⁷ See *id.* at 595.

⁵⁸ See *id.* at 600.

⁵⁹ See *id.* (noting that each sport league is diverse and it is necessary to ask the *Copperweld* question one league at a time, and potentially one facet of each league at a time, because it is possible to act as a single entity in one area and not in another).

§ 1 litigation.⁶⁰ The court's approach exemplifies that the inquiry into whether the single-entity defense should apply to a particular league is necessarily fact-intensive and fact-dependent.

The First Circuit also had to determine whether a team sport league was a single entity in *Fraser v. Major League Soccer, L.L.C.*⁶¹ In this case, Major League Soccer (MLS) players sued their league, claiming that the league and its investors violated § 1 of the Sherman Act by agreeing not to compete for player services.⁶² The MLS had a unique structure wherein all of the teams were league-owned, which meant that the league negotiated all player contracts for the teams and essentially determined where a player would play.⁶³ The First Circuit was able to dismiss the case on grounds other than the single-entity defense, so whether the MLS was a single entity was not a key determinant for the case.⁶⁴ Nevertheless, the court noted that the league's structure was not necessarily that of a single entity because the league and its investors had potentially diverging interests, such as team revenues, that dis-incentivized them from colluding.⁶⁵

The Supreme Court's decision in *American Needle, Inc. v. National Football League* is the latest word on team sport leagues' use of the single-entity defense.⁶⁶ In 1963, the National Football League (NFL) teams voted to form a corporate entity, the National Football League Properties (NFLP), to handle all of the teams' intellectual-property interests.⁶⁷ Prior to this agreement, all of the teams had created licenses and marketed trademarks for hats and jerseys as individual corporations.⁶⁸ In 2000, the NFLP decided to give an exclusive license to Reebok to manufacture and sell headwear with NFL teams' logos on the merchandise.⁶⁹ This effectively ended the nonexclusive rights deals other companies had obtained through the NFLP.⁷⁰ American Needle, Inc., was one of the nonexclusive licensees that had a deal with a

⁶⁰ *See id.*

⁶¹ 284 F.3d 47, 55 (1st Cir. 2002).

⁶² *See id.* at 54–55.

⁶³ *See id.* at 53.

⁶⁴ *See id.* at 59.

⁶⁵ *See id.* at 57–58 (determining that it was doubtful that MLS could be a single entity because the “distinct entrepreneurial interests” distinguished the case from *Copperweld's* “complete unity of interest” assessment).

⁶⁶ 560 U.S. 183 (2010).

⁶⁷ *See id.* at 186.

⁶⁸ *See id.*

⁶⁹ *See id.* at 187.

⁷⁰ *See id.*

NFL team before Reebok.⁷¹ The NFL asserted that the NFLP was acting as a single entity and therefore was incapable of conspiring under § 1.⁷²

The Court prefaced its decision by saying that in these situations it must look at how the parties involved in the alleged anticompetitive conduct actually operated and whether that operation was a concerted action.⁷³ The Court noted that while aspects of the NFL, such as game scheduling, require certain cooperation, that type of cooperation did not justify treating the league as a single entity in the context of individually-owned intellectual property.⁷⁴ A unanimous Court held that the NFL teams were unable to successfully claim a single-entity defense because they were independently owned and managed businesses with no common objective.⁷⁵ In actuality, the teams competed in the intellectual-property market, and, in so doing, did not share a common interest with the entire league.⁷⁶ The collective licensing done by the NFLP subsequently deprived the market of independent decision-makers, which led to less potential competition.⁷⁷

The cases discussed above mostly deny a league's single-entity defense and consequently weaken leagues' ability to claim the defense. They are also a step toward facilitating the core purpose of the antitrust laws to foster competitiveness by recognizing the potential to restrain trade in each league.⁷⁸ In the context of sports, athletes often bring antitrust lawsuits

⁷¹ *See id.*

⁷² *See id.* at 187–88. The NFL argued that the NFLP acted as a “single driver” that pushed teams’ merchandise as a common interest for the entire league. *Id.* at 198.

⁷³ *See id.* at 195 (“The relevant inquiry, therefore, is whether there is a ‘contract, combination . . . or conspiracy’ amongst ‘separate economic actors, pursuing separate economic interests’ such that the agreement ‘deprives the marketplace of independent centers of decision making,’ and therefore of ‘diversity of entrepreneurial interests’ and thus of actual or potential competition.”) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002)).

⁷⁴ *See id.* at 204; *see also* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (deciding a case where the collegiate teams actually sued the NCAA, which shows that participants, including teams, will sue their league for potential § 1 violations).

⁷⁵ *See Am. Needle*, 560 U.S. at 196.

⁷⁶ *See id.* at 197; *Copperweld*, 467 U.S. at 771. It should be noted that the *Copperweld* standard required that entities needed to have a “complete unity of interest” to be deemed a single entity not capable of conspiring. *Id.* at 771.

⁷⁷ *See Am. Needle*, 560 U.S. at 197.

⁷⁸ John A. Fortunato & Jef Richards, *Reconciling Sports Sponsorship Exclusivity with Antitrust*, 8 TEX. R. ENT. & SPORTS L. 33, 35–36 (2007) (noting further that corporate sponsorship exclusivity appears to decrease competition and that antitrust law could help courts mitigate certain issues).

against their respective leagues in an effort to gain more freedom from league rules, whether they be economic or based on general policy matters.

C. Comparing Team Sport League Athletes and Non-Team Sport Athletes

When leagues place restraints on their athletes, antitrust law is often used to help resolve the disputes.⁷⁹ In order for the leagues' rules affecting athletes to be considered valid, the rules have to encourage competition or at least have a business incentive.⁸⁰ However, if league rules fall within those general categories, the league normally has free reign in creating certain stipulations against players. The following subsections will compare the experience of team sport and non-team-sport athletes in contesting their respective league rules to provide a better view of the avenues available to each type of athlete.

1. Team Sport Athletes' Options to Challenge League Rules

In the team sport context, disputes between athletes and leagues often do not receive antitrust protection because players' unions represent athletes and can resolve the players' grievances without resorting to litigation.⁸¹ Moreover, the Supreme Court has long recognized a nonstatutory exemption from antitrust sanctions for union-employer agreements.⁸² The exemption allows for restraints on competition that develop through the collective bargaining process to be immune from antitrust sanctions.⁸³ The Court said in *Brown v. Pro Football, Inc.* that exempting the union and employer agreements helps ensure that a meaningful bargaining process can take place be-

⁷⁹ See, e.g., *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002); see also ABA SECTION OF ANTITRUST LAW, SPORTS AND ANTITRUST LAW 74-75 (2014).

⁸⁰ See ABA SECTION OF ANTITRUST LAW, *supra* note 79, at 78.

⁸¹ See Timothy Bolen, Note, *Singled Out: Application and Defense of Antitrust Law and Single Entity Status to Non-Team Sports*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 80, 94 (2010) (noting the difference between team sport leagues and non-team sport leagues is the players union in team sport leagues that have collective bargaining agreements with the governing body).

⁸² See *Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).

⁸³ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996) (“[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.”).

tween the employee and employer.⁸⁴ The case *Clarett v. National Football League* exemplifies how labor law and antitrust law interact within the sports world.

In *Clarett*,⁸⁵ Maurice Clarett challenged the NFL's draft eligibility rule, which requires entrants to be at least three years removed from high school, by claiming the rule was an unreasonable restraint of trade.⁸⁶ Clarett's antitrust claim failed because its remedy fell within the province of labor law.⁸⁷ The court found that the eligibility rules were "mandatory bargaining subjects."⁸⁸ Accordingly, the players' union and the NFL had to come to an agreement on the matter through the CBA negotiation process.⁸⁹ The rule developed by the NFL and the players union could not be considered a restraint on the marketplace because athletes had a voice in the matter through the labor process.⁹⁰

Unions in the professional sports world are different from regular industry unions because athletes have a particular set of skills that do not translate well to other professions.⁹¹ The athletes' narrow skillset means that most of the time there are no other legitimate alternatives for similar employment for the athletes, so they are unlikely to outlast a governing body in a labor dispute.⁹² Leagues, consequently, often have the upper hand in labor negotiations.

Just because players have a union does not mean that labor law is their only legal avenue, however. In response to some disputes, players will often dissolve their union and then bring an antitrust suit against the league as

⁸⁴ *See id.*

⁸⁵ *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004).

⁸⁶ *See id.* at 126.

⁸⁷ *See id.* at 143 ("It would disregard those [labor law] policies completely . . . to allow Clarett to undo what we assume the NFL and its players union regarded as the most appropriate or expedient means of settling their differences.").

⁸⁸ *See id.* at 139.

⁸⁹ *See id.* at 142.

⁹⁰ *See id.* at 143 (stating that Clarett's case was just an employee's disagreement with a policy established by the league and the labor union that did not amount to antitrust violations).

⁹¹ *See* Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1236–37 (2012).

⁹² *See id.* ("With no competing league, most players have no legitimate alternative job opportunity and thus, are unlikely to outlast management in a labor dispute." (quoting Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 403 (1989))).

individuals, rather than by using labor laws as a collective group.⁹³ As noted above, such action likely would not get blocked by the single-entity defense because the teams composing the league have competing interests. The flexibility of having a players' union gives athletes in team sports the benefit of a union while maintaining antitrust law as a safety net.⁹⁴

2. Non-Team Sport Athletes' Options to Challenge League Rules

In contrast to team sports leagues, in non-team sports, an athlete's ability to challenge league rules is limited by both labor law and antitrust law.⁹⁵ There is often no union representation for the athletes, which means there is no CBA between the athletes and the leagues that allows for negotiation on rules implemented by the league, nor is there a labor law resolution. Instead, the athletes are independent contractors participating in the league, not employees of the league like team sport athletes.⁹⁶ Independent contractors contract to do work on their own accord, and their employer has no control over how that work is performed.⁹⁷ Comparatively, an athlete who is an employee of a team sport league is bound by the union's CBA and must adhere to those employment agreements.⁹⁸ With no CBA for non-team sport athletes, athletes theoretically could bring § 1 challenges against leagues because there is no nonstatutory exemption.⁹⁹ This means that before the

⁹³ See *Brady v. Nat'l Football League*, 644 F.3d 661, 663 (8th Cir. 2011); *Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

⁹⁴ See *Feldman*, *supra* note 91, at 1259–60 (noting that when there is no conflict between labor law and antitrust law, then antitrust law should be given its full effect to govern).

⁹⁵ See *Bolen*, *supra* note 81, at 94; *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984).

⁹⁶ See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 100–01 (2008); Jeré Longman, *Nick Symmonds, a Sidelined Track Star, Continues to Break From the Pack*, N.Y. TIMES, Aug. 14, 2015, http://www.nytimes.com/2015/08/15/sports/olympics/nick-symmonds-a-sidelined-track-star-continues-to-break-from-the-pack.html?_r=0, {<https://perma.cc/R69K-998U>} (noting that “[a]thletes are not unionized, are not governed by a collective bargaining agreement and perform as independent contractors”).

⁹⁷ See *Russel v. Torch Club*, 97 A.2d 196, 197 (Hudson Cty. Ct. 1953).

⁹⁸ See *Mitten*, *supra* note 96, at 104.

⁹⁹ See *id.* at 110 (Stating that because individual athletes are not employees of a league, they have no union to collectively bargain on their behalf); *Feldman*, *supra* note 91, at 1238 (describing how the collective bargaining agreement between players and leagues effectively eliminates antitrust litigation because of the nonstatutory exemption).

single-entity defense was implemented, an athlete's antitrust claim would be heard without first having to determine how the league was structured.¹⁰⁰

For example, *Deesen v. Professional Golfers' Ass'n* involved an independent athlete challenging golf's governing body's eligibility policy.¹⁰¹ *Deesen* was decided eighteen years before the *Copperweld* decision. In the case, Herbert Deesen challenged the Professional Golfer's Association's (PGA) regulation that governed athletes' eligibility for PGA-sponsored tournaments as a restraint and boycott in violation of § 1.¹⁰²

The Ninth Circuit held that these rules were not put in place to destroy competition, but rather to foster it by maintaining high-quality competition.¹⁰³ In the court's analysis, there was only a small discussion of what the PGA was and not how the entity was structured as a business.¹⁰⁴ The court instead focused on the eligibility rule at issue.¹⁰⁵ The court's focus on the issue allowed it to determine that the league's rule was reasonably tailored to promote competition, meaning that Deesen's claim did not amount to a § 1 violation.¹⁰⁶ After the *Copperweld* decision, non-team sport governing bodies sought to use the single-entity defense as a way to immunize themselves from antitrust actions. The results of the defense have been mixed, much like the results seen when team sport leagues attempt to use the defense.

The Supreme Court's decision in *Copperweld* established a defense that significantly affected how the courts view antitrust litigation. The Court's determination that corporations that have a "complete unity of interest" cannot be subject to § 1 scrutiny opened the door for a variety of businesses to seek § 1 immunity, including team sport leagues. While the *American Needle* decision altered how the single-entity defense is utilized by team sports, there are still questions about how the defense should apply to non-team sport leagues.

¹⁰⁰ See *Deesen v. Prof'l Golfers' Ass'n*, 358 F.2d 165 (9th Cir. 1966).

¹⁰¹ See *id.*

¹⁰² See *id.* at 166.

¹⁰³ See *id.* at 170 ("The means PGA has chosen to accomplish this purpose also appear to be reasonable insofar as this record reveals, having in view the national scope of the activity and the practical problems which had to be met. . . . Deesen did not establish a violation of section 1 of the Sherman Act.").

¹⁰⁴ See *id.* at 166. The court only gives information that the PGA is an association of 4,300 golfers and that it sponsors all of the professional golf tournaments in the United States.

¹⁰⁵ See *id.* at 167–68. The court dedicates about five paragraphs to describing the rule that the PGA implements for eligibility purposes and what the exact issue with that rule is.

¹⁰⁶ See *id.* at 170.

III. IMPLEMENTING THE SINGLE-ENTITY DEFENSE IN A NON-TEAM SPORT CONTEXT

The number of cases where the single-entity defense has been discussed for non-team sport leagues is small. Further, the number of articles analyzing the defense's use in this area is overshadowed by articles written about team sports' use of the defense.¹⁰⁷ Non-team sports pose several problems for judicial analysis as their league structures can vary and their legal problems are often different than those of team sports.¹⁰⁸ These factors, along with the necessity of a fact-intensive analysis, have caused courts to struggle with properly defining whether these governing bodies are single entities. While some courts note that they have historically subjected sports leagues to § 1 scrutiny,¹⁰⁹ those decisions have mostly been made in *team sport* cases.¹¹⁰ This section will discuss how courts have analyzed the single-entity defense as applied to non-team sport leagues. It will then review scholars' opinions on how the defense has become flawed. Finally, it will show how the law has moved slightly away from using the defense by implementing other dismissal tools.

A. *The Single-Entity Defense Applied to Non-Team Sport Leagues*

When assessing whether a non-team sport league is a single entity, courts will still implement a fact-intensive analysis of whether there is independent economic decision-making. The Second Circuit determined that there was no independent decision-making in *Volvo North America Corp. v. Men's International Professional Tennis Council*, which led to holding that the single-entity defense did not apply.¹¹¹ The Men's International Professional

¹⁰⁷ See Thomas, *supra* note 16, at 297.

¹⁰⁸ See *id.* at 307–08 (suggesting that the structures of non-team sport leagues are not well known, which makes courts hesitant on how to apply antitrust law to them).

¹⁰⁹ See *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 599 (7th Cir. 1996) (noting that courts have preferred to treat professional sports as joint ventures rather than as single firms).

¹¹⁰ See, e.g., *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978). Each one of the challenged leagues is a team sport.

¹¹¹ See, e.g., *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) (noting that the Men's International Professional Tennis Council was made up of several different entities, which ultimately led to holding it susceptible to § 1 scrutiny).

Tennis Council (MIPTC) was a governing body for professional tennis that scheduled and presided over tournaments for Grand Prix tennis events.¹¹² Volvo had been a sponsor for some of these tournaments for several years before the litigation.¹¹³

Volvo and three other plaintiffs brought multiple claims of antitrust violations against MIPTC, stating that the restrictions MIPTC implemented limited their ability to compete with MIPTC-sanctioned events.¹¹⁴ Before analyzing the § 1 claim, the court first established that there must be an agreement between two or more persons for the claim to fall under § 1 liability.¹¹⁵ The court held that even though it is impossible to conspire with oneself, the MIPTC was not making singular decisions.¹¹⁶ The MIPTC was an association that consisted of other tennis associations, tournament owners, and professional tennis players.¹¹⁷ These connections meant that the MIPTC was acting more as a joint venture rather than a single entity and subsequently could violate § 1.¹¹⁸

A similar decision was made in *Deutscher Tennis Bund v. ATP Tour, Inc.*¹¹⁹ The Association of Tennis Professionals (ATP) ran a tour, comprised of various tournaments, for professional men and women tennis players.¹²⁰ The plaintiffs in this case produced and managed tournaments as part of the ATP Tour.¹²¹ When the ATP created its Brave New World plan for tennis tournaments, it demoted the plaintiff's tournaments to tier II tournaments, making them less attractive to players.¹²² The plaintiffs claimed that the defendants had violated § 1 of the Sherman Act by conspiring to control the best tennis players and creating a mandatory class of tennis tournaments.¹²³

¹¹² See *id.* at 58.

¹¹³ See *id.* at 59.

¹¹⁴ See *id.* at 60–62.

¹¹⁵ See *id.* at 70 (“An agreement between two or more persons is fundamental to any § 1 claim.”).

¹¹⁶ See *id.* at 71.

¹¹⁷ See *id.* (noting that joint ventures, like sports leagues, can violate § 1 and therefore, appellants had adequately shown that there was a “contract, combination, or conspiracy”).

¹¹⁸ See *id.* (deciding that because there were multiple actors coming together to create these tournaments, the plaintiff in the case had adequately claimed that the element of a contract, combination, or conspiracy existed).

¹¹⁹ *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2009).

¹²⁰ See *id.* at 824–25.

¹²¹ See *id.* at 826–27 (The Brave New World plan reorganized the ATP tour in an effort to boost the tour's popularity). *Id.* at 824.

¹²² See *id.* at 827.

¹²³ See *id.*

The court ultimately decided that the plaintiffs could not prevail on a § 1 violation because they did not establish a relevant market.¹²⁴ However, the court still commented on whether ATP was a single entity. ATP contended that its decisions were internal and therefore did not fall under § 1 scrutiny.¹²⁵ The court determined that the agreements between all of ATP's tournament members could have led to less competition in the market because the individual tennis tournaments normally competed over the player talent featured in the competitions.¹²⁶ Accordingly, any agreement between the ATP tournament members could have been subject to § 1 scrutiny.¹²⁷

In contrast to these decisions, the Fourth Circuit held that the PGA was a single entity in *Seabury Management, Inc. v. Professional Golfers' Ass'n of America*.¹²⁸ In 1989, Seabury entered into a five-year contract with the Mid-Atlantic Section of Professional Golfers' Association (MAPGA) that allowed Seabury to run a golf trade show under MAPGA sponsorship.¹²⁹ After having some difficulties in hosting a show within MAPGA's regional section, the PGA ordered MAPGA to pull its sponsorship contract with Seabury.¹³⁰ Seabury brought several claims against the PGA and the MAPGA, including a restraint of trade claim in violation of § 1 of the Sherman Act.¹³¹ After an examination of the relationship between the PGA and the MAPGA, the court found that the two were acting as a single entity.¹³²

The court reasoned that even though *Copperweld* did not decide whether a parent corporation can conspire with an affiliate, there had been cases where related entities are not capable of conspiring together.¹³³ The court affirmed the lower court's reasoning that the PGA and the MAPGA operated more like a single unit and were unable to conspire in violation of the

¹²⁴ See *id.* at 828.

¹²⁵ See *id.* at 835–37. ATP alleged that because each of its members relied upon each other to create a common product in a tennis tour, the members had always cooperated to produce a tour and never competed against one another. *Id.* at 835.

¹²⁶ See *id.* at 837.

¹²⁷ See *id.* (“The record in this case indicates that the individual tennis tournaments traditionally compete for player talent. An agreement restricting this competition should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour.”).

¹²⁸ *Seabury Mgmt., Inc. v. Prof'l Golfers' Ass'n of Am., Inc.*, No. 94-1814, 1995 WL 241379 (4th Cir. Apr. 26, 1995).

¹²⁹ See *id.* at *1.

¹³⁰ See *id.*

¹³¹ See *id.* at *1–2.

¹³² See *id.* at *3.

¹³³ See *id.* at *2 (citing *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 703–05 (4th Cir. 1991)).

antitrust laws.¹³⁴ The fact that each of the MAPGA's decisions had to be approved by the PGA showed the court that this type of relationship fell under the *Copperweld* rule.¹³⁵ These three cases are the extent of the single-entity defense jurisprudence and have their own specific issues, not including the athlete-against-league scenario.¹³⁶

Even though courts have not answered the single-entity defense question to the athlete-against-league scenario, they have addressed the employee-against-employer problem in similar contexts.¹³⁷ In *Bolt v. Halifax Hospital Medical Center*, the Eleventh Circuit held that it was legally possible for a hospital and its medical staff to conspire with each other in the context of awarding physicians staff privileges, thus opening the hospital up to § 1 scrutiny.¹³⁸ The court determined that because each staff member could have potentially competed with other staff physicians, the doctors were considered separate economic entities.¹³⁹

The court did not find a basis for holding that a hospital and its staff were analogous to a corporation and its officers, which cannot conspire as a matter of law.¹⁴⁰ Nevertheless, even though there was a theoretical possibility for the hospital and staff to conspire, the plaintiff still needed to prove that conspiratorial acts were taken.¹⁴¹ The reasoning stands that although a corporation is vulnerable to § 1 litigation, the corporation is not automati-

¹³⁴ See *id.* at *3 (agreeing with the district court that the PGA and its members “functioned as a single economic unit,” and that the PGA had ultimate authority over other sections’ actions (citing *Seabury Mgmt., Inc. v. Prof’l Golfers’ Ass’n of Am.*, 878 F. Supp. 771, 777 (D. Md. 1994)).

¹³⁵ See *Seabury*, 878 F. Supp. at 778.

¹³⁶ See *id.*; *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 828 (3d Cir. 2009); *Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council*, 857 F.2d 55, 71 (2d. Cir. 1988).

¹³⁷ See *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 813 (11th Cir. 1990).

¹³⁸ See *id.* at 814, 819.

¹³⁹ See *id.* at 819 (“We perceive no basis, however, for holding that the members of a medical staff are legally incapable of conspiring with one another. Each member practices medicine in his individual capacity; each is a separate economic entity potentially in competition with other physicians.”).

¹⁴⁰ See *id.* (“A hospital and the members of its medical staff, in contrast [to corporations and their agents], are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a ‘conspiracy.’”). *But see* *Weiss v. York Hosp.*, 745 F.2d 786, 817 (3d Cir. 1984) (holding that hospital staff members acted like an officer to a corporation because they could “make staff privilege decisions on behalf of the hospital.”). Further, the court noted that even though staff members had independent economic interests, the staff as an entity did not have an interest in competing with the hospital. *Id.*

¹⁴¹ See *Bolt*, 891 F.2d at 819 (“That the members of the committees could conspire with each other and with their hospital does not mean, however, that every

cally found guilty upon determination that it is able to conspire. With that said, a single instance where the single-entity defense failed is not dispositive of all the issues that surround the defense's use. It is necessary then to consider how these issues may be resolved before the issue fully presents itself. Before trying to analyze how the single-entity defense applies to non-team sports leagues, the Note will give an overview of the current state of the defense.

B. *Has the Single-Entity Defense Become Hopelessly Flawed?*

The single-entity defense has been in place for thirty-one years. During that time span, the use of the defense has not come without its difficulties or critiques by some scholars.¹⁴² For example, Cleveland State University Professor Chris Sagers argues that the single-entity defense is really an unneeded obstacle in antitrust litigation.¹⁴³

Professor Sagers's argument is that while the defense provides a way for a defendant to receive an early dismissal, antitrust is already abundant with quick-removal practices, making an additional avenue for removal unnecessary.¹⁴⁴ There is also the idea that the single-entity defense will protect individual firms from frivolous lawsuits, but Professor Sagers offers a contrary argument that frivolous suits would likely be dismissed on the merits alone or not brought at all.¹⁴⁵ Furthermore, because the single-entity defense is a difficult issue to resolve, the legal process slows down in order to conduct discovery for the sole issue of whether a league is a single entity.¹⁴⁶ Then, after a court determines whether the case should continue or not, parties will start additional discovery on the actual antitrust issue, which is a burdensome process in itself.¹⁴⁷ However, if a court decides to grant summary judgment

action taken by the committees and hospital satisfies the contract, combination, or conspiracy requirement of section 1 of the Sherman Act.”).

¹⁴² See Sagers, *supra* note 23, at 378 (claiming that the decision made in *Copperweld* now seems more regrettable than ever before).

¹⁴³ See *id.* at 378.

¹⁴⁴ See *id.* at 378 n.7 (listing several ways in which an antitrust suit can get thrown out at the early stages of litigation, such as the *Twombly* pleading standard and statutory exemptions for some industries).

¹⁴⁵ See *id.* at 379.

¹⁴⁶ See *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 739 (7th Cir. 2008), *rev'd*, 560 U.S. 183 (2010) (noting that the only discovery done before summary judgment was to determine if the NFL qualified as a single entity).

¹⁴⁷ See *id.*; see also Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 901 (2009).

ment to a league on the single entity issue, then no discovery is performed for the actual antitrust issue at all.¹⁴⁸ Therefore, the single-entity defense either unnecessarily lengthens an already-grueling litigation process, or the defense prematurely ends a case before adequate discovery for the anticompetitive practice is even started.

Moving forward, scholars claim that *Copperweld* only answered a very narrow question of antitrust law—whether a parent company and wholly-owned subsidiary were a single entity—but gave no consideration to the fact that other cases can become much more complex.¹⁴⁹ Lower courts have used the *Copperweld* opinion in various ways to try to distinguish between what concerted action is and what unilateral action is.¹⁵⁰ Courts have created multiple types of judicial tests because the criteria for determination of a single entity is general and various.¹⁵¹ For instance, courts have examined whether businesses had complete ownership, majority ownership, or potential for competition, along with many other tests, to answer the singular question of whether the challenged agreement was “fraught with anticompetitive risk.”¹⁵² Further, the courts have diverged from each other on how to properly apply the single-entity defense to the point that there is no consistency, and the defense has evolved into an expensive precursor to litigation rather than being a way to filter meritless claims.¹⁵³ Even with the observed problems from scholars, the single-entity defense still plays a key role in antitrust, but the Supreme Court has started to whittle away at its expansiveness.

¹⁴⁸ See *Am. Needle*, 538 F.3d at 739; see also Feldman, *supra* note 147, at 894.

¹⁴⁹ See *Copperweld Inc. v. Indep. Tube, Corp.*, 467 U.S. 752, 755 (1984); Sagers, *supra* note 23, at 386.

¹⁵⁰ See *O'Bannon v. NCAA*, No. C 09-1967 CW, 2010 WL 445190, at *3 (N.D. Cal. Feb. 8, 2010) (holding that a former collegiate athlete had plead sufficient facts to show a potential conspiracy between the NCAA and its members by showing that the NCAA member presumably abided by its bylaws); Feldman, *supra* note 147, at 855.

¹⁵¹ See Sagers, *supra* note 23, at 390-93 (discussing the flaws in the Second Circuit's decision in *American Needle* and other cases where each decision showed nothing more than “empirically unsupported and theoretically unbounded hunches”).

¹⁵² See Feldman, *supra* note 147, at 855.

¹⁵³ See Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL*, 2010 CATO SUP. CT. REV. 369, 400 (2010).

C. *Narrowing the Broad Copperweld Decision*

In the past couple of years, Supreme Court decisions have started to narrow *Copperweld*, perhaps because of the defense's ambiguous criteria.¹⁵⁴ Professor Gabriel Feldman has argued that because of the complexity of single-entity defense problems, the courts should focus on simplifying the resolution to § 1 cases.¹⁵⁵ The Supreme Court's decision in *American Needle* seems to have mitigated some of those issues.¹⁵⁶ For example, the decision narrowed the number of businesses that could receive *Copperweld* protection.¹⁵⁷ Under *American Needle*, it is necessary that there be complete ownership from a single firm for there to be a unitary economic interest.¹⁵⁸

In addition to the *American Needle* decision, the single-entity defense's use was further limited by *Bell Atlantic Corp. v. Twombly* because a plaintiff who wants to challenge ordinary business decisions through antitrust law must allege a plausible claim of anticompetitive effects from such a practice.¹⁵⁹ In effect, *Twombly* acts as a substitute to the single-entity defense's job of filtering out meritless claims. *Twombly*, however, provides for a better gatekeeping procedure than the single-entity defense because its dismissal occurs early at the pleading stage of litigation, compared to the necessary discovery stage for the single-entity defense. Because of these implementations, the single-entity defense is not as robust as it once was but is still a tool in antitrust litigation.

Even with the significant changes to antitrust litigation, the single-entity defense serves a purpose in certain circumstances. The Court in *American Needle* said that there may be times where the league collectively owns a piece of intellectual property that could be used in commerce without facing § 1 scrutiny.¹⁶⁰ Nevertheless, how courts analyze the single-entity defense

¹⁵⁴ See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 183 (2010); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 544 (2007); see also Stone, *supra* note 153, at 395, 405 (noting that *Copperweld* was narrowed by *American Needle* by requiring full common ownership to obtain single-entity status and by *Twombly*).

¹⁵⁵ See Feldman, *supra* note 147, at 902, 915–16.

¹⁵⁶ See *Am. Needle*, 560 U.S. at 191 (noting that the Court favors functional considerations of how the parties in the alleged anticompetitive conduct actually operate); Stone, *supra* note 153, at 394–98 (analyzing all of the implications that the *American Needle* decision has on how antitrust litigation will proceed after the case).

¹⁵⁷ See Stone, *supra* note 153, at 400.

¹⁵⁸ See *id.* at 395.

¹⁵⁹ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007) (changing the pleading standard of antitrust complaints by requiring complaints, taken as true, to show that an actual agreement was made).

¹⁶⁰ See *Am. Needle*, 560 U.S. at 198.

has changed. The decision in *American Needle* shifted the focus from asking whether separate entities seem like one firm to asking whether there are independent decision-makers acting together to foreclose competition. This shift is likely to narrow the types of issues and cases moving forward in antitrust litigation. With that being said, lower courts have not performed an in-depth analysis concerning whether the single-entity defense applies to non-team sport leagues, and, it is unclear how *American Needle* will affect these unique governing bodies.¹⁶¹

The single-entity defense has been used sparingly by non-team sport governing bodies with inconsistent results. Because not every non-team sport governing body is structured similarly to team sport leagues, applying the defense categorically to every issue is not an option. While the Supreme Court has narrowed the defense slightly, it is still unclear how this controversial defense should be applied to the league-athlete relationship.

IV. PROPOSAL TO NARROWLY TAILOR THE SINGLE-ENTITY DEFENSE FOR NON-TEAM SPORTS

The single-entity defense was created in a very narrow *Copperweld* holding and focused solely on the potential harm that concerted action would have on competitors to the alleged conspiring firms.¹⁶² The decision does not provide an adequate basis for distinguishing between a § 1 violation and a § 2 violation. The Court only concerned itself with Congress's intent to exclude unilateral conduct from § 1 scrutiny but never provided a definition for what exactly concerted action would look like.¹⁶³ Simply stating that a parent company and its wholly owned subsidiary could not be subject to § 1 scrutiny because they had a "complete unity of interest" does not give adequate insight into how courts should handle § 1 litigation. Cases such as *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*¹⁶⁴ provide for a more clear analysis on what would justify § 1 scrutiny.¹⁶⁵ Because the *Copperweld* decision failed at being a filter to meritless claims, it is necessary to recon-

¹⁶¹ See Thomas, *supra* note 16, at 312.

¹⁶² See *Copperweld Inc. v. Indep. Tube, Corp.*, 467 U.S. 752, 778 (1984) (focusing on how a single firm's anticompetitive decision or action would affect a competitor, but did not consider the broad implications of antitrust law).

¹⁶³ See *id.* at 775 (noting that the plain language of the Sherman Act shows that courts should accord a difference between unilateral and concerted action).

¹⁶⁴ 475 U.S. 574 (1986).

¹⁶⁵ See *id.* at 575 (noting that a plaintiff must show evidence that tends to show the alleged conspirators did not act independently, focusing the court's attention on the allegedly unlawful activity, which is more helpful than determining if there is a common interest).

sider the scope of the single-entity defense. This section aims to explain the difficult position non-team sport athletes are placed in, argue why the single-entity defense is unnecessary in this area of sports, exemplify how non-team sport athletes are treated unfairly in comparison to team sport athletes, and finally offer a potential solution to the problem.

Oftentimes in sports, antitrust law extends beyond considering the potential effect that conspiracies have on competing firms and is instead used to protect athletes from the anticompetitive practices of the league.¹⁶⁶ In other words, instead of a running company, like Asics, challenging the USATF's sponsorship policies, the athletes can utilize antitrust laws for their own benefit. However, with no clear answer as to how the single-entity defense applies to non-team sport leagues, it is possible that these athletes' rights could be barred from antitrust protection.

A. *The Single Entity Defense Provides an Unfair Roadblock to Non-Team Sport Athletes' Legitimate Claims*

As exemplified by the situation between USATF and its athletes, non-team sport leagues can create anticompetitive rules that ultimately injure their athletes.¹⁶⁷ A decision that may seem harmless on its face in actuality causes a league's athletes to suffer financially to the point that they can no longer feasibly pursue their careers. This situation could theoretically evolve into a potential lawsuit brought by either a single athlete or a number of athletes. This section will outline the complexities of the single-entity analysis as well as explain why the defense is unfair to non-team sport athletes.

In the hypothetical track and field lawsuit, USATF could be immune from an antitrust claim because it made its rule as a "single entity" and thus did not conspire with another corporation. A court would necessarily have to analyze the league's structure to verify the league's claim. What makes this analysis difficult is USATF's league structure could be considered as a single entity or not depending on which area of the organization is analyzed.

¹⁶⁶ See, e.g., *Brady v. Nat'l Football League*, 644 F.3d 661, 663 (8th Cir. 2011); *Deesen v. Prof'l Golfers' Ass'n*, 358 F.2d 165, 166 (9th Cir. 1966) (exemplifying that anticompetitive challenges do not only come from competitors in the marketplace, but can come within an organization by its employees).

¹⁶⁷ See Layden, *supra* note 11 (noting that USATF's Statement is met with natural resistance from athletes because it requires non-Nike athletes to wear Nike equipment to their financial detriment).

USATF's main governing body consists of one board of directors.¹⁶⁸ The not-for-profit organization establishes grassroots programs, selects and manages the USA national team, and establishes the rules and regulations for the sport.¹⁶⁹ Furthermore, the organization runs the USATF Championship Series, which is a series of track and field meets sponsored by various companies.¹⁷⁰ USATF also has fifty-seven associations around the country, each with multiple running clubs.¹⁷¹ These constituencies choose officers, members, and delegates who represent the associations at the USATF's Annual Meeting.¹⁷² There are more than 126,000 members and close to 3,500 running clubs under USATF.¹⁷³ What makes the single-entity determination difficult is that, as in *Seabury*, USATF mirrors how the PGA and its affiliates were structured by having one final decision maker,¹⁷⁴ but it also has a similarity to how the tennis associations worked with the individual tennis-tournament planners in *Volvo* and *Deustcher*.¹⁷⁵ Because of the league's ambiguous structure, it could be difficult for a court to decide what capacity the league operates in regards to the creation of the Statement.

USATF claims that its Statement has been in place for a long period of time and is a common practice overall within the sport.¹⁷⁶ This would seemingly show that USATF was adhering to protocol and was neither creating a conspiracy with Nike or Nike athletes, nor contracting with Nike to restrain

¹⁶⁸ See *Board of Directors*, USATF, <http://www.usatf.org/About/Committees/Board-of-Directors.aspx>, {<https://perma.cc/AL9G-78A4>} (last visited Sept. 28, 2015).

¹⁶⁹ See *About USATF*, USATF, <http://www.usatf.org/About.aspx>, {<https://perma.cc/HVL8-XWL3>} (last visited Oct. 25, 2015).

¹⁷⁰ See *USATF Championship Series - Outdoor*, USATF, <https://www.usatf.org/Events---Calendar/2015/Home/2015-USATF-Outdoor-Championship-Series.aspx>, {<https://perma.cc/X9VF-F6UQ>} (last visited Oct. 25, 2015).

¹⁷¹ See *About USATF*, *supra* note 169.

¹⁷² See Nick Weldon, *USATF Versus Its Critics: Who's Off Track?*, RUNNER'S WORLD, <http://www.runnersworld.com/general-interest/usatf-vs-critics-whos-off-track>, {<https://perma.cc/N4EE-DMH8>} (last visited Feb. 7, 2015).

¹⁷³ See *id.*

¹⁷⁴ See *Seabury Mgmt., Inc. v. Prof'l Golfers' Ass'n of Am.*, 878 F. Supp. 771, 777 (D. Md. 1994) (noting that the PGA had ultimate authority over its individual sections actions), *aff'd in part, rev'd in part* by *U.S. v. Florea*, 52 F.3d 322 (4th Cir. 1995).

¹⁷⁵ See *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 837 (3d Cir. 2010).

¹⁷⁶ See *Statement from USATF Regarding Nick Symmonds*, USATF, <http://www.usatf.org/About/Statements/Nick-Symmonds.aspx>, {<https://perma.cc/NNU4-Z5RZ>} (last visited Oct. 27, 2015).

trade. However, the contract between USATF and its athletes via the Statement has resulted in a restraint of trade, whether intentional or not. That contract has caused anticompetitive actions by both USATF and Nike in enforcing the Statement that at least raises an antitrust question. USATF's unilateral structure combined with its strict, anticompetitive practices make it unclear whether such a decision should result in § 1 scrutiny. What makes the uncertainty more unsettling is that non-team sport athletes may never be able to have their complaints heard in court.

The non-team-sport athlete does not benefit from having a labor relationship with his or her league through an athletes' union. With no labor union, the only voice an athlete has with the governing body is informal and would only be taken as suggestive rather than instrumental.¹⁷⁷ Without a union, then, athletes do not have the option to challenge league rules through labor law.¹⁷⁸ Because there are no athletes' unions for non-team sport leagues, these leagues are theoretically more susceptible to antitrust scrutiny.¹⁷⁹ While this would be beneficial to non-team-sport athletes who cannot take advantage of labor laws, the antitrust legal avenue can be blocked by the single-entity defense, leaving the athletes with almost zero options to settle their grievances.¹⁸⁰ Instead of exempting a non-team sport league with a broad single-entity defense, the courts need to create a policy that makes the league susceptible to antitrust lawsuits in specific areas of league activity and decision-making to limit the chances of athletes being taken advantage of.

If non-team sport leagues establish a defense to antitrust suits because they are a "single entity," then questions of whether league actions against

¹⁷⁷ See *id.* (noting leagues such as the NFL, NBA, NHL, and MLB form collective bargaining agreements with their athletes "that dictate the terms and conditions of employment for the athletes" and no such agreement is present for athletes and non-team sport leagues).

¹⁷⁸ See Feldman, *supra* note 91, at 1225 ("A basic tenet of labor law holds that employees have a right to choose not to be represented by a union and to refrain from collective bargaining. If employees choose to forego collective bargaining and opt to negotiate and compete for employment opportunities individually, antitrust—and not labor law—applies.").

¹⁷⁹ See Thomas, *supra* note 16, at 307 ("There are no collective bargaining relationships between athletes and any of the governing bodies of non-team sports. As a result, they are more vulnerable to Section One challenges.").

¹⁸⁰ See *id.* (noting that, despite *American Needle*, non-team sport leagues have not given up the single-entity defense and opining that the leagues should not give it up).

athletes create an illegal restraint of trade would go unanswered.¹⁸¹ The broad power would leave athletes vulnerable to unfair practices because the non-team sport leagues would not be held accountable by any outside party. Leagues could ostensibly hide behind internal league decisions, when in reality those choices could be in pursuit of an anticompetitive prerogative. With the single-entity defense acting as a pretrial roadblock to certain cases, it is unclear what practices actually rise to the level of anti-competitiveness that society would not tolerate. The courts' application of the single-entity defense is unjustifiably ambiguous when it is being used in the non-team sport context. Without a legal intervention to correct the ambiguity and haphazard approach to the single-entity defense, athletes will enter into costly litigation blind to whether there is a legal remedy to the unfair treatment they are receiving.

B. The Single-Entity Defense is Too Unwieldy to Serve as a Fair Dismissal for Non-Team Sport Athletes

The current state of the single-entity defense creates a multitude of issues as to how the defense should apply to non-team sport leagues.¹⁸² First, *Copperweld* was a narrow holding that focused on a parent company and its wholly-owned subsidiary and did not consider other potential business structures. Second, courts have avoided giving an absolute judgment on non-team sport leagues' use of the defense.¹⁸³ Third, the *American Needle* decision is not analogous to non-team sport leagues because the different structures between leagues suggest that non-team sport leagues cannot invoke the single-entity defense. Furthermore, determining if a business is a single entity is a complex legal issue that distracts from the actual issues of the case.¹⁸⁴ The single-entity defense was once a way for courts to quickly dismiss cases, and now it has turned into a heavily litigated precursor to antitrust litigation.¹⁸⁵ Courts spend a significant amount of time devoted to

¹⁸¹ See Stone, *supra* note 153, at 378 (noting that the single-entity defense is an early dismissal for antitrust litigation).

¹⁸² See Thomas, *supra* note 16, at 297 ("At first glance, it may seem that single-entity status is available for non-team sports because these sports do not require cooperation among economic competitors. However, issues unique to non-team sports, such as joint ventures and sponsorships for tournaments, complicate the issue.").

¹⁸³ See Thomas, *supra* note 16, at 297.

¹⁸⁴ See Sagers, *supra* note 23, at 388 n.44.

¹⁸⁵ See Stone, *supra* note 153, at 400 (noting that when courts diverged from each other on how to properly apply *Copperweld*, the value of the defense as an inexpensive dismissal of meritless claims declined).

determining if the defense should be applied to the particular situation in front of them.¹⁸⁶ Before *Copperweld*, courts actually discussed the anticompetitive issue alleged by an athlete, rather than wasting litigation time on a league's structure.¹⁸⁷ The task of analyzing a league's structure is not easy because the complex intricacies involved with business structures and relationships only add to the already difficult assignment of determining whether a business is a single entity.¹⁸⁸ As was noted in *American Needle*, there are situations where a firm may be acting unilaterally and other circumstances where it is acting in a concerted fashion.¹⁸⁹ These ambiguous situations can blur the lines of what exactly a single entity looks like.

For example, USATF is comprised of fifty-seven associations across the country,¹⁹⁰ has six different divisions each with multiple committees pertaining to different races and teams, produces several track meets in its championship series, and develops the national team.¹⁹¹ With so many operations being run by "one" organization, at least in name, it is a difficult decision whether it should be considered a single entity. A court making the final decision faces a daunting challenge because independent decisions within a single organization are generally treated as an action done to maximize profits, not to conspire.

At first glance, it seems that USATF would be considered a single entity because it makes the sole decisions on rules in the sport, sponsors events, and develops Team USA. However, definitively calling the league a single entity becomes more problematic when other actors, such as athletes, running clubs, and sponsors, are added into the business structure.¹⁹² The line determining which part of the organization constitutes the firm and

¹⁸⁶ See, e.g., *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 55–59 (1st Cir. 2002); *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n*, 95 F.3d 593, 596–601 (7th Cir. 1996).

¹⁸⁷ See *Deesen v. Prof'l Golfers' Ass'n*, 358 F.2d 165, 166–68 (9th Cir. 1966).

¹⁸⁸ See *Feldman*, *supra* note 147, at 855 (noting that courts have looked at a variety of business structures and relationships, such as, "complete common ownership, majority ownership, [and] potential for competition" among many more to differentiate unilateral and concerted action).

¹⁸⁹ See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010).

¹⁹⁰ See *About USATF*, *supra* note 169.

¹⁹¹ See *USA Track & Field - Divisions, Committees, and Councils*, USATF, <http://www.usatf.org/About/Committees.aspx>, {<https://perma.cc/JL4A-8HUX>} (last visited Oct. 28, 2015).

¹⁹² See *id.*; *Am. Needle*, 560 U.S. at 200 (noting that even though the NFLP was a single operation, the decisions made by the organization came from thirty-two independent teams, each with separate interests apart from the NFLP). It could be similarly said that each cog of USATF has a separate interest in the decisions made by the organization. See also *About USATF*, *supra* note 169.

which part is a separate actor is much hazier. It is unclear what role each participant actually has in the functioning of the league, leaving the status of the league as a single entity in question.

Nevertheless, even with the difficulties that the single-entity defense presents in its application to sports leagues, the *American Needle* decision did not completely rule out that non-team sport leagues could obtain single-entity immunity from § 1 scrutiny.¹⁹³ Rather, the Court only focused on the case in front of it.¹⁹⁴ In other words, the Court did not broadly strike down the use of the defense in all sports-related litigation. In fact, Professor Nathaniel Grow argues that the defense still is promising for non-team sport leagues despite how *American Needle* was decided.¹⁹⁵ It is likely that these types of leagues will continue to assert the defense because the outcome may be favorable to the leagues' questionable actions. If leagues are broadly granted the defense, then courts would have to determine on a case-by-case basis whether a league is a single entity based on how a particular league is structured, which is a complex process. If courts were to concretely decide that non-team sport leagues can use the single-entity defense for the athlete-league relationship, then extending such a broad immunity would create substantial policy issues in terms of athletes' rights. For instance, athletes could have to give up their careers because league rules restrict the potential compensation an athlete can receive.¹⁹⁶ Furthermore, the current state of antitrust law creates ambiguity for whether non-team sport athletes can be protected by antitrust law that is not present in the team sport context.

C. *The Different Worlds of Non-Team and Team Sport Athletes in Antitrust Law*

As noted above, non-team sport athletes have very limited options when it comes to challenging league rules and policies. Team sport athletes are much more fortunate. In the realm of team sport leagues, leagues have a

¹⁹³ See generally, *Am. Needle*, 560 U.S. 183.

¹⁹⁴ See *id.*; Grow, *supra* note 38, at 495–96 (noting that the consensus after *American Needle* was that the single-entity defense could not be used by professional sports leagues, but because sports leagues have different structures, such a broad conclusion may not be correct).

¹⁹⁵ See Grow, *supra* note 38, at 497–98 (“[T]he defense may still yield promise for other professional sports relying on entirely different structures. Specifically, in contrast to leagues like the NFL . . . professional sports like tennis, golf, and auto racing utilize a circuit structure, in which a single central body independently coordinates many aspects of the sport.”).

¹⁹⁶ See Woods, *supra* note 10 (noting that athletes give up their dreams because they cannot earn an adequate living in their sport).

non-statutory exemption from antitrust suits when it comes to issues with their athletes because those disputes are generally governed through labor law. The Supreme Court created the non-statutory exemption to ensure that meaningful bargaining between the league and its athletes could be accomplished without fear of an antitrust lawsuit looming overhead.¹⁹⁷ In effect, the balance theoretically not only allows for the athletes in team sport leagues to have a voice in league rules through collective bargaining, but also to have the option to bring an antitrust suit against the leagues by dissolving their union.¹⁹⁸

As *American Needle* points out, team sport leagues are not generally considered to be single entities because of the multiple independent teams that make up the league.¹⁹⁹ These leagues cannot utilize the single-entity defense because the teams are all in competition with one another for ticket sales, merchandise sales, and even players, which leaves the door open to antitrust litigation for athletes when a union is dissolved. In fact, team sports leagues have been subject to many antitrust lawsuits because the teams in the league have to agree to the same employee conditions for the league to function properly.²⁰⁰ Therefore, team sport athletes have a multitude of options available to them when leagues violate their rights as players.²⁰¹ With that said, the athletes do not hold all of the power because team sport leagues still have the opportunity to bargain with athletes through a CBA and then can dispute any issues with a union in the courts through labor law.²⁰² Simply put, there are a lot of options where team sport athletes' voices can be heard against league policies.

¹⁹⁷ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

¹⁹⁸ See Feldman, *supra* note 91, at 1260–61. Feldman argues that when a union is dissolved, there is no longer a conflict between antitrust law and labor law; therefore, antitrust law would govern the market in such situations. See *id.*

¹⁹⁹ See 560 U.S. at 198.

²⁰⁰ See, e.g., *Mackey v. NFL*, 543 F.2d 606, 609 (8th Cir. 1976) (challenging the NFL Rozelle Rule as conspiracy in restraint of trade that denied players' right to freely contract); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 467 (E.D. Pa. 1972) (determining whether NHL violated antitrust laws through its reserve clause, affiliation agreements, and market power dominance); *Wash. Prof'l Basketball Corp. v. NBA*, 131 F. Supp. 596, 597 (S.D.N.Y. 1955) (seeking to enjoin the NBA's purchase of Baltimore Bullets in violation of antitrust laws); see also Feldman, *supra* note 91, at 1234.

²⁰¹ See Feldman, *supra* note 91, at 1260–61.

²⁰² See *id.* at 1238 (noting that collective bargaining between players and athletes can lead to substantial conflict, forcing courts to balance antitrust and labor law, which eventually led to the nonstatutory labor exemption).

Non-team sport athletes should enjoy the same flexibility in challenging league rules that team sport athletes enjoy. The relationship between non-team sport athletes and their leagues offers a unique interplay of conflicting interests that should be vulnerable to § 1 scrutiny. For example, Nike is the main sponsor of USATF. The \$500 million that Nike pays USATF provides for the majority of the governing body's budget.

The contract is a cause for concern because USATF's priorities are more likely to fall in favor of Nike than the athletes on the team.²⁰³ Since athletes often are not paid a salary to participate in non-team sport leagues, but rather obtain their own shoe and apparel sponsorships that pay only a modest salary, the conflicting priorities become a major problem.²⁰⁴ Furthermore, all athletes have a special set of skills that can only be practically used through leagues.²⁰⁵ These skills are unlike the typical attributes needed for a regular career, such as typing or analytical reasoning, because an athlete's physical prowess only lasts for a finite number of years. The very limited scope to earn money puts athletes in a precarious position.²⁰⁶ The athletes can either challenge the league and potentially lose their careers, or take whatever money they can. Therefore, it is easy to see how conflicts between athletes and their governing bodies can arise, especially when considering the financial disparities athletes face. But the law does not necessarily have to function this way.

As exemplified by *American Needle* and *Chicago Professional Sports Ltd.*, courts generally agree that a sport league can be a single entity in one area and a joint venture in a separate area.²⁰⁷ The single-entity defense is malleable when determining which areas of a league to apply the defense to, suggesting how easily the single-entity defense can be tailored. In other words, courts can grant use of the defense in certain situations where a league is operating unilaterally, but deny it when there is a question of concerted activity even though it is one league. It is not "all or nothing." Courts

²⁰³ See Rovell, *supra* note 1 (noting that some athletes who are not sponsored by Nike may not "have a voice at the table," meaning their interests are pushed to the side when it comes to USATF decisions).

²⁰⁴ See Layden, *supra* note 11 ("It's become big bucks or poverty level for athletes. . . . The number of \$30,000-to-\$60,000 contracts has evaporated. Now it's big money for stars and \$15,000 for others, and I mean athletes on world championship teams. And there are very accomplished athletes getting just bonuses and travel expenses.").

²⁰⁵ See Feldman, *supra* note 91, at 1236.

²⁰⁶ See *id.* at 1237 (noting that in team sports, a lockout is a powerful tool in negotiations because it jeopardizes athletes earning potential with their short careers).

²⁰⁷ See 560 U.S. 183, 188 (2010); 95 F.3d 593, 600 (7th Cir. 1996).

should take advantage of the defense's flexibility to ensure that athletes' rights do not get overlooked while also trying to protect business decisions.

D. Tailoring the Single-Entity Defense to Permit Non-Team Sport Athletes' Claims

The use of the single-entity defense should be tailored in a way that allows antitrust litigation against non-team sport leagues, thereby ensuring that athlete grievances can be solved. The single-entity defense should not be used against non-team sport athletes because athletes in non-team sport leagues perform as independent contractors and not as employees.²⁰⁸ Non-team sport athletes are never fully enveloped into league functions like team sport athletes.²⁰⁹ As a result, when non-team sport athletes compete in their league, they are doing so at their own independent discretion. In *American Needle*, the Court shifted the focus of the single-entity defense inquiry so courts should now ask whether a contract, combination, or conspiracy would minimize the number of independent decision-makers in the market.²¹⁰ Since non-team sport athletes are not technically employed by the league, they should be considered independent decision-makers by courts, much like individually-owned teams in regular professional leagues.

By viewing athletes as independent economic entities when contracting with leagues instead of as cogs in the singular league structure, it is easier to see that the two parties are acting more like a joint venture and thus would be susceptible to § 1 scrutiny.²¹¹ Although the athletes do not own a stake in the governing body, as would be typical in a joint venture, there is still a necessary relationship between the two separate entities to have a functioning league. There is simply no common, collective mind when non-team sport leagues make rules for their athletes to abide by, and according to *American Needle* that is an absolute necessity to be considered a single entity.

Furthermore, when looking at non-team sport athletes as a collective whole, rather than as individual athletes, it becomes easier to comprehend

²⁰⁸ See, e.g., Longman, *supra* note 96 (noting that “[a]thletes are not unionized, are not governed by a collective bargaining agreement and perform as independent contractors”).

²⁰⁹ See *id.*

²¹⁰ See 560 U.S. 183, 195 (2010).

²¹¹ See Joseph Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1524 (1982) (“Joint ventures raise antitrust problems because they distort competitive incentives among independent firms by making the firms co-owners of a common profit center.”); Joint Venture, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining joint venture as “[a] business undertaking by two or more persons engaged in a single defined project”).

the impact they have on leagues, despite currently having no real influence in league decisions.²¹² Courts have already used this type of reasoning to rule that non-team sport leagues are not single entities. In *Volvo*, the Second Circuit established that because the league consisted of multiple entities, including the tennis players who played in the tournaments, MIPTC was subject to § 1 scrutiny.²¹³ When athletes agree to participate in a non-team sport league, like USATF athletes do by signing the Statement, that participation should make the league an entity capable of conspiring and thus susceptible to antitrust litigation in that area of the league's operations.

Another reason why the single-entity defense should not be used against non-team sport athletes is because it is possible for league decisions to favor one group of athletes over another. This relationship between a governing body and its athletes is similar to a hospital and its staff of physicians.²¹⁴ Some circuits have recognized that these hospital relationships are susceptible to § 1 scrutiny because it is possible for the hospital and staff to conspire, even if that was not the original intent of the parties. Courts have determined that a doctor practices medicine in his or her own individual capacity and is considered a separate economic entity; the same status should be applied to an individual athlete.

As stated before, these athletes are independent contractors and are not obligated to compete in every meet or every tournament that the league may provide. They make their own decisions separate from what the league actually wants. Due to this separation, when a league decision is made that benefits one group of athletes over another, suspicions of conspiracy are raised.²¹⁵ To defeat a single-entity defense claim, a plaintiff is only required to prove that a conspiracy is possible, not that there actually is one occurring at that very moment.²¹⁶ A court's assessment of whether a conspiracy has actually taken place still must be proven in the litigation, but that is beyond the scope of this Note.

²¹² See, e.g., *About USATF*, *supra* note 169 (noting that there are about 700 athletes on the USATF team in any given year). There are nearly 1,000 golfers that comprise the five professional tours that make up the Professional Golfers Association. *World Rankings*, PGA TOUR, <http://www.pgatour.com/stats/stat.186.html>, {<https://perma.cc/8C8S-PLHW>} (last visited Jan. 12, 2016). See also Layden, *supra* note 11.

²¹³ See, e.g., *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988).

²¹⁴ See *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990).

²¹⁵ See Layden, *supra* note 11 (noting that not allowing non-Nike apparel into certain events drives down competition for athlete sponsorship, which leaves Nike to sign athletes at lower contract prices).

²¹⁶ See *Bolt*, 891 F.2d at 819.

With all the faults of the single-entity defense, it does serve a valuable purpose in certain situations. There is value in keeping unilateral business decisions away from constant scrutiny because those decisions affect how successful a company is.²¹⁷ The single-entity defense, then, should not be used only when a league rule directly affects the athletes' rights.²¹⁸ Because it is fundamental for a § 1 claim to involve an agreement between two parties, any athlete claim would necessarily have to derive from a contract between the athletes and the league. By keeping the scope where an athlete can bring a claim to just the athlete-league relationship, the "gap" in the Sherman Act that does not touch a single firm's decisions is left intact.

Because non-team sport leagues make internal decisions in furtherance of their business, it is possible that they fall under the policy established in *Copperweld* that the Court does not want to open businesses to potentially frivolous claims.²¹⁹ The fact that internal choices are exempt from scrutiny could be true for the majority of the league's decisions; however, the relationship with its athletes combines too many independent entities for the league to be considered as a single, functioning unit. Again, this does not mean that a league is open to any and all antitrust claims, but the narrow area of the athlete relationship could potentially yield valid claims, and having the league vulnerable to such claims is a necessity to protect athlete rights.

Courts will need to limit the scope of issues brought by athletes that can suppress a league's single-entity defense. Courts must narrow the issues that circumvent a single-entity defense to problems that specifically stem from the athlete-league relationship and that affect the athletes' participation in the league. First, the limitation would ensure that no abuse of power by the athletes would occur by bringing frivolous claims. Second, leagues would not be chilled from making decisions for fear of litigation because eliminating the single-entity defense would only apply to league decisions that have a direct effect on athletes and not on decisions that only have a disparate impact on them. Nevertheless, narrowing the scope of the single-

²¹⁷ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984) (noting that subjecting every decision to judicial scrutiny would "discourage the competitive enthusiasm that the antitrust laws seek to promote").

²¹⁸ See *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 70 ("An agreement between two or more persons is fundamental to any § 1 claim.").

²¹⁹ See *Copperweld*, 467 U.S. at 769 (noting that "[t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals").

entity defense will ensure athletes a fair opportunity in court and create a stronger trust in antitrust litigation.

E. Arguments to Keep the State of Antitrust in Its Current Form

Proponents of the single-entity defense will argue that while some circuit courts have held that hospitals and their staff members can conspire, there are other circuits that have not made the same decision.²²⁰ They would say that this circuit split should indicate that the single-entity defense should apply to all non-team sport leagues no matter what. However, the reasoning behind those circuits' decisions is not analogous to the athlete-league relationship.

In the hospital scenario, the Third Circuit said there is no possible conspiracy between hospitals and its staff because the staff members are acting on behalf of the hospital and have no desire to compete with it.²²¹ In the non-team sport league and athlete context, the athletes simply compete in the league and do not act on behalf of the league; the athlete is simply a member of the league. For any type of athlete, there is a clear division between the athlete and the league. However, a major difference between a non-team sport athlete and team sport athlete is that the independent non-team-sport athlete is not folded into league decisions with a union. It cannot be said that any non-team sport league action is done unilaterally within the organization because the athlete and league must interact with each other. In a way, non-team-sport athletes are like their own individual teams, and according to *American Needle* that would make non-team sport leagues vulnerable to § 1 scrutiny.

Proponents may further claim that when a non-team sport league creates a rule, they are acting independently of the athletes and are not working directly with them to create an anticompetitive rule. This idea, however, ignores the fact that athletes still have to contract with a non-team sport league in order to participate.²²² When athletes contract with a non-team sport league, it is presumed they agree to follow the rules, even if they are anticompetitive.²²³ A plaintiff only has to allege that a potential conspiracy has resulted in anticompetitive conduct, but does not have to show that the

²²⁰ See *Weiss v. York Hosp.*, 745 F.2d 786, 817 (3d Cir. 1984).

²²¹ See *id.*

²²² See *USA TRACK & FIELD*, *supra* note 4, at 174.

²²³ See *id.*; *O'Bannon v. NCAA*, No. C 09-1967 CW, 2010 WL 445190, at *3 (N.D. Cal. Feb. 8, 2010) (holding that because "members presumably agree to abide by the organization's constitution, bylaws and rules" that was enough to show a possible conspiracy in violation of § 1).

parties intended to restrain trade.²²⁴ Furthermore, the agreement only has to reduce the number of independent actors in the market.²²⁵ Therefore, even though the USATF's Statement has been around a long time, that does not mean the governing body is free from § 1 scrutiny because the governing body is forcing an agreement that reduces the number of independent economic actors.

Sports have always served as a unique realm for antitrust law, and therefore they require a distinctive approach to handling antitrust issues.²²⁶ The conclusion of this Note, arguing that non-team sport leagues are not a single entity when contracting with their athletes, is legally sound after the broader *American Needle* decision.²²⁷ This view ensures that athletes have some sort of protection absent a union. Finally, at the very least, such an interpretation would encourage non-team sport governing bodies to work more closely with their athletes to resolve issues, as is the case in the realm of team sports.

V. CONCLUSION

Because non-team sport leagues are only comprised of athletes and a governing body, as opposed to individually owned teams, they have a strong argument for being considered single entities.²²⁸ However, treating these leagues as a single entity equates to putting a wolf in sheep's clothing; it would leave the non-unionized athletes vulnerable to questionable anti-competitive practices. For that reason, the single-entity defense should be tailored so that it does not apply to disputes between non-team-sport athletes and their governing body. The general purpose of the single-entity defense was to ensure that singular business decisions would not be scrutinized each

²²⁴ See *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 819–20 (1990) (“[P]laintiff, however, need not prove an intent on the part of the co-conspirators So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under section 1.”).

²²⁵ See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010) (stating that the question is whether the agreement joins together independent decision makers).

²²⁶ See Bolen, *supra* note 81, at 105 (noting that antitrust's impact on sports has provided a hotbed for litigation and debate of how it applies to the sporting world).

²²⁷ See *Am. Needle*, 560 U.S. at 200 (“Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.”).

²²⁸ See Bolen, *supra* note 81, at 94.

time a choice was made.²²⁹ Considering the unique relationship between athletes and governing bodies in non-team sports, this acumen is much more difficult to handle. Athletes have limited options in how they benefit financially through their athletic ability,²³⁰ and allowing a governing body to be considered a single entity unable to conspire does more harm than good. By eliminating the defense from athlete disputes, cooperation between the two sides is encouraged and a safety net is provided to athletes. With the defense, there is just an unnecessary hurdle to the finish line.

²²⁹ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 775 (1984).

²³⁰ See Feldman, *supra* note 91, at 1236–37.

