I. INTRODUCTION

There is one area of sports antitrust jurisprudence that no one questions -- it is unlawful for the only professional league or circuit of events in a sport to put a fledgling competing league or circuit of events in that same sport out of business by means of improper conduct (if the production and exhibition of games in that sport constitutes a relevant market). In other words, if a dominant league, by unfairly eliminating (or blocking the entry of) all competing leagues, can gain monopoly power, the dominant league should only be allowed to behave in reasonable, lawful ways, not in unreasonable, predatory, or exclusionary ways. The primary question becomes apparent -- what are reasonable, lawful ways to prevail over one's rivals, and what are unreasonable, exclusionary, and predatory ways?

The featured cases in this Chapter are all about the National Football League. The reasons are simple -- first, the only other dominant major sports leagues that have faced competitive challenges that have been the subject of litigation are (1) the National Basketball Association (from the American Basketball Association) and (2) the National Hockey League (from the World Hockey Association). The ABA did institute antitrust litigation against the NBA, but the primary litigation was by the players-- the Robertson litigation -- when the ABA and NBA began to discuss a merger. See Chapter Seven's discussion of the history of the NBA and antitrust litigation at pages 281-283. Eventually, while the litigation played on, the ABA was forced to fold and four ABA teams became NBA expansion teams in 1976. The NHL faced substantial antitrust litigation from the WHA, which was the subject of a lengthy decision of a district court. See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) and Chapter Seven's discussion of the history of the NHL and antitrust litigation at pages 290-293. However, for teaching purposes, we determined that the NFL cases were more useful. It is also our view that it is helpful to have the Chapter focus on the development of the NFL and the litigation against that league, as the background facts discussed in the series of cases should help the students learn the facts necessary to understand the cases.

In Major League Baseball, the reported decision that comes the closest to being a monopolization challenge by a competing league would probably be the 1922 Federal Base Ball Club case discussed in Chapter Eight, in which baseball's exemption was established (remember -- the Federal Base Ball Club of Baltimore sued, alleging that the National League and the American League conspired to monopolize baseball by, among other things, inducing all of the Federal League teams (except one) to join their leagues).

In the world of individual sports, the reported decision closest to a decision about a dominant circuit's efforts to prevent competition from a competing circuit or individual competing events is the Volvo decision that ended Chapter Ten's discussion of player restraints. Therefore, as discussed in the beginning of Chapter Eleven (see pages 472-473), the Chapter Ten
discussion of the *Volvo* case transitions well into a focus on monopolization cases involving professional sports leagues.

For all of these reasons, the cases in Chapter Eleven are cases that focus on the historical development of the NFL and challenges to the NFL by the AFL, WFL, USFL, and, to a lesser extent, the North American Soccer League. The most basic questions for the students to focus on as they read each of these cases are:

1. What did the plaintiffs allege the defendants did to harm the competing league (the plaintiffs)?
2. Were the plaintiffs able to prove that defendants did what the plaintiffs alleged?
3. Was any of the challenged conduct held to be exempt from antitrust scrutiny? If yes, what was the basis of an exemption?
4. What relevant market(s) was at issue in the case?
5. Did the challenged conduct involve an agreement? If it did, did the challenged conduct violate Section 1 of the Sherman Act as a "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade"?
6. Were the defendants found guilty of unlawful monopolization?

Similar questions appear in the text on page 474.

It may be useful to suggest to the students that they re-read the Chapter Seven discussion of Section 2 of the Sherman Act -- the law of monopolization, attempts to monopolize, and conspiracy to monopolize -- found at pages 269-277.

### II. ANALYSIS OF THE CASES


**Primary Reason for Inclusion:** The case includes a good discussion of the history of the American Football League and its competition with the NFL and it addresses the fundamental question of monopolization cases -- what conduct can a dominant firm or league engage in and what conduct that would be lawful for a business in a competitive market will not be permissible for a dominant firm or a firm with monopoly power? To what extent can the dominant league
defend based on the concept that only one league can survive in the country or only one team can survive in most cities, because the league or the teams are "natural monopolies"? By strategically awarding franchises to potential AFL cities and potential AFL team owners, did the NFL violate the antitrust laws?

**Points to Emphasize:**

1) The district court's analysis of the relevant geographic markets and the Court of Appeals' analysis of those issues (pages 476-478) are the key to the decision. The opinion discusses the various markets in which the parties competed -- competition for recruiting players (the market for professional football player services), competition for nationwide television contracts and coverage, and competition for spectators (live gate attendance). For each of those markets, the geographic market definition could be different, but the opinion concludes that the competition between the two leagues is nationwide. When the NFL took individual cities or potential team owners away from the AFL, the court concludes that was merely part of the overall nationwide competition -- not monopolization of a local geographic market around that city.

2) The opinion also discusses two factual conclusions that are interesting to consider now, about thirty-five years later -- (a) sixteen teams is the maximum one league can efficiently accommodate, and (b) there were thirty-one suitable locations to locate a professional football team to locate. See N&Q 2 on page 480. The lists of teams and their locations that are found at pages 555-561 may be useful to consider in connection with this discussion.

3) The opinion is quick to accept that certain cities (Baltimore, Washington, Boston, Buffalo, Houston, Denver, and San Diego) can only support one team because they are "natural monopolies." Is the court correct? Assume two football leagues, with each playing a sixteen game season (eight home games per team) in stadia that hold 60,000 to 70,000 fans. Given that many football fans purchase season tickets and attend at least half (and some attend all) of the home team's games, how large a population center is necessary to sell-out the home games of both teams? Is the concern the size of the population center, the interest level of the fans in the area, or the availability of adequate stadia to support two teams?

4) The district court found and the court of appeals agreed that the NFL did not have monopoly power -- which is often defined as the power to control price or exclude competition -- based primarily on the fact that the AFL survived. The Court of Appeals even cites back at the AFL their press statements, made at the end of the 1960 season, that "declared that the League's success was unprecedented." See pages 478-479. Is that fair? What would you expect a struggling league, seeking to reassure the media and its fans that it would not fold, to say? The AFL owners incurred major losses for many years, as they struggled to go head-to-head against
the NFL. Of course, a league with unlimited resources and a willingness to incur losses indefinitely will survive -- but what should be the standard in assessing whether an existing league has the power to exclude competition? Does the NFL today have monopoly power -- could it block entry by a new league if the NFL engaged in exclusionary conduct, or even if it did not? Eventually the AFL and NFL merged with the blessing of Congress. See pages 279-280.

5) The statement of law in the opinion (see page 479 -- "[w]hen one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly") should be emphasized -- even having monopoly power (if lawfully secured) is not unlawful. And, a business with monopoly power that was lawfully obtained can defend that monopoly position by lawful means. What is prohibited is acquiring or maintaining a monopoly position by exclusionary, unfair, or predatory means, or utilizing monopoly power that was obtained unlawfully. The court seemed to believe that the NFL had simply gained its position by being first -- sometimes called "superior skill, foresight, and industry" in antitrust parlance. See pages 276-277. Was it unfair for the NFL to expand into cities the AFL was considering if it could be proven that the sole reason was to block AFL entry? Was it unfair to offer potential AFL team owners NFL franchises to take those owners away from the AFL and to make it difficult for the AFL to have the minimum number of teams they needed to launch their competing league? If the courts had concluded that the NFL had monopoly power, the outcome of the case, and the fate of the AFL, might have been different. Compare the analysis and the conduct of the NFL to the events twenty-five years later when the NFL faced another real threat -- from the USFL in the 1980's. See USFL v. NFL at pages 490-513. See also N&Q 3 at pages 480-481.

NOTES AND QUESTIONS: The answer to N&Q 1 is “Yes,” the court did affirm the district court’s finding that the NFL lacked the power to monopolize professional football in the United States (including Hawaii and portions of Canada) – what it found to be the relevant market. That finding was based on the court’s belief that (1) there were 31 cities that could support an NFL team (and a few could support more than one team) and (2) sixteen teams is a maximum that one league can efficiently accommodate. The court held that the NFL could not block the formation of a competing league.

It is clear that the NFL now accommodates thirty teams (and Cleveland will be number 31). N&Q 2 suggests that the court’s conclusion that the NFL could only accommodate 16 teams, whether correct or not in 1963, is not correct in 1998. Or, is it possible that the NFL does not accommodate 31 teams “efficiently,” even now? Have changes in technology (travel, television, cable, etc.) made it possible for a league to accommodate additional teams or does a league grow over time, so that it is able to accommodate more teams over time?
N&Q 3 explores the antitrust concept that incurring losses in order to block entry can constitute unlawful monopolization. Is that why the NFL expands to foreclose access of competing leagues to cities (and stadia) that can support competing teams (and, thereby, facilitate a competing league)? Are the agreements between the NFL and the CFL or the NBA and the CBA designed to (1) foreclose a revitalization of and competition from these leagues or (2) keep a weak competing league alive to foreclose the creation of a new, stronger competing league?

N&Q 4 discusses the fact that the relevant product market may vary from case to case—depending on what is at issue in the dispute. The competition that is alleged to have been restrained may alter the relevant market at issue. Restraints on television broadcasts may implicate a television market, restraints on relocation may adversely affect a stadium market, and so on.

Case: Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977)

Primary Reason for Inclusion: This case discusses the antitrust concept that a monopolist may have an obligation not to exclude a potential competitor from an "essential facility." It is the decision that may keep owners of teams in a dominant national sports league from using their power to keep a competing team or league from gaining access to a facility that the competitor may need to challenge the dominant league.

Points to Emphasize:

1) The market definition in this case stands in marked contrast to the market definition in the preceding case (AFL v. NFL). In AFL v. NFL, brought by the league, the court concluded the market should be defined nationally, based on the overall national competition between the two leagues. The defendants in Hecht argued that the same market definition should apply in Hecht. The district court agreed, but the Court of Appeals did not and held that the market should be defined to be the metropolitan area of Washington, D.C. See pages 483-484 and notes 13 and 20. Do you find the Court's distinguishing of the AFL v. NFL market definition persuasive? If not, which court is right?

2) The Court of Appeals did not enter judgment for the plaintiffs -- it merely reversed the district court and sent the case back for a new jury trial, with specific changes to be made when the trial is conducted the next time. Those changes, however, are dramatic, and would have been likely to lead a different jury decision.
3) The defendants' ability to keep a potential entrant from ever getting started and then to defend based on the argument that someone who never got started lacks standing is discussed on page 483 and in N&Q 1 on page 489.

4) The elements of an essential facility claim and the possible application of the "essential facility doctrine" to other sports situations is an important issue. This issue is explored in some detail in N&Q 3 at pages 489-490.

5) In *Hecht*, the defendants' conduct was challenged under both Section 1 and Section 2 of the Sherman Act. The Redskins did not own the stadium, but they utilized a restrictive covenant in their agreement with the Armory Board that prohibited any lease with a football team in a competing league. Therefore, to win under Section 1 of the Sherman Act, Hecht only had to show the restrictive covenant restrained trade unreasonably, not that it led to monopolization of a relevant market. However, the elements of an essential facility claim have generally been defined the same by courts, whether the restraint was pursuant to an agreement (as in *Hecht*) or pursuant to a unilateral refusal to deal (which would have been the situation if the Redskins had owned the stadium). This is one point where you might want to discuss some of the benefits of asserting a Section 2 claim (it is more clear in the *USFL* case) -- for example, by alleging monopolization, not just that a particular restraint restrains trade, testimony and evidence about the means by which the defendant acquired its monopoly power (past exclusionary, improper, or predatory conduct) is relevant and admissible.

**NOT A TYPO IN THE CASEBOOK, BUT PERHAPS IN THE REPORTED DECISION**

NOTE: On page 488, in the first line of *Hecht's* discussion of "C. Expert Testimony", the decision refers to "testimony of plaintiffs' experts." It appears clear from the context that the testimony was by defendants' experts, not plaintiffs' experts, but the casebook accurately quotes the court's decision.

**NOTES AND QUESTIONS:** N&Q 1 explores a defense used frequently by the NFL over the years. After blocking competition or competitive conduct before it can even get started, the NFL contends that the plaintiff never progressed far enough along to establish injury or, in turn, standing. See, e.g., *Sullivan* case in Chapter 12.

N&Q 2 discusses the concept of “natural monopoly,” the idea that it is inevitable that only one competitor can survive. While defendants have argued that the antitrust laws should be indifferent as to which competitor survives if it is inevitable that there will only be one survivor, the courts have not generally agreed, holding that the antitrust laws protect each competitor’s right to compete to be that surviving natural monopolist.
N&Q 3 explains the “essential facility” doctrine, and describes its requirements.

N&Q 4 discusses the fact that the Hecht decision, which dealt with competition in one geographic area, defined the relevant geographic area locally. If the lawsuit concerns league-wide competition against a competing league, should the relevant market be defined nationwide or should the restraint be analyzed as it impacts on a number of local geographic markets where teams are located? The answer may turn on whether the challenged conduct was local in nature or was national in character. The issue is presented in the USFL v. NFL case, which follows.


Primary Reason for Inclusion: This is the most comprehensive modern antitrust case between two competing leagues and the case discusses a fairly comprehensive list of conduct that could be used by an incumbent dominant professional sports league to deter and block entry by a new, competing league.

Points to Emphasize:

There are a great many points that can be gleaned from this case -- issues concerning nominal damages (the $3 (after trebling) jury award), attorneys fees to the USFL as the prevailing party -- did the USFL really prevail, the consequence of the jury's finding of illegal monopolization by the NFL, and so on, but the following are a few for you to consider.

1) If a dominant league desired to block new entry by a competing league, it would generally have to do so by entering into agreements with others -- those who supply necessary inputs to the competing league (e.g., investors of the capital and management skill necessary to operate the teams and the league, and suppliers of player services, stadium services, referee services, coaching services) or those who purchase the league's output -- the games and an association with the games (e.g., fans who come to the games, television companies, sponsors, licensees of the league and team marks and logos). The dominant league would have to cause suppliers or purchasers of the output to boycott the new league or to only agree to deal with the new league on burdensome terms and conditions. If the new league could not get access to quality stadia, players, referees, coaches, or owners, it would have a difficult time creating a product that could compete with a dominant league. Similarly, if the new league could not sell its product, because sponsors, television companies, or other consumers of league games were coerced not to deal with the new league, it would be difficult for the new league to generate sufficient revenue to stay in business. See generally N&Q 7 at pages 510-511. The issue in the
USFL case was whether the NFL had in fact engaged in those strategies, and if it had, whether the conduct was unlawful.

2) The history of the USFL is set-out at some length in the USFL opinion. A full reading of the record in the case makes it clear that the USFL was started by some owners with an idea that could have succeeded -- start a spring professional football league, keep costs low, over time improve the quality of the players in the league, and at some point, after fan loyalty and television support had been established, decide whether to continue playing in the Spring, or move the schedule of games to compete head-to-head against the NFL. The problem the USFL faced was with owners who were unwilling to keep costs low -- the temptation of attracting a major player caused a number of the USFL owners to offer superstar salaries to top players to attract them away from the NFL. This lead to spiraling team costs, and the USFL teams that did not go after top players, but rather filled their rosters with players the NFL teams released, suffered on the field in competition against teams like the New Jersey Generals who, after they were purchased by Donald Trump, fielded a number of NFL-quality players. Eventually, the USFL strategy changed (forced by Trump and a few other owners who had not been part of the original USFL) -- a) move the USFL teams out of the major television markets with NFL teams and into potential NFL expansion markets, b) move the USFL games into the Fall, and c) sue the NFL. The strategy was geared toward forcing a merger with the NFL or securing an antitrust jury damages verdict in excess of $1 billion. The job of the court and the jury was to determine to what extent the ultimate demise of the USFL was caused by the USFL's own strategy or by anticompetitive conduct by the NFL.

3) The primary conduct the USFL alleged the NFL engaged in was coercing the three major over-the-air networks (ABC, CBS, and NBC -- this was pre-FOX and ESPN was not received in nearly as many homes as today) not to enter into a contract to televise NFL games. If the jury had been convinced that the NFL had engaged in this conduct, that would have been sufficient to support a major verdict in favor of the USFL, but the court affirmed the jury's $1 verdict.

4) The opinion shows that by alleging not just a series of agreements to restrain trade, but an attempt to monopolize and monopolization, the plaintiff was permitted to put in evidence about the NFL's intent and motive and evidence about how the NFL achieved its monopoly power. The court of appeals reviewed the decisions of the district court about which prior antitrust judgments against the NFL could be described to the jury, and which prior judgments had to be excluded. See pages 504-505.

5) The Noerr-Pennington doctrine gives an antitrust exemption to efforts by a competitor to achieve a competitive advantage or even to gain a monopoly by asking the government for such relief. Whether lobbying Congress, filing a meritorious lawsuit, or
pursuing a matter before an administrative agency, the conduct is protected from antitrust scrutiny unless it is a "sham" -- i.e., the government action is not what was sought, but rather the direct interference in a competitor's business that the nominal effort to petition the government for redress of grievances might cause. The Noerr-Pennington doctrine is introduced and discussed at pages 505-506.

6) Various insights to the factual background and aftermath of the USFL decision and the ramifications of the litigation are offered in various notes and questions that follow the decision. In particular, see N&Q 1-4 and 9.

**NOTES AND QUESTIONS:**

N&Q 1-2 and 4 provide additional information about the USFL v. NFL case. N&Q 3 discusses the fact that the federal antitrust laws award prevailing plaintiffs their reasonable attorneys fees, in addition to treble damages. The district court held that the USFL was the prevailing party and awarded over $5 million in attorneys fees despite the jury only awarding $1 dollar (trebled to $3) of damages. The United States Court of Appeals for the Second Circuit affirmed the district court’s attorneys fees award. The jury held against the USFL on many points, but held that the NFL had unlawfully monopolized professional football in the United States.

N&Q 5 questions Judge Winter’s assertion that in-season competition would be more expensive than off-season competition, even though players still had to choose one league and could not play in both. It is difficult to understand the basis for that conclusion. Does anyone believe that the WNBA and ABL would compete more intensely for players if their seasons were played at the same time of year?

N&Q 6 questions what remedies would enhance competition. Many alleged that the USFL owners sued for over $1 billion in an effort to force the NFL to award them expansion franchises. The Mid-South Grizzlies case held that an order giving teams from a competing league franchises in the dominant league was not procompetitive, because it would simply make the league more dominant, further restricting competition or the likelihood of the creation of a competing league.

N&Q 7 discusses conduct that an existing league can engage in to attack or block entry by a competing league and identifies conduct that was recommended to the NFL by Professor Porter.

N&Q 8 discusses reason why a plaintiff who can prove the “contract, combination . . ., or conspiracy” that is required by Section 1 of the Sherman Act might nevertheless also allege unlawful monopolization under Section 2 of the Sherman Act.
N&Q 9 explains the history of the World League of American Football and the competitive (anticompetitive) reasons for its creation.

N&Q 10 discusses the NFL’s television broadcast strategy. In fact, the NFL opted in 1998 to continue to leave one network out (NBC), in order to get more from the three networks (ABC, CBS, and FOX) that agreed to broadcast NFL games. N&Q 11 discusses when prior antitrust judgments may or may not be relevant and admissible in a subsequent antitrust trial.


Primary Reason for Inclusion: A case about competition between the NFL and a soccer league, this case discusses ownership of sports teams and provides a great transition from cases about disputes between leagues and disputes among owners within one league, as this case involves both.

Points to Emphasize:

1) This case gives some information about the history of the North American Soccer League, which disbanded within three years of the court of appeals decision. Despite the continued existence of the Major Indoor Soccer League into the 1990's and several other professional soccer leagues -- both indoor and outdoor -- the next true national professional soccer league that could make the claim of being a major league was Major League Soccer ("MLS"), which began play in 1996, following the United States' success in World Cup '94, the first World Cup played in the United States. Once again, the launch of the MLS depended on NFL owners -- again the Kansas City Chiefs' Lamar Hunt, and this time Bob Kraft of the New England Patriots. The fact that soccer games and football games are played in the same stadia makes an owner of a football stadium a prime candidate for purchase of a professional soccer league team.

2) The key to this case is again the market definition. The court accepts the concept of a limited sports capital market (sports ownership capital and skill). The best evidence for the plaintiffs on all issues seems to be the fact that if enforcing the cross-ownership ban and forcing Lamar Hunt and Joe Robbie out of the NASL would not have mattered, because there would be plenty of alternative capital investment available, what would possibly have motivated Max Winter and Leonard Tose and the other NFL owners to face major antitrust litigation in order to enforce the ban.
3) As a Section 1 case, this is a great case for consideration of the "less restrictive alternative" component of the rule of reason. The NFL defended the cross-ownership ban on the basis that confidential NFL data might be used to promote a competing league, but the NFL had never done anything to preserve its confidences -- e.g., keep owners with interests in teams in other leagues off of committees that discuss sensitive competitive issues (e.g., the television committee or the NFL committee that oversees NFL Properties). See court's discussion of this issue at 520-522.

4) This case illustrates that not all inter-league disputes focus primarily on Section 2 of the Sherman Act. This case would have been much more difficult as a Section 2 case -- what market is being monopolized? There was no need to admit evidence of past antitrust violations - - the restraint itself was indefensible under the facts of this case.

5) The subsequent history of the NFL's cross-ownership ban is chronicled in N&Q's 1-4. If the NFL tried to enforce the ban against MLS owners, would the plaintiffs have to relitigate the issue, or could they prevail pursuant to a) the prior permanent injunction or b) res judicata/collateral estoppel theories? See N&Q 1. Recent exceptions to the cross-ownership ban were recently passed by the NFL owners in order to accommodate Wayne Huizenga and Paul Allen. See N&Q 4.

6) N&Q 5 provides a problem that puts the cross-ownership ban in a very practical hypothetical situation. Cross-owners Peter Angelos (Major League Baseball's Baltimore Orioles), George Steinbrenner (Major League Baseball's New York Yankees) and Michael Eisner of Disney, the owner of the NHL's Mighty Ducks of Anaheim) seek to purchase the team. Do the New York Yankees really compete in the same market area as the New York Giants and New York Jets, who play in the Meadowlands in New Jersey? However, could Major League Baseball be harmed by the NFL's cross-ownership ban? The NHL is weaker than Major League Baseball, and technically Disney, not Eisner, owns the Mighty Ducks. Therefore, there may not even be a cross-ownership issue with Eisner. In addition, while the NFL still contends that cross-ownership by an owner of a team in the Los Angeles or Anaheim area is prohibited, because that territory has been reserved by the league in the aftermath of the departures of the Rams and Raiders, the argument is much weaker when there is no NFL team in Anaheim or Los Angeles and Paul Allen is permitted to purchase the Seahawks because his Portland Trailblazers are not within the territory of any NFL team. These are some of the issues suggested by the problem.

7) The "special event" rule in the Volvo case from Chapter Ten is very similar to a cross-ownership ban, as designed for an individual sport. However, given the autonomy of the events in the MIPTC's Grand Prix circuit and the fact that the cross-ownership prohibition was so broad and was geared to prevent ownership or any involvement in any competing circuit or
event, the *Volvo* restraint is much less defensible. This may be a good fact situation for the students to compare and contrast, to help prepare them for an issue-spotting exam.

8) The *NASL* decision can be used as a transition from discussing inter-league restraints in Chapter Eleven to discussing intra-league restraints in Chapter Twelve, because the *NASL* case could be placed in either chapter.

**NOTES AND QUESTIONS:** N&Q 1 presents a difficult question – would a 1982 decision, based on market conditions at that time, govern an attempt to apply the same ban sixteen years later. The authors of the casebook do not know how a court would see that case. However, there is a strong argument that the court held the ban unlawful, and given that the owners of the NFL teams have arguably not reenacted the ban by the necessary ¾ vote of the owners, there is currently no cross-ownership ban. The response of the NFL was that the league has operated on the understanding that the ban is still in effect, and the enactment of the exception to the rule (see N&Q 4) constitutes in effect a reaffirmation of the ban. It is likely, however, that while the NFL could get ¾ of the owners to say the ban did not apply to Messrs. Huizenga and Allen and others in similar situations, they would have been hard-pressed to get ¾ of the owners to reaffirm the ban. There may be a strong argument that there have been so many more sports teams and sports leagues and sports owners over the past sixteen years that the sports investment capital market is now stronger and broader, and the NFL, despite its thirty (soon to be thirty-one) teams, does not have the power over that overall market that it once yielded. It may be that an additional factor with respect to soccer that is key involves the amount of control the NFL owners collectively wield over stadia in the United States that are suitable for a major professional soccer league team.

N&Q 2 raises another difficult question – what market impact does the NFL cross-ownership ban have on Major League Baseball (“MLB”), the NBA, and/or the NHL? Could a plaintiff show the same anticompetitive purpose and effect, given that there is only overlap between the early of the NBA and NHL seasons with NFL games? Could the NBA and NHL cite the competition for television coverage as evidence of competition, even though there tends to be more direct competition between the end of Major League Baseball’s season and NFL games for television coverage? Remember – except for Monday Night Football and Saturday and Thursday night games after the college football season is over, NFL games and broadcasts are generally limited to Sunday afternoons and evenings. The NBA has thrived without substantial NFL cross-ownership, and it would be difficult to attribute any difficulty (if difficulty exists) in attracting competent NHL ownership and management to the NFL’s cross-ownership ban.

N&Q 3 discusses the concept that there might be more business justification (hence greater procompetitive benefits under the Rule of Reason) for a cross-ownership ban that
only restricted ownership in a competing professional football league. The confidential business information of one football league and other competition between the teams in the leagues (at least for players) would be greater if the two leagues played the same sport and sought to employ many members of the same work force.

N&Q 4 chronicles the Wayne Huizenga and Paul Allen exceptions to the NFL cross-ownership ban. Having permitted owners of MLB and NBA teams to own NFL teams and to have access to league information that those NFL owners are able to share with all other MLB and NBA owners, it will further weaken the NFL’s efforts to establish any procompetitive benefits from the cross-ownership ban. A plaintiff challenging the ban is likely to assert that the “exceptions” demonstrate that the NASL court correctly concluded that the primary motivation for the ban is to insulate NFL teams from competition in their “home territories.” Given that the league plays very little role in competition at the local level for sponsorship, ticket sales, luxury suite sales, etc., the argument that an NFL team will get substantial confidential competitive business information about another NFL team’s local competitive efforts is not strong. And, while a team owner may gain access to national competitive strategy information, which could possibly help a competing league with its national competitive efforts, that has not been a sufficient concern to motivate the NFL to maintain an across-the-board ban.

N&Q 5 is an issue spotting question concerning the legality of a cross-ownership ban. Some of the factual observations that students might make include the following: (1) the geographic proximity of the Orioles and the Baltimore Ravens is the greatest (across a parking lot), (2) the Yankees, while within 75 miles of East Rutherford, New Jersey (the Meadowlands) and the Jets and the Giants, are presently quite a ways away, (3) there is presently no NFL team in Los Angeles and no immediate prospect of a team, and it is only the NFL’s “reserving that territory for the league” (whatever that means) that places Eisner in a different situation than Paul Allen, and (4) Eisner does not own any NHL team—his corporation does, so by its terms the ban may not apply to him. With these factual points in mind, and the questions raised above (see discussion of N&Q 1-4, above), including the discussion about whether a plaintiff could prove anticompetitive effects in the relevant market, you can conduct a classroom discussion about what a court’s analysis of this factual scenario.

N&Q 6 discusses the purpose of the NFL cross-ownership ban and what consequence that purpose should have in litigation. Given that it can be inferred that the purpose was to harm a rival league, should the NFL be permitted to come forward and defend on the basis that despite their knowledge of the business and the industry and their purpose in enacting the rule, they were in error, and the ban would not have harmed competition? Could a claim be brought on a state common law tortious interference with contract theory or some other business tort theory?
N&Q 7 gives students an opportunity to apply their knowledge of the law and the court’s analysis to craft a rule that might achieve the NFL’s goals, and that would also be more easily defended against an antitrust challenge. In effect, can the students identify a less restrictive rule that might nevertheless achieve the NFL’s goals. One possibility would be to draft a rule that causes no significant anticompetitive effects to a rival league. Another alternative, however, would be to try to design a rule that appears more reasonable and would be more defensible, but that achieves the purpose of harming the rival, as well, in case your clients (the league or the owners) advise you in confidence that a narrowly-tailored rule that does not hurt the rival league is unacceptable, in large part because they do want the rule to disadvantage a competing league. Does it raise ethical questions to draft a rule that might be unlawful under the federal antitrust laws?