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DEUTSCHER TENNIS BUND V. ATP TOUR, INC.: A "QUICK LOOK" AT A POST-AMERICAN NEEDLE WORLD

By: Ryan Keeley[1]

ABSTRACT

In an effort to revitalize its popularity and increase competition with other sports and entertainment events, the Association of Tennis Professionals ("ATP")[2] reorganized their professional tennis circuit, the ATP Tour,[3] in 2009.[4] Known as the Brave New World Plan ("BNW Plan"), the redesign was intended to attract a greater number of top-tier players to the most prestigious tournaments.[5] As a result of the reorganization, the German Tennis Championships in Hamburg, Germany was downgraded from a Tier I to a Tier II tournament.[6]

Professional tennis players earn ATP points by playing in ATP tournaments.[7] These points determine a player's world ranking, which in turn "governs entry into, and seeding in, the Grand Slams as well as ATP top-tier tournaments – the most important professional tennis tournaments."[8] The BNW Plan reorganized the point system so the winner of a Tier I tournament is awarded 1000 points, while a winner of a Tier II tournament only receives 500.[9] The BNW Plan also requires the top 30 players from the ATP rankings to play in all nine Tier I events but requires them to play in only four of the eleven Tier II events.[10]

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[2] The ATP is a non-profit member corporation consisting of 440 player members and 61 tournament-owner members.
[3] Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 825 (3d Cir. 2010).
[4] The BNW Plan was created in 2007 and became effective January 1, 2009. Brief of Appellants at 1, Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010) (No. 08-4123), 2009 WL 2946689.
[5] Deutscher, at 824.
[6] *Id.*
[7] *Id.* at 825.
[8] *Id.*
[9] *Id.*
[10] The 2012 Official ATP Rulebook, 10 (2012), *available at* http://www.atpworldtour.com/Corporate/Rulebook.aspx.

Unhappy with its downgrade to a Tier II tournament, the Hamburg tournament owners (the "Federations")[11] sued ATP and certain of its officers alleging the BNW Plan violated Sections 1 and 2 of the Sherman Act and that ATP's directors breached fiduciary duties owed to the Federations.[12] The Section 1 claim alleged the BNW Plan was an unreasonable restraint of competition in which the Tier I tournaments were shielded from competing with other tournaments.[13] The Section 2 claim alleged the BNW Plan was an attempt to monopolize the market of professional men's tennis player's services.[14] The Federations also claimed ATP directors breached their fiduciary duties of due care, loyalty, and good faith owed to the Federations.[15]

Deutscher provides insight into the way courts apply the Supreme Court's decision in *American Needle, Inc. v. NFL*.[16] In *American Needle*, the Supreme Court held that National Football League ("NFL") teams did not constitute a single entity for the purposes of licensing their intellectual property rights. Because Section 1 of the Sherman Act prohibits collusive, anticompetitive behavior, an organization that is considered a single entity is incapable of violating Section 1.[17] While the Third Circuit Court of Appeals did not rule on the issue of whether the ATP constitutes a single entity under antitrust law, its opinion elicits a common view in antitrust circles: that the single entity defense for sports leagues is dead.

This comment examines that proposition. First, it looks at the various methods of antitrust analysis and relevant prior cases. Then, it analyzes each claim and both courts' respective decisions. Finally, it considers how this case may affect sports leagues in the future.

[11] The Hamburg tournament is owned by the Qatar and German Tennis Federations.
[12] Deutsher, at 824.
[13] Deutscher, at 827.
[14] *Id.*
[15] *Id.*
[16] 130 S. Ct. 2201 (2010).
[17] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770-73 (1984); *See* discussion *infra* Part I.B.

I. BACKGROUND

A. Methods of Antitrust Analysis

The Supreme Court has established that the Sherman Act prohibits only those practices that "unreasonably" restrain trade.[18] Section 1 of the Sherman Act broadly prohibits concerted action that restrains the nation's domestic or foreign trade.[19] Section 2 of the Sherman Act makes unlawful three practices: (1) monopolization; (2) attempts to monopolize; and (3) combinations or conspiracies to monopolize.[20] Because the Federations did not appeal the Section 2 verdict, this comment will focus on the Section 1 claim.

U.S. courts have established three methods of analysis to examine practices that are alleged to be in violation of Section 1. The first method concerns practices that are viewed as being so inherently anticompetitive that they are considered *per se* illegal.[21] Examples of such practices include horizontal price fixing (agreements between competitors to set prices), horizontal market allocations (horizontal territorial, customer, output and other market restraints between competitors), and horizontal group boycotts (agreements between two or more competitors with shared market power or control over a scare resource or facility).[22] For *per se* violations it is unnecessary to perform any inquiry into actual market impact or possible

[18] Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 65 (1911); *see also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) ("As this Court has made clear, the Sherman Act's prohibition of '[e]very' agreement in 'restraint of trade,' 26 Stat. 209, as amended, 15 U.S.C. § 1, prohibits only agreements that unreasonably restrain trade.").
[19] *See, e.g.*, Nat'l Soc. of Prof'l Engineers v. U.S., 435 U.S. 679, 690 (1978); Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1, 65 (1911).
[20] *See* JOHN BORDEAU ET AL., 54 AM. JUR. 2D MONOPOLIES, RESTRAINTS OF TRADE, AND UNFAIR TRADE PRACTICES § 34 (2012).
[21] *See, e.g.*, U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (horizontal price-fixing).
[22] WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:9 (2012).

procompetitive justifications of the practice; assuming there is standing to assert a claim,[23] one need only prove the practice occurred.[24]

The second, and more pervasive, standard of analysis of antitrust claims under Section 1 of the Sherman Act is the "rule of reason."[25] Rule of reason analysis involves a general inquiry in to whether, under "all the circumstances," the challenged practice "impose[es] an unreasonable restraint on competition."[26] Under rule of reason analysis, no single factor is determinative; the fact finder considers all circumstances of a case in determining whether a practice results in an unreasonable restraint on competition. The plaintiff bears the burden of demonstrating that a particular practice or agreement results in anticompetitive effects in the relevant product and geographic markets.[27] Plaintiffs can demonstrate anticompetitive effects by showing an actual adverse effect, such as an increase in price or reduction in output.[28] Demonstrating a potential adverse effect as evidenced by defendant's market power may satisfy this burden as well.[29]

There is also an intermediate standard termed "quick look" analysis, which is essentially an abbreviated version of the rule of reason. Quick look analysis is utilized when *per se* condemnation would be inappropriate, but a full-scale market analysis is unnecessary because the anticompetitive effects can be realized after only a "quick look." A court may utilize quick look analysis when the alleged anticompetitive effects are so obvious that "an observer with even

[23] *See id.* at § 9:5-9 (2012) (explaining that a person must have been "injured in his business or property" to sue for treble damages or have suffered "threatened loss or damage" by a violation of the Sherman or Clayton Acts to seek injunctive relief).
[24] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 884-86 (2007).
[25] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).
[26] *Id.*
[27] United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir.1993).
[28] *Id.*
[29] *Id.*

a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[30]

The *Deutscher* court emphasized that the method for determining which of the above three standards to apply is not as clear-cut as their names may imply.[31] It stated that these three modes of analysis should be viewed as a part of a single inquiry that, depending on the circumstances, involves varying presumptions.[32]

B. Relevant Prior Antitrust Cases

Deutscher was decided just one month after the Supreme Court decided *American Needle, Inc. v. NFL*. Considered the most important case in sports law history,[33] the plaintiff, American Needle, Inc., challenged the NFL's grant of an exclusive license agreement to Reebok to manufacture and sell NFL hats, alleging that such an action was a violation of Sections 1 and 2 of the Sherman Act.[34] The question before the Court was whether the NFL was "capable of engaging in a 'contract, combination … or conspiracy' as defined by § 1 of the Sherman Act, 15 U.S.C. § 1, or … whether the alleged activity by the NFL respondents 'must be viewed as that of a single enterprise for purposes of § 1.'"[35] Justice Stevens stated:

> The key is whether the alleged 'contract, combination…, or conspiracy' is concerted action – that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a 'contract, combination ... or conspiracy' amongst 'separate economic actors pursuing separate economic interests,'[36] such that the agreement 'deprives the marketplace of independent centers of decisionmaking,'[37] and therefore of

[30] California Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999).
[31] Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3d Cir. 2010).
[32] *Id.*
[33] McCann, Michael, *Why American Needle-NFL Is Most Important Case in Sports History*, SI.COM (January 12, 2010), http:// sportsillustrated.cnn.com/2010/writers/michael_ mccann/01/12/americanneedlev.nfl/index.html.
[34] American Needle, Inc. v. NFL, 130 S. Ct. 2201, 2207 (2010).
[35] *Id.* at 2208 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S 752, 771 (1984)).
[36] *Id.* at 2212 (quoting Copperweld, 467 U.S. 752, 769).
[37] *Id.*

> 'diversity of entrepreneurial interests,'[38] and thus actual or potential competition.[39]

American Needle relied heavily on *Copperweld Corp. v. Independence Tube Corp.*,[40] where the Court held that a parent and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act."[41] The *Copperweld* Court explained:

> [A]lthough a parent and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are controlled by a single center of decision making and they control a single aggregation of economic power. Joint conduct by two such entities does not 'deprive[e] the marketplace of independent centers of decision making,' and as a result, an agreement between them does not constitute a 'contract, combination ... or conspiracy' for the purposes of § 1.[42]

The Court analyzed how the different NFL teams interact solely in the intellectual property realm.[43] The Court noted that while NFL teams must collaborate for scheduling purposes and share an interest in making the entire league successful and profitable, that interest "does not justify treating them as a single entity for § 1 purposes when it comes to the marketing of the teams' individually owned intellectual property."[44] Utilizing *NCAA v. Board of Regents*,[45] the Court stated, "Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centers of decision making, and therefore of actual or potential competition."[46] The Court held that the NFL was not a single entity for purposes of licensing its intellectual property and thus was not

[38] *Id.* (quoting Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 57 (C.A. 1 2002) (Boudin, C.J.)).
[39] *Id.*
[40] 467 U.S. 752 (1984).
[41] *Id.* at 777.
[42] American Needle, Inc. v. NFL, 130 S. Ct. 2201, 2211 (3d Cir. 2010) (quoting in part Copperweld, 467 U.S. 752, at 769).
[43] *Id.* at 2213.
[44] *Id.* at 2216-17.
[45] 468 U.S. 85 (1984).
[46] Am. Needle, at 2213.

immune from antitrust scrutiny and should be subjected to the more flexible rule of reason analysis on remand.[47]

In *NCAA v. Board of Regents*, another case *Deutscher* relied on, the Supreme Court held it may be inappropriate to apply a *per se* rule in certain situations.[48] The NCAA had an established practice of limiting the total amount of televised intercollegiate football games and the number of games that any school could televise so as to limit the adverse affects of televised games on game attendance.[49] While the Court held that the NCAA's television plan constituted horizontal price fixing and output limitation in violation of the Sherman Act, they also held that "[i]t would be inappropriate to apply a per se rule in this case where it involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[50] Since *NCAA v. Board of Regents*, courts generally rely on rule of reason analysis when horizontal restraints are necessary for the existence of an industry.[51]

II. DISCUSSION

In *Deutscher*, the Federations sued ATP and certain of its officers and directors alleging that the BNW Plan violated Sections 1 and 2 of the Sherman Act and that ATP's directors breached fiduciary duties owed to the Federations.[52] The trial court granted ATP's motion for judgment as a matter of law, dismissing the personal liability claims against the directors. The jury returned a verdict for ATP on the antitrust claims, finding the Federations failed to prove

[47] *Id.* at 2217.
[48] NCAA, 468 U.S. at 99.
[49] *Id.* at 85.
[50] *Id.* at 86.
[51] Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir.1998).
[52] Deutscher Tennis Bund Bund v. ATP Tour, Inc., 610 F.3d 820, 824 (3d Cir. 2010).

ATP entered into a contract, combination, or conspiracy with any separate entity under Section 1 of the Sherman Act, and that they did not establish a relevant product market under Section 2.[53]

The Federations did not appeal the Section 2 verdict, but they did appeal the Section 1 claim, asserting the district court erred in instructing the jury on the "single entity" defense and should have instructed on the "quick look" mode of analysis instead of the full rule of reason analysis. The Federations also appealed the dismissal of the antitrust claims against the directors and the breach of duty of loyalty claim against director Charles Pasarell.[54]

A. ANTITRUST CLAIMS

Under the Section 1 claim, the Federations alleged that the BNW Plan was evidence of a conspiracy "to control the supply of top men's professional tennis players' services, establishing a favored class of tournaments in which top-player participation was mandatory, while precluding other tournaments from competing for such player services."[55] The Section 2 claim alleged that the BNW Plan was a conspiracy and an attempt to monopolize the market for men's professional tennis players' services.[56]

At trial, ATP argued it was a single entity and thus immune from antitrust scrutiny.[57] It claimed that the member tournaments of the ATP tour do not compete but instead cooperate to form an annual professional tennis tour.[58] The Federations argued that ATP operates in the market for top-tier men's professional tennis players, and individual tournaments compete to

[53] *Id.*
[54] *Id.*
[55] *Id.* at 827.
[56] *Id.*
[57] Deutscher, at 835.
[58] *Id.*

attract top players. They claimed the BNW Plan was an agreement unreasonably restraining trade in this market.[59]

The trial court, utilizing rule of reason analysis, found that the Federations did not prove ATP "entered into contract(s), combination(s), or conspiracy(ies) with any separate entity or entities."[60] On appeal, the Federations argued that the district court erred by instructing the jury on rule of reason analysis and refusing to instruct on quick look analysis.[61] The Federations did not appeal the finding on the Section 2 claim that the Federations did not establish "the existence of any relevant product market(s) within any geographic market(s)."[62] By not appealing the Section 2 claim, the Federations were relying on their argument that quick look analysis was proper because, under quick look, an analysis of the anticompetitive effects on the relevant market is not required.

While "inquiries into the scope of competition under § 1 and § 2 are not precisely the same,"[63] in this case the Federations relied on identical market definitions for both their Section 1 and Section 2 claims.[64] *Deutscher* concluded that, because the Federations provided identical market definitions in their proposed jury instructions for the Section 1 and Section 2 claims, the jury's conclusion that the Federations failed to prove a relevant market under Section 2 should apply to the Section 1 claim.[65]

[59] *Id.*
[60] *Id.* at 828.
[61] *Id.*
[62] *Id.*
[63] Deutscher, at 828 (quoting Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3d Cir. 1978)).
[64] *Id.*
[65] *Id.* at 829.

1. Quick Look vs. Rule of Reason

The Federations claimed the BNW Plan was a horizontal restraint in violation of Section 1 because it eliminated the need for Tier I tournaments to compete for players while at the same time making it impossible for other tournaments to compete with the Tier I tournaments in attracting top-tier players.[66] It was on the basis of this output-limiting horizontal restraint that the Federations argued for quick look analysis. The Federations favored quick look analysis because, under quick look, "the competitive harm is presumed, and 'the defendant must promulgate 'some competitive justification' for the restraint."[67] If quick look analysis had been performed, the jury's Section 2 finding that the Federations failed to prove a relevant market would not have affected the Section 1 quick look analysis. "Regardless of the standard used, the purpose of the inquiry is always to assess the effect of the conduct on competition: 'Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition.'"[68] Citing a lengthy history of cases,[69] the *Deutscher* court stated that "for a tennis tour, like other sports leagues, 'horizontal restraints on competition are essential if the product is to be available at all.'"[70]

[66] *Id.*
[67] United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (quoting NCAA v. Board of Regents, 468 U.S. 85, 110 (1984)).
[68] Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 831 (3d Cir. 2010) (quoting NCAA, 468 U.S. at 104).
[69] *See also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979) (rejecting *per se* treatment "where the agreement on price is necessary to market the product at all"); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004) ("Because there is no doubt that horizontal restraints are necessary to make the kind of league competition at issue available, the rule of reason applies."); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[C]ourts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product[.]").
[70] Deutscher, at 831 (quoting NCAA, 468 U.S. at 101).

As stated above, quick look analysis is only appropriate when the anticompetitive effects on markets and consumers are obvious.[71] However, in order for the effects on a market to be obvious, the existence of a relevant product and geographic market must be clear. The definition of what constituted the relevant market for top-tier professional tennis players was one of the most contested issues at trial – "so much so that after all the evidence was presented the district court saw the bounds of the relevant market as 'ambiguous.'"[72] The court concluded that the "contours of the market" were not sufficiently obvious so as "[t]o permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition."[73] *Deutscher* thus held that the jury was properly instructed to analyze the restraints using the rule of reason.[74]

2. Single Entity Status

In order to be in violation of Section 1 of the Sherman Act, a plaintiff must establish a "contract, combination…or conspiracy."[75] Accordingly, two entities must exist in order for cooperation to exist. The court in *Deutscher* addressed the issue of whether ATP and its members function as a single business entity and would thus be incapable of violating Section 1 of the Sherman Act. The court looked to *Copperweld,* where the Supreme Court set fourth that "in certain cases, distinct legal entities are incapable of concerted action for the purposes of Section 1 and must be viewed as a single entity."[76] While *Copperweld* did not establish a

[71] *Id.* at 832.
[72] *Id.*
[73] *Id.* (quoting Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004)).
[74] *Id.* at 833.
[75] *Id.* at 834.
[76] *Id.*

steadfast rule outside of the parent-subsidiary relationship, it established "substance, not form, should determine whether a[n] … entity is capable of conspiring under § 1."[77]

In *Deutscher*, the court did not make a decision whether the single entity jury instruction was given in error because the jury found that the Federations did not prove by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market.[78] While the court was unable to rule on the issue, it did suggest that the BNW Plan might have deprived the marketplace of potential competition.[79]

B. Breach of Fiduciary Duties

The Federations claimed that six of the directors of ATP who voted for the BNW Plan breached their fiduciary duties of loyalty, due care, and good faith.[80] "The district court granted ATP's motion for judgment as a matter of law on these claims. The Federations appealed the judgment only in relation to the claim of breach of duty of loyalty by Director Charles Pasarell."[81]

The Federations claimed that Director Pasarell's vote in favor of the BNW Plan was a breach of duty of loyalty due to his role as the Tournament Director of the Indian Wells Masters Series, in which he held a 24% ownership interest.[82] Under Delaware law, courts will not interfere with the decisions of officers and directors of a company, absent a finding of fraud, illegality, conflict of interest, or waste.[83] Known as the "business judgment rule," this doctrine "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best

[77] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 773 n.21 (1984).
[78] Deutscher Tennis Bund, 610 F.3d at 828.
[79] *Id.* at 837.
[80] *Id.* at 838.
[81] *Id.*
[82] *Id.* (Indian Wells is a Tier I ATP tournament in Indian Wells, California. It is now called the BNP Paribas Open.).
[83] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

interests of the company."[84] In this way, the business judgment rule insulates corporate decision makers from liability, assuming they acted in good faith and without a corrupt motive.[85]

In order to prevail on their breach of fiduciary duty claim, the Federations would have had to rebut the business judgment rule presumption by establishing "that the *board* was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders."[86] The Third Circuit affirmed the trial court's decision in *Deutscher* that the Federations failed to do so, stating, "Parasell was not materially self-interested because he did not stand to obtain any unique benefits from the BNW Plan."[87] In order to bypass the protections of the business judgment rule, a material benefit must be alleged that was significant enough "to have made it improbable that the director could perform her fiduciary duties to the … shareholders without being influenced by her overriding personal interest."[88] The *Deutscher* court determined Pasarell's interest was not material because he was not in a position to benefit differently than others affected by the reorganization.[89] Particularly, the Indian Wells tournament was already one of the most financially successful tournaments before the BNW Plan was adopted.[90] The court determined that "the alleged benefit was not 'significant enough in the context of the director's economic

[84] *Id.*
[85] *See* WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1036 (2012), *available at* Westlaw 3A Fletcher Cyc. Corp. § 1036.
[86] Deutscher Tennis Bund, 610 F.3d at 838 (quoting Orman v. Cullman, 794 A.2d 5, 22 (Del. Ch. 2002)).
[87] *Id. See, e.g.*, Aronson v. Lewis, 573 A.2d 805, 812 (Del. 1984) ("The Delaware Supreme Court has defined 'interest' to 'mean[ ] that directors can neither appear on both sides of a transaction nor expect to derive any personal benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.").
[88] Deutscher, at 840 (quoting *In re* Gen. Motors Class H S'holders Litig., 734 A.2d 611, 617 (Del. Ch. 1999)).
[89] *Id.*
[90] *Id.* at 838.

circumstances' to interfere with Pasarell's ability to perform his fiduciary duties 'without being influenced by [his] overriding personal interest.'"[91]

C. Analysis

The procedure developed in *American Needle* that will inevitably be applied to future sports league cases is the ability for courts to examine one particular facet of a league in order to determine whether the league functions as a single entity within that limited scope. Due to the necessity for cooperation within certain aspects of sports leagues as acknowledged in *NCAA v. Board of Regents*, it seems unlikely that many leagues will be considered single entities immune from antitrust scrutiny under Section 1 of the Sherman Act in future litigation.

Because the Federations did not satisfy their burden of proving a relevant market at the trial level, the appellate court did not have the opportunity to actually apply *American Needle* and decide whether the ATP should be considered a single entity under antitrust law. Even though the court did not make a decision on the single entity element of the case, they did reserve a modest section of the opinion to discuss it, and in so doing, attempted to mirror the Supreme Court's single entity analysis in *American Needle*.

Whether a sports league or association should be considered a single entity for antitrust purposes has been a debated issue amongst courts. Ultimately, the classification comes down to the facts.[92] *Deutscher* recognized this, and in doing so, looked to the Seventh Circuit Court of

[91] *Id.*

[92] *See* NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 470 (6th Cir. 2005) (holding that the hockey league's adoption of a players-eligibility rule was "an agreement between multiple actors"); Sullivan v. NFL, 34 F.3d 1091, 1099 (1st Cir. 1994) (refusing to hold as a matter of law that the NFL is a single entity under *Copperweld*); Seabury Mgmt., Inc. v. PGA of Am., Inc., 878 F. Supp. 771, 778 (D. Md. 1994) (holding that the PGA could not conspire with its regional sections as a matter of law) aff'd in relevant part, 52 F.3d 322 (4th Cir. 1995); Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) (holding that MLS was a single entity due to its unique structure).

Appeals' opinion in *Chicago Professional Sports Limited v. NBA*[93] (commonly referred to as "*Bulls II*"). In that case, the court stated that whether the National Basketball Association ("NBA") "is more like a single firm … or a joint venture … is a tough question" because "it has characteristics of both."[94] The *Bulls II* court noted that depending on the perspective, the NBA may look more or less like a single entity.[95] The court made an important point that was adopted by the Supreme Court in *American Needle*, namely that "[s]ports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*'s functional question one league at a time – and perhaps one facet of a league at a time[.]"[96] This was precisely how the Supreme Court approached the licensing of intellectual property in *American Needle*.

In the *Deutscher* court's analysis of the single entity status issue, it mirrored the main issues touched upon in *American Needle* as reasons why the NFL should not be considered a single entity for purposes of the licensing of their intellectual property. Just as the Court in *American Needle* examined whether the NFL was a single entity within a limited context, an analysis of the ATP, or any sports league, would likely be undertaken in a similar manner. As the Supreme Court noted in *NCAA v. Board of Regents*, a certain amount of cooperation is typically necessary in a sports league in order to preserve "the type of competition that [the league] and its member institutions seek to market."[97] However, as that court concluded, if that cooperation extends to preventing "member institutions from competing against each other … [they] have created a horizontal restraint – an agreement among competitors on the way in which they will compete with one another."[98] While some horizontal restraints are necessary in sports

[93] 95 F.3d 593 (7th Cir. 1996).
[94] *Id.* at 599.
[95] *Id.*
[96] *Id.* at 600.
[97] NCAA, 468 U.S. at 117.
[98] *Id.* at 99.

leagues, an output limiting horizontal restraint that limits the availability of a product to consumers is typically considered an unreasonable restraint of trade.[99] In *NCAA v. Board of Regents*, the horizontal restraint at issue limited the quantity of televised football games available to consumers and was considered an unreasonable restraint of trade.[100] In *Deutscher*, the question was whether the BNW Plan created a similarly unreasonable restraint.

While *Deutscher* did not rule on whether the ATP and its members should be considered a single entity, it provided a glimpse of how they would apply *American Needle* if given the chance. After citing to the Supreme Court's ruling in *American Needle* that NFL teams compete in the market for intellectual property, the *Deutscher* court stated, "[T]he agreement among the ATP's tournament members in the Brave New World Plan might have deprived the marketplace of potential competition."[101] Referencing *Brown v. Pro Football, Inc.*,[102] the court noted, "Professional sports teams or tournaments always have an interest in obtaining the best players possible."[103] Considering this interest, an agreement restricting a tournament's ability to acquire players would appear to be an unreasonable restraint of trade. Because top-tier men's professional tennis players only play in around nineteen to twenty-two tournaments on average per year,[104] an agreement mandating top players to play in the nine annual Tier I tournaments decreases other tournaments' ability to land top-tier players, and thus compete with Tier I tournaments for fans, sponsorships and advertising. Furthermore, just like each team in the NFL,

[99] *Id.*
[100] *Id.*
[101] Deutscher Tennis Bund, 610 F.3d at 837.
[102] 518 U.S. 231 (1996).
[103] Deutscher Tennis Bund, 610 F.3d at 837.
[104] Brief of Appellants at 14, Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010) (No. 08-4123), 2009 WL 2946689.

the individual member tournaments of the ATP Tour can be seen as a "substantial, independently owned, and independently managed business."[105]

The court continued by stating, "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."[106] This statement directly contradicts ATP's argument that the tournaments actually cooperate and thus should be considered a single entity under antitrust law. That said, just because a league or an aspect of it is not considered a single entity does not mean that collusion within the league necessarily constitutes an unreasonable restraint of trade.

While *Deutscher* does not add any revolutionary insight into *American Needle* analysis, it provides a glimpse into how courts may apply *American Needle* when considering whether a league constitutes a single entity. In this way, *Deutscher* offers a distinction of the Supreme Court's definition of the interface between *Copperweld* and *American Needle* through which the lower courts may be guided. By embracing the idea that "[t]he necessity for cooperation does not 'transform[ ] concerted action into independent action,"[107] *Deutscher* encourages the examination of an entity within a limited scope. Focusing on the competition that is necessary within a league, and not just the necessary cooperation, *Deutscher* highlights the shift in focus from *Copperweld* to *American Needle*. In future litigation, if sports leagues are less likely to be awarded single entity status and are therefore no longer immune to antitrust scrutiny under Section 1 of the Sherman Act, they will be subjected to rule of reason analysis. As the Court

[105] Am. Needle, at 2212; Brief of Appellants at 1, Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010) (No. 08-4123), 2009 WL 2946689.
[106] *Id.* at 837.
[107] Deutscher, at 837 (quoting Am. Needle, at 2214).

stated in *American Needle,*[108] many agreements of this type are likely to survive a rule of reason analysis.[109] Leagues will simply have to argue that the procompetitive benefits of their questioned practice outweigh any anticompetitive effects.

[108] Am. Needle at 2216 (the Court suggested that the NFL's "agreement is likely to survive the Rule of Reason").
[109] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009) (finding that defendants have won 221 out of the last 222 antitrust cases that reached a final determination under the rule of reason).