The Supreme Court has addressed antitrust issues arising from the sports industry many times. This is not surprising given the financial success of professional sports and the necessity the Super Bowl. For these games to occur and to be successful requires extensive coordination between the teams in matters such as the rules of play, scheduling, and promotion.

In the early 1960s, the teams decided to collectively promote the NFL brand to compete against other types of entertainment. As part of this effort, the NFL licensed vendors to make and sell consumer products bearing team logos and trademarks. For several decades, the NFL granted licenses to make headwear – essentially baseball caps – to several companies, including American Needle. In 2000, the NFL changed course and decided to offer an exclusive headwear license for ten years to the highest bidder. Reebok won, and American Needle lost its license.

American Needle responded by filing an antitrust action under the Sherman Act in federal district court. American Needle claimed that the NFL's exclusive license to Reebok was in fact a conspiracy among the teams to restrain competition for headwear. According to American Needle, the 2000 agreement and subsequent license to Reebok eliminated competition and independent decisionmaking that had previously existed among the teams.

The NFL argued that it was immune from liability under the Supreme Court's decision in the *Copperweld* case, which held that a parent corporation and its wholly-owned subsidiaries are a single entity for antitrust purposes.[6] In *Copperweld*, the Court explained that a corporate parent-subsidiary relationship is "guided or determined not by two separate corporate consciousnesses, but one," and accordingly any so-called agreement between the two does not deprive the marketplace of any independent sources of economic power.[7] The NFL argued that it fell within the *Copperweld* exception because the individual NFL teams functioned as a single

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[6] *Copperweld Corp. v. Indep. Tube Corp*., 467 U.S. 752, 771 (1984). Section 1 of the Sherman Act prohibits a "contract, combination . . . or conspiracy, in restraint of trade." As these words suggest, Section 1 requires at least two people acting in concert for a violation; a single person or entity acting alone cannot, by definition, violate Section 1.

[7] *Id*. at 769-71.

entity when promoting NFL football and because licensing was an essential part of this promotional activity. The district court agreed and granted the defendants summary judgment.

The Seventh Circuit affirmed in a unanimous opinion, explaining that "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property."[8] In reaching this conclusion the court rejected any consideration of the extent to which "the NFL teams could [have] compete[d] against one another when licensing and marketing their intellectual property."[9] The panel also seemed to place a lot of weight on the fact that football teams had collectively licensed their trademarks for several decades.

What happened next was unusual. Both American Needle *and* the NFL urged the Supreme Court to grant certiorari, pointing to a circuit split on the issue of whether a sports league can be a single entity under *Copperweld*. You are no doubt wondering why the NFL sought review of a decision in its favor. As Drew Brees, quarterback of the Super Bowl Champions New Orleans Saints, wrote in a Washington Post op-ed: "It was an odd request – as if I asked an official to review an 80-yard pass of mine that had already been ruled a touchdown."[10] While the NFL won in the Court of Appeals, it did so on narrow grounds, arguably with no application to other aspects of its operations. The NFL apparently hoped for a broader holding that would immunize more of its activities.

When asked for its views, the U.S. Solicitor General's office argued against certiorari on the grounds that the Seventh Circu5(e)-u8d erican that a case involving a sports league was not an appropriate way to address *Copperweld*-type issues.[11]

separate entities in all aspects of their operations.[16] Instead, the Court seemed to be searching for a middle ground. Several of the justices – perhaps a majority – appeared to want a fact-intensive inquiry as to the necessity of a particular joint activity to the success of the game.

My reading of the tea leaves is that the Court is likely to reverse the Seventh Circuit and remand with instructions to apply a fact-intensive test along these lines. This would be a victory for plaintiffs but would still leave many hurdles for plaintiffs to establish liability.

Without yet knowing the outcome of the case, let me offer some thoughts on potential implications of the Court's decision. First, the current Supreme Court continues to be very interested in antitrust. *American Needle* will be the eleventh antitrust decision in the last six terms, which is nearly two decisions a term. By comparison, the Court averaged less than one decision a year in the prior fifteen terms.[17]

Second, *American Needle* is the first opportunity to see how Justice Sotomayor approaches antitrust cases as a Supreme Court justice. Her questions at oral argument suggested that, like the other Justices, she was not inclined to support either side's argument and was searching for a middle ground. I should mention that *American Needle* is not her first exposure to antitrust law as a jurist. Not long before her elevation to the Supreme Court, she participated as a circuit court judge in an antitrust case that was surprisingly similar to *American Needle*

[16] Referring to the game's rules and schedule, Chief Justice Roberts stated that "[t]here are some things that it just seems odd to subject to a rule of reason analysis." *Id*. at 24. Justices Kennedy and Alito echoed this concern. *Id.* at 6-9.

[17] I have previously discussed why the current Court is so interested in antitrust. *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, The Supreme Court's Antitrust Jurisprudence: Will The Past Be Prologue?, Remarks before the Antitrust Section of the Connecticut Bar Association 8-11 (Apr. 23, 2008), *available at* http://www.ftc.gov/speeches/rosch/090423robertscourt.pdf.

involving the licensing of major league baseball trademarks.[18] The case is also not her first exposure to sports law, as she is credited for ending the 1994-1995 Major League Baseball strike when she issued a preliminary injunction prohibiting the league from implementing a new collective bargaining agreement and using replacement players.[19]

congressional subcommittee that a ruling in the NFL's favor would increase the chance of a lockout.[21] Likewise, Drew Brees asserted in his same op-ed that an NFL victory could give the owners the power to "end or severely restrict free agency, continue to enter into exclusive agreements that will further raise prices on merchandise, lock coaches into salary scales that don't reward them when they're promoted and set higher ticket prices (including preventing teams from competing through ticket discounts)."[22] In contrast, a ruling in favor of American Needle or a narrow ruling in favor of the NFL probably would have little effect beyond the specific headwear license at issue.

II.

The next case, *Jones v. Harris*, is another case from the Seventh Circuit.[23] The issue in *Jones v. Harris* is how courts should evaluate the compensation of mutual fund advisors. What's interesting about the case from an antitrust perspective is that the judges who authored the appellate panel decision and the en banc dissenting opinion are both leaders of the law and economics movement, yet they reached very different conclusions about the marketplace's ability to control advisors' compensation. Their disagreement reflects, to some extent, a deeper debate about the role of economic thinking in the law.

In 1970, Congress amended the Investment Company Act to provide a cause of action when an investment advisor of a registered investment company breaches its fiduciary duty with

[21] By Mark Maske, *NFL Players' Union Braces for a 2011 Lockout*, Wash. Post, Jan. 21, 2010.

[22] Brees, *supra* note 10.

[23] *Jones v. Harris Associates L.P.*, 527 F.3d 627 (7th Cir. 2008).

respect to compensation.[24] Congress created this fiduciary duty out of concern that the close relationship between investment advisers and investment companies could result in excessive compensation to advisors.[25] In the *Gartenberg* case, the Second Circuit explained that "the test is essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in light of all of the surrounding circumstances."[26] Put another way, "the adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining."[27] At least two other circuits have followed *Gartenberg*.[28]

The plaintiffs in the *Jones v. Harris* case were investors in three mutual funds operated by Oakmark, which is a family of mutual funds established and advised by Harris Associates. Plaintiffs contended that Harris' fees to Oakmark were excessive in violation of the Investment Company Act because Harris charged institutional clients less for similar services. The district court, applying the *Gartenberg* standard, dismissed plaintiff's claim based on the undisputed evidence that Harris' fees were consistent with industry standards.

In a unanimous opinion written by Chief Judge Easterbrook – a strong advocate of the Chicago School of economics, which is essentially what you learned in Economics 101 back in

[24] Section 36(b) of the Investment Company Act states that "the investment advisor of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services." 15 U.S.C. § 80a-35(b).

[25] *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 540-541 (1984).

[26] *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923, 928 (2d Cir. 1982).

[27] *Id*.

[28] *Krantz v. Prudential Investments Fund Management LLC*, 305 F.3d 140 (3d Cir. 2002) (per curiam); *Midgal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d 321 (4th Cir. 2001).

college – the Seventh Circuit affirmed the judgment of the district court but rejected the *Gartenberg* standard. Instead, the proper test, according to the Seventh Circuit, is whether the advisor was honest and disclosed all relevant fee information.[29]

The court advanced three reasons for its departure from *Gartenberg*. First, the court noted that under the law of trusts, a fiduciary is not subject to a cap on compensation. In the court's words: "A fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation."[30]

Second, the court saw little need for judicial oversight of advisor fees given the highly competitive nature of the mutual fund business. As the court explained, there are thousands of mutual funds in the United States, and cost is one of the metrics on which the funds compete for investors. The court observed that "[m]utual funds rarely fire their investment advisors, but investors can and do 'fire' advisors cheaply and easily by moving their money elsewhere."

industry-wide."[35] Judge Posner was likewise skeptical of the panel's claim that investors will avoid funds that charge excessive fees.

Judge Posner was particularly concerned by the advisor's charging the funds more than twice what it charged institutional investors. While acknowledging that the difference could be justified by a difference in costs, he asserted that there was no record evidence to justify such a conclusion.[36] Finally, Judge Posner dismissed Judge Easterbrook's concern with judicial review of corporate salaries, explaining that such a review was necessary to the determination of whether a breach of fiduciary duty had occurred.

Picking up where Judge Posner left off, some of the amicus briefs pointed to recent research in behavioral economics, which is an emerging field of research that questions whether people and companies actually act rationally, as the Chicago School assumes. For example, one brief submitted by three academics pointed to research suggesting that "the vast majority of investors cannot accurately assess the quality of the mutual funds in which they invest . . . [and] lack essential information necessary for them to make informed decisions."[37] Another brief submitted by several law professors echoed these comments, saying that "investors . . . have demonstrated little behavioral capacity to invest rationally."[38] As a result of these deficiencies, investors are unlikely to be able to control advisor compensation by shifting their investments.

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[35] *Id*. at 732.

[36] This point was debated at length at oral argument. *See* Transcript of Oral Argument at 8, 34-36, 41, 44-50, Jones v. Harris Associates L.P., No. 08-586 (U.S. Nov. 2, 2009).

[37] Brief of Robert Litan, Joseph Mason, and Ian Ayres as *Amici Curiae* Supporting Petitioners at 5-6, Jones v. Harris Associates L.P., No. 08-586 (U.S. June 17, 2009).

[38] Brief of *Amici Curiae* Law Professors in Support of Petitioners at 23, Jones v. Harris Associates L.P., No. 08-586 (U.S. June 15, 2009).

On Tuesday, March 30th, in a 9-0 decision authored by Justice Alito, the Court turned its back on Judge Easterbrook's Seventh Circuit "pure Chicago School" decision.[45] It essentially adopted the *Gartenberg* standard – a "totality of the circumstances test" – for liability, including monopoly to an inventor can result in higher prices, reduced output, and diminished follow-on innovation. As the Supreme Court has explained, the Constitution's "Patent Clause reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition . . . ."[47]

Perhaps nowhere is this tension more apparent today than in the area of business method patents, which are a class of patents which disclose and claim new methods of doing business. The Federal Circuit blessed the granting of business method patents in a 1998 decision.[48] Since then, the number of business method patents issued by the PTO has exploded.[49] Critics have charged that these patents are poorly defined, cause uncertainty, result in expensive litigation and defensive patenting, and are contrary to the purposes of the Patent Act. Critics also charge that business method patents are favored by non-practicing entities, or "patent trolls," which are companies that acquire patents solely with the intent to sue. Supporters argue that patent coverage for business methods encourages innovation, augments public knowledge though the Patent Act's disclosure requirement, and is consistent with the aim of the Patent Act to be read broadly to accommodate new and useful technologies.

In 2003, the FTC issued a report that examined the proper balance between patent law and antitrust law.[50] The report recognized "the continuing debate regarding business method patents raises the issue of the proper boundaries of patentable subject matter."[51] Given the complexity of the issue, the report took no position on whether the patentability of business methods should be reconsidered. The report did note, however, that future extensions of patent coverage should not be undertaken lightly, given "the uncertainty surrounding the benefits and the possible competitive downside."[52]

The *Bilski* case arose from the attempt of two inventors to obtain a patent in 1997 on mathematical formulas to hedge against the risk of fluctuating raw material prices. A patent examiner and then the patent appeals board rejected the application, but for different reasons.[53]

The inventors appealed to the Federal Circuit, which *sua sponte* heard the case en banc. The case generated intense interest, with 38 amici joining the case – a remarkable number. The court in a 9 to 3 decision by Chief Judge Michel held that the "machine-or-transformation" test was the exclusive test for determining whether a process is patentable. Under this test, a process is eligible for a patent if "(1) it is tied to a particular machine or apparatus or (2) it transforms a

[50] Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003).

[51] *Id*. Ch. 4, pg. 39.

[52] *Id*. Ch. 4, pg. 43.

[53] The Board explained that the applicants' process was not drawn to a patent-eligible subject matter because it did not produce a "useful, concrete and tangible result." *Bilski*, 545 F.3d at 950. The examiner rejected the application because "the invention is not implemented on a specific apparatus and merely manipulates [an]

particular article into a different state or thing."[54] The court left open the possibility, however, that it might "refine or augment" the machine-or-transformation test "to accommodate emerging technologies."[55] Turning to the facts of the case, the court found that the invention at issue "entirely fails the machine-or-transformation test" and therefore affirmed the decision of the Patent Board to reject the patent application.

The inventors sought certiorari, arguing that the machine-or-transformation test conflicted with Supreme Court precedent requiring broad interpretation of the patent grant and that Congress had specifically allowed business method patents. The Solicitor General, representing the Patent Office, patented.[56] While it seemed clear that the Court agreed with the Federal Circuit and the Patent Office that the invention at issue is not patentable, it is far less clear whether the Supreme Court will endorse the machine-or-transformation test. At oral argument, the Court was searching for a test that would avoid patenting questionable business method patents while providing enough flexibility to account for future technologies. Some of the justices also seemed to want a more straightforward standard than the machine-or-transformation test.

The oral argument was also noteworthy for Justice Breyer's discussion of how the case required the Court to weigh the conflicting goals underlying the patent system. It is worth quoting him at length. He said:

There are actually four things in the patent law which everyone accepts. There

In conclusion, at first blush the 2009-2010 term may involve fewer antitrust cases than prior terms. But in reality there is plenty on the docket for those interested in antitrust to chew on.