

# **USFL v. NFL: The Challenge Beyond the Courtroom**

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This is a story of a professional football league that between 1983 and 1986 captured the attention of millions of Americans – both on the field and in the courtroom. Initially conceived as a spring time sport, the founders sought to draw in fans with a high level of competition played on national television stage. In its first two years, the league was able to produce TV ratings and game attendance that nearly rivaled those of the more established National Football League. During this time, the success of the league was spurred on by superstar players such as quarterbacks Jim Kelly and Steve Young, running back Herschel Walker, guard Nate Newton, and defensive end Reggie White. Games were played in front of capacity crowds at stadiums such as Soldier Field in Chicago, the New Orleans Superdome, and Giants Stadium in New Jersey. Prior to the 1985 season, the league was offered nearly \$250 million in cable and network TV contracts. Despite all of this apparent success, within 6 months the league would be in financial ruin and most of its players and owners would soon be forgotten. This is a story about the difficulties of competing against an established professional football league and the legal battles that ensued. This is the story of the United States Football League.

## **The Early Era of the National Football League and League Competition**

The National Football League (NFL) is the largest professional American Football league. It is an unincorporated association controlled by its members. The league currently consists of thirty-two teams from American cities and regions, divided evenly into two conferences — the American Football Conference (AFC) and National Football Conference (NFC) — of four four-team divisions. The NFL has the highest per-game attendance of any domestic professional sports league in the world, drawing over 67,000 spectators per game for each of its two most recently completed seasons in 2006 and 2007.<sup>1</sup> With total revenue exceeding an estimated \$6 billion in 2007, the modern NFL is a far cry from its uncertain beginnings in small town in Ohio.

The NFL was founded in 1920 at a Hupmobile dealership<sup>2</sup> in Canton, Ohio under the name American Professional Football Association.<sup>3</sup> In 1922, it changed its name to the National Football League. The original teams were the Akron Pros, the Canton Bulldogs, the Cleveland Indians, the Dayton Triangles, the Decatur Staleys, the Hammond Pros, the Massillon Tigers, the Muncie Flyers, the Rock Island Independents and the Rochester Jeffersons, although Massillon and Muncie never played any games.

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<sup>1</sup> <http://www.nfl.com/news/story/9908132>. In comparison, the NFL's overall attendance is only approximately 20% of that of Major League Baseball, due to MLB's much longer schedule, currently 162 games per team with 81 home games each, plus playoffs.

<sup>2</sup> The Hupmobile was an automobile built from 1909 through 1940 by the Hupp Motor Company of Detroit, Michigan. Their first car, the Model 20, was introduced to the public at the Detroit Auto Show in February 1909. See <http://en.wikipedia.org/wiki/Hupmobile>.

<sup>3</sup> The league changed the name to American Professional Football League in 1921 and then settled on its current name in 1922.

By 1926, the NFL had grown to twenty-two franchises. By 1931, it had shrunk back to ten as the great depression wreaked havoc on all forms of professional sports and entertainment. The first championship game was not played until 1933. By 1934 all of the small-town teams, with the exception of the Green Bay Packers, had moved to or been replaced by teams in big cities. The first NFL draft of college players took place in 1935. All NFL teams played the same number of games for the first time in 1936. As late as 1952, NFL teams encountered bankruptcy. Indeed, NFL Commissioner Rozelle once testified that "41 franchises failed in the first 41 years of the League's existence."<sup>4</sup>

A competing league, the All-America Football Conference (AAFC), was organized in 1945 and operated for four seasons. Founded by Chicago Tribune sports editor Arch Ward<sup>5</sup>, the AAFC proved to be a formidable rival to the NFL. Ward brought together a number of wealthy pro football enthusiasts, some of whom had previously attempted to purchase NFL franchises. At the same time, NFL was just emerging from its wartime retrenchment. The AAFC was successful in competing for collegiate and professional talent as many of the athletes returned home from the war. The AAFC also introduced numerous innovations to the game on and off the field. Among them were year-round coaching staffs, precision pass patterns, and the face mask.

Ultimately, the AAFC was unable to sustain itself in direct competition with the NFL due to limited attendance and the relatively small market for professional football at the time. The league began with a total of 8 teams: Brooklyn, Buffalo, Chicago, Cleveland, Los Angeles, Miami, New York and San Francisco. Baltimore replaced Miami in 1947, and after the 1948 season, the Brooklyn team merged with the New York team. The AAFC ceased operations in 1949 when the Baltimore, Cleveland and San Francisco teams were absorbed by the NFL, raising the number of its teams to thirteen.

Shortly thereafter, the number of NFL teams was reduced to twelve, where it remained until 1960. The NFL's twelve teams were the Baltimore Colts, Chicago Bears, Chicago (later St. Louis) Cardinals, Cleveland Browns, Detroit Lions, Green Bay Packers, Los Angeles Rams, New York Giants, Philadelphia Eagles, Pittsburgh Steelers, San Francisco Forty-Niners and Washington Redskins. The Dallas Cowboys, Minnesota Vikings, Atlanta Falcons and New Orleans Saints were added as expansion teams in 1960, 1961, 1966 and 1967, respectively.

### **Further Competition: The American Football League and World Football League**

The American Football League (AFL) was founded in 1959 by the late Lamar Hunt and began play in the fall of 1960. Hunt founded the league after being refused entry to the NFL as an owner.<sup>6</sup> Although other rival leagues had come and gone in the early years of professional football, the new AFL was able to capitalize on the ever-rising popularity of the sport. Hunt's initial goal was to bring professional football to Texas, which was home to two of the new teams.

Demand for professional football was then sufficiently great to enable the AFL to obtain a contract with ABC for the years 1960-63. The new league was fueled in part by the NFL's cautious approach toward expansion; many of the AFL's original owners had

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<sup>4</sup> Transcript of Proceedings at 55, *United States v. National Football League*, No. 12808 (E.D. Pa. July 27, 1961).

<sup>5</sup> Ward was also the originator of baseball's All-Star Game and football's College All-Star Game.

<sup>6</sup> Along with Bud Adams, who was also snubbed by the NFL.

unsuccessfully sought NFL franchises, and the majority of the AFL teams were located in cities without an NFL team. The original eight teams were the Boston Patriots, Buffalo Bills, Dallas Texans, Denver Broncos, Houston Oilers, Los Angeles (San Diego after the 1960 season) Chargers, New York Titans, and Oakland Raiders. The Miami Dolphins joined the AFL in 1960, the Cincinnati Bengals in 1968.

On June 17, 1960, the AFL filed an antitrust lawsuit<sup>7</sup> against the NFL, for, among other things, putting a team in Dallas after the AFL had placed one there and for interfering with the league's attempt to get TV contracts. The AFL's first contract with ABC averaged only \$2,125,000 million a year for the entire league. After a two-month trial in 1962 in Baltimore, a federal judge ruled against the AFL, holding that the AFL had shown no monopolization by the NFL defendants of the relevant market, and no attempt or conspiracy by defendants to monopolize it.<sup>8</sup>

A number of innovations distinguished the AFL and helped it maintain a legitimate rivalry to the NFL: a stadium game clock for the spectators (the NFL relied only on time announcements from the officials on the field); players' names on their jerseys; and a playing style geared to the attractive and flashy passing game. The AFL was inclusive of black players and actively recruited from colleges with black players historically shunned by the NFL. AFL teams further installed blacks at positions from which they were tacitly excluded in the NFL, such as quarterback and middle linebacker.<sup>9</sup>

The AFL also forced the NFL to expand: The Dallas Cowboys were created to counter Hunt's AFL Dallas Texans franchise. The Texans moved the franchise to Kansas City as the Chiefs in 1963; the Minnesota Vikings were the NFL franchise given to Max Winter for abandoning the AFL; and the Atlanta Falcons franchise went to Rankin Smith to dissuade him from purchasing the AFL's Miami Dolphins.

In 1966, the NFL and the AFL agreed to merge, largely because the competition for players had sharply increased salaries. With both leagues conducting college drafts for the same players, the bidding war was out of control. In 1965, in the most high profile such contest occurred over University of Alabama quarterback Joe Namath, who signed with the New York Jets in preference to the NFL's St Louis Cardinals for a then-record \$427,000.

In an agreement brokered by AFL founder Lamar Hunt, and Dallas Cowboys General Manager Tex Schramm, on June 8, 1966 the two leagues announced their merger deal. The leagues would henceforth hold a combined draft, and an end-of-season title game (later known as the Super Bowl) would be played between the two league champions. In 1970, the leagues would become fully merged under the name National Football League, divided into two conferences of an equal number of teams each.

Thirteen years after it passed the Sports Broadcasting Act<sup>10</sup>, Congress once again intervened in the professional football arena, granting a statutory exemption to the AFL-NFL merger with an amendment to the Sports Broadcasting Act, the Football Merger Act<sup>11</sup>. The act specifically exempted from antitrust scrutiny the combining of professional football leagues. Congress intended the Football Merger Act help professional sports leagues run

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<sup>7</sup> See *AFL v. NFL*, 323 F.2d 124 (4th Cir. 1963), *aff'd* 205 F. Supp. 60.

<sup>8</sup> *Id.* at 126.

<sup>9</sup> In January 1965 there was a player boycott of the 1964 AFL All-Star Game in New Orleans, over discrimination of black players by some of the hotels and businesses in the city. This was a seminal civil-rights action and is commemorated at the Pro Football Hall of Fame.

<sup>10</sup> See *infra*.

<sup>11</sup> See 15 U.S.C. § 1291.

more efficiently and avoid ruinous competition. The statute amounted to a congressionally authorized acquisition of market power potentially amounting to monopoly power.<sup>12</sup>

In 1974, the World Football League ("WFL") was founded. The WFL lasted for one-and-one-half seasons before disbanding. Its teams were underfinanced and played in mostly smaller markets. The WFL never obtained a television contract with a major network, although its games were televised by a syndicated network. At least one of the league's teams tried unsuccessfully to enter the NFL through litigation.<sup>13</sup> In that litigation, the U.S. District Court for the Eastern District of Pennsylvania, and later the Third Circuit held that the NFL was not required under the Sherman Act to permit entry into the league by a qualified application.

In a foreshadowing of the possible effects of competition between multiple football leagues, the WFL *was* successful in raising the bar on salaries that had been stagnant in the NFL. At the time, average salaries of NFL players were among the lowest in the four major sports. As NFL stars such as Larry Csonka and Ken Stabler signed with WFL teams, NFL owners responded by begrudgingly raising salaries to levels which WFL teams could not afford. The salary increase was only marginal as the league folded in under two years, and its player spending had looked suspect well before then.<sup>14</sup>

### **The Beginnings of the United States Football League**

In the 1970s and 1980s, the NFL solidified its dominance as America's top spectator sport and its important role in American culture. The Super Bowl became an unofficial national holiday and the top-rated TV program most years. *Monday Night Football*, which first aired in 1970, brought in high ratings by mixing sports and entertainment. Rule changes in the late 1970s ensured a fast-paced game with lots of passing to attract the casual fan. The founding of the United States Football League in the early 1980s was the biggest challenge to the NFL in the post-merger era.

The USFL was founded by David Dixon, a New Orleans antique dealer who had been instrumental in bringing the New Orleans Saints to town. In 1965, he envisioned football as a spring and summer sport. Dixon (and future USFL owners) believed that public demand for football was not satisfied by the NFL's and the colleges' fall seasons; that cable television - which could not televise NFL games under the existing NFL-network contracts - would offer unique opportunities for television revenues and exposure; that a spring football league would face limited competition; that there was a sufficient supply of football players for two leagues; and that a spring league could draft college players and put them on the field even before the NFL draft.

Over the next 15 years, he studied the last two challengers to the NFL's dominance of pro football; the AFL and the WFL. In 1980, a study commissioned by Dixon found promising results for a spring and summer football league. In November of 1980, Dixon circulated a prospectus to advertising agencies and prospective owners laying out his idea for a spring football league. Dixon also formed a blueprint for the prospective league's

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<sup>12</sup> 21 U. Miami L. Rev. 729.

<sup>13</sup> See *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983) (rejecting antitrust claim by WFL team denied admission to NFL).

<sup>14</sup> For example, the Memphis Southmen signed three Miami Dolphins players, fullback Larry Csonka, halfback Jim Kiick, and wide receiver Paul Warfield to what was then the richest 3-player deal in sports, an astounding US\$3.5 million to start in 1975.

operations, which included early television exposure, heavy promotion in home markets, and owners willing to absorb years of losses - which he felt would be inevitable until the league found its feet. He also assembled a list of possible franchises located in markets attractive to a potential television partner.

After almost two years of preparation, the USFL announced its formation on May 11, 1982, at the 21 Club in New York City. Judge Peter Spivak, part owner of the Detroit team, was announced as the president of the league, an interim position until a commissioner could be found. The league announced that it would be made up of 12 teams in major markets across the country. Franchises would play in New York (the Meadowlands, NJ), Los Angeles, Chicago, Detroit, Boston, Tampa, Oakland, Denver, Washington, Philadelphia, Birmingham and San Diego (eventually switched to Phoenix). On June 14, Chet Simmons - the former ABC executive and broadcasting executive with ESPN - was named the league's first commissioner. In part because of the location of its teams in major television markets, the USFL quickly reached an over-the-air television deal with ABC Sports and a cable deal with then-fledgling ESPN.

The USFL's founders did not seek to obtain a television contract for fall play. Before fielding a team, however, the USFL received bids for a spring television contract from ABC and NBC and from two cable networks, ESPN and the Turner Broadcasting System. The league entered a four-year contract with ABC, and a two-year contract with ESPN. The ABC agreement provided for ABC to pay the USFL \$18 million for the 1983 and 1984 seasons, with options exercisable by ABC at \$14 million for 1985 and at \$18 million for 1986. ESPN contracted to televise USFL games for two years at rights fees of \$4 million for 1983 and \$7 million for 1984.<sup>15</sup>

The USFL's founders placed a high priority on the fans' perception of the quality of play. They intended to use major stadiums<sup>16</sup> and to hire well-known coaches.<sup>17</sup> The USFL would have slightly different rules than the NFL, many of which would later be adopted by the NFL, most notably: the two-point conversion (adopted by the NFL in 1994); the college rule of stopping the clock after first downs was used only for the final two minutes of each half; a method of challenging officials' rulings on the field via instant replay (using a system that is almost identical to that used by the NFL today); and a salary cap of \$1.8 million to reduce inevitable losses and spread talent throughout the league (later abandoned by league owners)<sup>18</sup>. Most importantly, the USFL founders wanted the league to control costs. For its first season, therefore, the USFL established budget guidelines for player salaries of between \$1.3 and \$1.5 million per team.

On March 6, 1983, the Tampa Bay bandits beat the Boston Breakers 21-17 in the first ever USFL game. The USFL's first year of play, 1983, was a mixed success. Although play

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<sup>15</sup> The USFL began with eight of its twelve teams in the nation's top ten television markets. The ABC contract required the USFL to field teams in the three largest television markets (New York, Los Angeles and Chicago) and in at least four of the five other top-ten television markets in which teams were originally located (Philadelphia, Boston, Detroit, San Francisco/Oakland and Washington).

<sup>16</sup> Included were such prominent NFL stadiums as Soldier Field in Chicago (capacity 65,793); the New Orleans Superdome (72,675); Giants Stadium in New Jersey (76,891); the Houston Astrodome (47,965); the Silverdome in metropolitan Detroit (72,675); and RFK Stadium in Washington, D.C. (54,794).

<sup>17</sup> A number of the USFL's coaches had coached in the NFL: George Allen (Redskins and Rams); Chuck Fairbanks (Patriots); Frank Kush (Colts); Walt Michaels (Jets); Red Miller (Broncos); and John Ralston (Bills). Several had been successful NFL players: John Hadl, Craig Morton, Jack Pardee and Steve Spurrier.

<sup>18</sup> The NFL introduced a salary cap in 1994.

was often uneven during the inaugural year, most teams showed steady improvement. The league averaged more than 24,000 fans per game, which was very close to what Dixon originally forecast. The Nielsen television rating for the first week of games was 14.2, a figure comparable to NFL ratings. As the season went on, however, the USFL's television ratings declined; average television ratings for the year were 6.23 on ABC and 3.28 on ESPN. Overall, both ABC and ESPN were very pleased with the ratings, as these average figures were consistent with the league's and networks' pre-season projections. The league also received extensive media exposure when it signed Heisman Trophy winner Herschel Walker to a three-year, \$5 million contract. Walker signed with the New Jersey Generals in February of 1983 after his junior season at the University of Georgia.

On the financial side, the picture was not as bright. The USFL lost a total of almost \$40 million in its first year of operation, or an average of \$3.3 million per team. The league had projected losses of only about \$2 million per year for each team over the first three years. Only the Denver Gold, who topped the league in attendance, and the Tampa Bay Bandits managed to escape large financial losses. The unanticipated financial losses were chiefly the result of the failure to stay within the original salary guidelines. Indeed, in a November 1983 letter to other owners, Tad Taube of the Oakland team warned that: "If we are not successful in establishing player [salary] caps I can guarantee you that there will not be a USFL within three years, irrespective of improved revenue [from] television . . . . We have sighted the enemy and they are us!"

Despite solid league attendance, the USFL's second year was marked by change. Immediately following the 1983 season, Simmons was replaced by Harry Usher – who had been instrumental in the success of the 1984 Los Angeles Olympics – as commissioner. Expansion, new owners and new players highlighted the USFL's second season. The league, over the objection of some owners, expanded from twelve teams to eighteen. Joining the league were the Houston Gamblers, Memphis Showboats, Pittsburgh Maulers, San Antonio Gunslingers, Oklahoma Outlaws and the Jacksonville Bulls. Owners of four teams moved their teams to new cities, while five of the original owners left the league entirely.<sup>19</sup> One notable addition to the league's ownership was real estate tycoon Donald Trump, who became the new owner of the New Jersey Generals on September 22, 1983.

Throughout the second half of 1983 and early 1984, several USFL owners escalated spending on player salaries. The league continued to attract new talent, as Mike Rozier, college football's top player, was just one of many quality players to sign with the league in its second season. The league also inked Jim Kelly, Reggie White, Steve Young and a host of college football's best along with former NFL starters.<sup>20</sup>

Trump, in particular, signed a number of players who were still under contract with the NFL to future contracts, including superstar Lawrence Taylor of the New York Giants. The USFL's spending on players greatly outpaced its revenues. The owner of the Los Angeles team, for example, committed the team to \$13.1 million in salaries and bonuses for just one season. He even entered into a multiyear, \$40 million contract with just one player, Steve Young of Brigham Young University. By the end of the 1984 season, high player

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<sup>19</sup> For example, the owner of the Chicago franchise exchanged that franchise for the Phoenix franchise, taking his winning Chicago coach and players while the original Phoenix team moved to Chicago under a new owner.

<sup>20</sup> USFL teams, for example, signed established NFL players such as running back Joe Cribbs and defensive back Gary Barbaro.

salaries had busted USFL franchises in two of the top three television markets, Chicago and Los Angeles. At the same time, only four of the original owners remained in the league.

Independent of their competition for players with the USFL, salaries of NFL teams had begun rising as early as 1982 when the league signed a new collective bargaining agreement. Between 1982 and 1987, the average NFL player's salary rose from \$90,000 to \$230,000. Gains secured by the NFL Players Association in the areas of free agency, salaries, severance, and pre-season pay further increased the market rates at which USFL owners would have to compete in order to attract the top NFL talent. In comparison, salary gains during past periods of rival league competition such as during the existence of the AFL were relatively smaller due to the lack of unionized power among the players.

The league was not a failure as entertainment, however. Despite a decline in the USFL's television ratings to 5.7 on ABC and 2.8 on ESPN, ABC exercised its option to carry the USFL in the spring of 1985 at \$14 million and offered a new contract worth \$175 million for four years in the spring beginning in 1986. ESPN offered a contract worth \$70 million over three years.

### **Viability as a Spring Sport**

As I will discuss later in my paper, 1984 was a turning year for the USFL as owners would later vote to move the league into a fall time slot and thereby competing against the NFL not only players but for cities, stadiums, and television contracts. Was the USFL viable as a spring sport? By the end of the USFL's second season, the cumulative debt of the league combined with each of the franchises was in excess of \$100 million dollars. As mentioned above, league revenue was set to increase from two new television contracts. However, to obtain these contracts the USFL had already begun competing with the NFL for the elite college and professional players. This competition had driven salary costs to such a level that even increased television revenue would likely be unable to overcome.

The initial strategy of keeping player salaries low was abandoned by many of the owners in the first two seasons of the USFL. Inspiring attendance and positive national exposure spurred owners to prematurely increase salaries. This decision was premature because the league was locked into a relatively meager initial television deal. While cities such as Denver and Tampa Bay embraced their winning franchises, other less successful franchises who had yet to field a winning team, were not receiving significant boosts from ticket or merchandise sales. At the same time, extremely wealthy owners in both leagues, such as Donald Trump, were able to absorb short-term losses in hopes of future returns, other league owners were not (or chose not to be) capable of dealing with the financial losses. Referring to the upcoming season, Trump said, "There is only one owner who can afford to play this year. And that's me." In fact, the league had brought together several wealthy owners<sup>21</sup>. But not everyone in the league was well off. In Tampa, as the league was voting to suspend operations for '86, the Hillsborough County Sheriff's office confiscated weights, equipment and souvenirs from the Bandits' offices to satisfy a \$150,000 judgment awarded former safety Bret Clark, now with the Atlanta Falcons. Clark had received the loot in an arbitration settlement for money owed to him by the late John Bassett, the team's original owner.

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<sup>21</sup> Including real estate magnates Trump and A. Alfred Taubman of the Oakland Invaders, who were estimated to be worth \$600 million each, and William B. Dunavant Jr. of the Memphis Showboats, a cotton merchant said to be worth a mere \$150 million.

At the same time, NFL owners were confident that their teams and their league would survive another challenge, and were thus willing to endure higher costs in the wake of competition from the USFL. Veteran owners of NFL franchises who been around during the AFL days recognized that the current bidding war for player salaries would be unlikely to continue indefinitely.

As previously mentioned, the USFL sought to win over football fans with a high-quality on-the-field entertainment product. It is difficult to speculate whether such a product could have been produced while at the same time keeping costs at reasonable levels. The supply of talented football players for whom the public would spend their time and money is limited. Rather than produce a marginal product with the prospect of future growth, many USFL owners chose to bid for the upper-echelon talent from the college and NFL ranks. The league was quickly losing money, and as teams locked into increasingly larger player salaries, owners became increasingly more desperate to increase revenue.

### **The Beginning of the End**

On May 9, at a meeting of the USFL owners in New York, Donald Trump urged the other owners to move to a fall schedule, telling them “there will not be a merger” with the NFL unless that happens. By this time the significant turnover in league ownership meant that those responsible for the initial strategic plan for the league were no longer involved with the USFL, and many new owners were now looking to recoup their risky investments. Thereafter, the issue of when to play became divisive, and several owners came to believe that Trump was trying to bring about a merger with the NFL that would include only some USFL teams. The NFL would later introduce extensive evidence designed to prove that the USFL followed Trump's merger strategy, and that this strategy ultimately caused the USFL's downfall. The merger strategy, the NFL argued, involved escalating financial competition for players as a means of putting pressure on NFL expenses, playing in the fall to impair NFL television revenues, shifting USFL franchises out of cities where NFL teams played into cities thought to be logical expansion (through merger) cities for the NFL, and, finally, bringing an upcoming antitrust litigation.. On June 29, CBS conducted an internal economic analysis to study the possibility of putting the USFL in the fall schedule and determined that under all scenarios, because of a “dilution factor,”<sup>22</sup> the network would be unable to meet the USFL's financial demands.

Nevertheless, during an August 1984 owners' meeting, a divided group of owners voted to move to the fall in 1986. This decision was made despite: (i) ABC's warning that such a move would breach its contract for the spring of 1985 and 1986; (ii) the contrary recommendations of a management consulting firm, McKinsey & Company, which the USFL had retained for \$600,000 to consider the advisability of a fall season; and (iii) the contrary recommendations of the USFL's directors of operations and marketing. Moreover, Eddie Einhorn, a USFL owner who was to represent the USFL in negotiations to secure a network contract for the fall, warned that moving from large television markets to “merger” cities too quickly might preclude the securing of a network contract.

In order to compete directly with the NFL, USFL owners decided to move many of the leagues franchises from cities which had both USFL and NFL teams, to “merger” cites which lacked NFL teams. This strategy would also have the effect of making the franchises

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<sup>22</sup> See *infra*.



more attractive in the event the two leagues negotiated a merger. In the ensuing months<sup>23</sup>, the USFL withdrew from Chicago, Detroit, Philadelphia, Pittsburgh and Washington, D.C. - each a large television market with an NFL team - and moved into Baltimore (which had lost its NFL team in 1984) and Orlando (which had no NFL team). Through mergers, the USFL bolstered franchises in Oakland (which had lost the NFL Raiders to Los Angeles) and Phoenix (which had been discussed as a possible NFL expansion city).

While the viability of this strategy was certainly questionable, it is unclear whether the owners themselves believed that at the time this strategy had a chance of success, or whether they had acted in anticipation of a legal battle with the NFL. Certainly Trump, and possibly other owners, were anticipating a future merger between the USFL and NFL. The likely answer is that USFL in support of the new fall schedule felt that it would be a successful strategy - whether by creating a merger candidate or a viable league - and less focused (or even aware) of future legal trouble with the NFL.

During this period, the NFL had considered placing teams in some of these "merger" cities, notably Oakland and Phoenix, however, the NFL had matured by this stage in its existence and was unlikely to make more than a couple moves or expansions in any five-year period. In the early years, the league was not stable and teams moved frequently. Franchise mergers were particularly popular during World War II in response to the scarcity of players. By the early 1980's, franchise moves became far more controversial when a vastly more popular NFL, free from financial instability, allowed many franchises to abandon long-held strongholds for perceived financially greener pastures. Additionally, with the increasing suburbanization of the U.S., the building of new stadiums and other team facilities in the suburbs instead of moving to another central city became popular from the 1970s on.

USFL owners themselves responded in different ways to the revised league model. Many owners, bolstered by the possibility of profit-maximizing merger, stuck with their franchises and maintained ownership as their teams moved to new markets. These teams were encouraged to move by league officials, but much of the impetus for the movement came from the profit-seeking (and now more desperate) owners themselves. The league also introduced fresh ownership (and capital) as six new franchises were added during the 1983-1984 off-season - most of these in new "merger" cities.<sup>24</sup> The decision to move to the fall damaged the USFL's relations with ABC and ESPN. The former withheld a significant portion of the USFL's rights fees for the 1985 season, while the latter demanded a renegotiation of its proposed 1985-87 USFL contract.

Prior to the 1985 campaign, on October 17, 1984, the USFL announced its intention to switch to a fall schedule beginning in 1986 and to file an antitrust lawsuit against the NFL in Federal District Court. The change of playing season had severe ramifications for several franchises, many of which faced direct NFL competition in their cities. The on-the-field product of the USFL remained competitive, as league play improved dramatically due in large part to the preseason consolidations. Doug Flutie became the third consecutive Heisman winner to sign with the league. At the same time, negative headlines and near financial ruin plagued the league even as it was showcasing its best football.

The USFL's 1985 "lame-duck" spring season appears to have been affected adversely by the now publicly announced move to the fall, along with the more than \$160 million in

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<sup>23</sup> Between August 1984 and March 1985.

<sup>24</sup> The league added the Pittsburgh Maulers, Houston Gamblers, San Antonio Gunslingers, Memphis Showboats, Oklahoma Outlaws and Jacksonville Bulls.

debt accrued by league owners. The league's television ratings declined to 4.1 on ABC and 2.0 on ESPN. These lowered ratings were particularly damaging as the USFL lost bargaining leverage in the months immediately preceding negotiations for a potential fall contract. By the end of the 1985 season, several owners had withdrawn financial support for their teams, and a number of clubs were no longer meeting their payrolls and other bills. The USFL scheduled eight teams for its fall 1986 season, which was ultimately cancelled after the verdict in the antitrust case.

### **USFL v. NFL**

The USFL brought suit in the Southern District of New York against the NFL, its commissioner, Pete Rozelle, and twenty-seven of its twenty-eight member clubs.<sup>25</sup> Seeking damages of \$1.701 billion<sup>26</sup> and appropriate injunctive relief, the USFL alleged that the NFL violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The USFL claimed that the older league had conspired to restrain trade and did in fact monopolize the market for professional football by, among other things, jeopardizing the USFL's broadcasting contract with the major television networks.

The trial between the USFL and the NFL possessed all of the drama of the game of football itself. On the one side stood the owners of the fledgling and embattled USFL, a group of individuals who had succeeded in various other business enterprises, and who brought to the league enormous financial resources in the hope that the American public would respond favorably to professional football played in the spring. The USFL's opponents in the courtroom consisted of the establishment - the NFL's twenty-seven owners - some of whom had experienced the lean years of professional football before the league had captured the hearts and pockets of the American public.

Forty-eight days of trial before Judge Leisure produced a trial transcript of nearly 7,100 pages and thousands of additional pages in exhibits. While ultimately decided by a jury, the court would go on to publish seventeen opinions dealing with various aspects of both pre- and post-trial motions.<sup>27</sup>

### **NFL's Television Contracts**

USFL v. NFL often is described as the "television" case, because the heart of the antitrust issues revolves around whether one league prevented the other from obtaining a television contract, perhaps the most critical measure of success in the highly competitive sports industry.<sup>28</sup> In fact, the current television rights to the NFL are the most lucrative and expensive rights not only of any American sport, but of any American entertainment property. For the 2006 season, five American television networks (CBS, NBC, FOX, ESPN, and the NFL Network) are paying a combined total of \$21.4 billion to broadcast NFL games.

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<sup>25</sup> The Los Angeles Raiders, Ltd., were not named as defendants in this action. *See infra*.

<sup>26</sup> The complaint requested that "the Court award the plaintiffs threefold the amount of actual damages, not less than \$ 440,000,000 in the aggregate (\$ 1,320,000,000 when trebled)"; in the joint pretrial order, plaintiffs sought "threefold the amount of actual damages in excess of \$ 567,000,000 in the aggregate (in excess of \$ 1,700,000,000 when trebled)."

<sup>27</sup> Two of the most significant are: *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986); *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986).

<sup>28</sup> 21 U. Miami L. Rev. 729, 803.

It comes as no surprise that the growth of the NFL has been closely related to the growth of television. Beginning in 1951, the Dumont network televised five regular season games (twelve by 1954), as well as the championship game each year. In the mid-1950's, CBS began broadcasting certain NFL regular season games for \$1.8 million per year, and NBC acquired the right to televise the NFL championship game. The broadcast rights to games were controlled by individual teams during the 1950's, however.

In 1961, the NFL teams agreed to sell their collective television rights as a single package and to share broadcast revenues equally among all franchises. This decision was in response to arguments by Commissioner Rozelle that the league's competitive balance on the field would eventually be destroyed if teams in major television markets continued to sell their broadcast rights individually. In the long run, he believed, great differentials in television revenues among teams would lead to a competitive imbalance that would diminish the overall attractiveness of the NFL's product. Rozelle's arguments were bolstered by the policy of the recently organized AFL to pool television rights and revenues in its first broadcast contract with ABC.

Before the NFL could enter a pooled-rights television contract, however, it had to overcome several legal obstacles. An earlier attempt by the NFL to control the sale of television rights by its teams had been deemed a violation of Section 1 of the Sherman Act in *United States v. National Football League*<sup>29</sup>. In that case, the government sought to enjoin the enforcement of Article 10 of the NFL's by-laws, which regulated the broadcast of distant games into the home territories of other teams. Judge Grim – the presiding judge over the case - held that the restriction on the broadcast of outside games when home teams were playing away was an impermissible restraint of trade.<sup>30</sup> The final judgment provided that: “The defendants are jointly and severally . . . enjoined . . . from directly or indirectly entering into . . . any contract, agreement or understanding with the league defendant or any member club of the league defendant, . . . having the purpose or effect of restricting the areas within which broadcasts or telecasts of games . . . may be made.”<sup>31</sup>

In 1961, the NFL brought a pooled-rights agreement with CBS before Judge Grim for a determination as to whether the agreement violated the 1953 Final Judgment. This contract provided that CBS would have the “right to determine, entirely within its own discretion . . . which games shall be televised and where such games be televised.”<sup>32</sup> Judge Grim held that CBS's authority to determine when and where games would be broadcast violated Section V of the Final Judgment.<sup>33</sup> A subsequent motion by the NFL for a modification or suspension of the Final Judgment was denied. Judge Grim accordingly enjoined the execution and performance of the pooled-rights contract between the NFL and CBS, and further enjoined the NFL from entering into “any other contract and agreement having similar purpose or effect.”<sup>34</sup>

Eight years later, Congress sought to specifically alter Judge Grim's order. Congress intervened and enacted the Sports Broadcasting Act<sup>35</sup>, which exempts from antitrust review

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<sup>29</sup> 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>30</sup> *Id.* at 327.

<sup>31</sup> *Id.*

<sup>32</sup> *United States v. National Football League*, 196 F. Supp. 445, 447 (E.D. Pa. 1961).

<sup>33</sup> *Id.*

<sup>34</sup> *United States v. National Football League*, No. 12808 (E.D. Pa. July 28, 1961) (order construing 1953 Final Judgment).

<sup>35</sup> 15 U.S.C. § 1291 (1983).

all agreements between professional sports leagues and broadcasting enterprises that involve the telecasting and transmission of league games.<sup>36</sup> In order to protect college games from competition with pro football telecasts, the exemption did not apply to the broadcast of professional football games on Friday nights and Saturdays during the college football season.<sup>37</sup> *Id.* at 2.

The first NFL pooled-rights contract was with CBS. For the 1962 and 1963 seasons, CBS was the only network permitted to bid for this contract because it had individual rights contracts running through 1963 with nine teams. The NFL received \$4,650,000 per season from CBS during these two seasons. For the 1964-65 NFL contract, CBS outbid NBC and ABC with an offer of \$14,100,000 per season. In 1964, the AFL, which had had a contract with ABC, entered into a five-year, \$ 36 million contract with NBC.

In 1966, Congress amended the Sports Broadcasting Act specifically to confer antitrust immunity on the NFL-AFL merger.<sup>38</sup> At the same time, the restriction on Friday night and Saturday telecasts was expanded to include protection for high school football.<sup>39</sup> In 1970, the NFL entered into a contract with ABC to televise a game nationally on Monday nights. Between 1970 and 1986, all three major television networks broadcast NFL games, and the NFL's annual revenues from television increased by more than 800 percent during that period.<sup>40</sup>

The ABC, CBS and NBC contracts from 1970 onward have given each network rights of first negotiation and first refusal to decide whether to continue its NFL contract for subsequent years. The NFL's 1982-86 contracts were nonexclusive and did not forbid a network from televising another football league's games at any time when it was not broadcasting NFL games. The airtime available to the three networks was likely sufficient to allow for broadcast of a competing league's games, even during primetime. The larger hurdle for the USFL in entering the primetime arena would have been the high ratings requirements of primetime television. These network contracts included the national broadcasts for higher-rated games such as *Monday Night Football* and the NFL Playoffs, as well as the regional broadcast rights for all the NFL franchises.

The NFL was, however, forbidden by its network contracts to televise games on cable, making cable television contracts open to a competing league, although such contracts are less lucrative than network contracts. Upon formation, such network contracts were appropriate for the USFL as their costs were low enough to be met by these TV contracts. As the league pursued higher player salaries as well as smaller-television markets in "merger" cities, the league had essentially forced itself to require network television deals in order to financially support the league while directly competing against the more powerful NFL.

When the NFL's network contracts expired in 1981 and 1986, the networks were free to contract with a competing league's games for all time slots. As discussed earlier, the USFL signed both network and cable contracts in 1981 – and both met ratings expectations. Despite damaged relations from the unanticipated move to a fall schedule, the USFL was offered a \$175 million network deal with ABC for four years in the spring beginning in 1986, as well

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<sup>36</sup> See S. Rep. No. 1087, 87th Cong., 1st Sess. 1.

<sup>37</sup> See 15 U.S.C. § 1291 (1983).

<sup>38</sup> Pub. L. No. 89-800, 6(b)(1), 80 Stat. 1515 (codified as amended at 15 U.S.C. § 1291).

<sup>39</sup> *Id.*

<sup>40</sup> The NFL teams received approximately \$186 million for the 1970-73 seasons; \$ 268 million for the 1974-77 seasons; \$646 million for the 1978-81 seasons; and \$2.1 billion over the five-year period 1982-86.

as a three-year \$70 million cable contract with ESPN. Unfortunately, these deals would never be realized as the league was nearing financial ruin and would need a favorable antitrust ruling to escape bankruptcy.

### **Sherman Act**

The decision whether to apply the Sherman Act to the operation and business of professional sports is one that courts have made in virtually all areas of league conduct, ranging from restraints upon franchise relocation, league expansion or denied transfers of ownership, player mobility, league rule enforcement, and the prevention of rival league competition. It's worth mentioning that

#### Section 1

The Sherman Act offers the antitrust plaintiff two roads to recovery.<sup>41</sup> Section 1 seeks to prohibit conspiracies or coordinated group activity designed to restrain trade among those who would otherwise be competitors or sellers at different levels of the distribution chain. Indeed, a typical section 1 claim against a professional sports league alleges the existence of a conspiracy among franchise owners to restrict competition.<sup>42</sup> The cases allege various league abuses, including rules that restrict player movement, limitations on the rights of team owners to move existing franchises to potentially more lucrative locations, and insurmountable barriers to entry imposed by the established league.<sup>43</sup>

#### Section 2

Section 2 of the Sherman Act<sup>44</sup>, presents an entirely different set of circumstances that trigger its violation. Regardless of how professional sports leagues fare in the context of section 1, section 2 is still an available means by which to challenge the market power of a sports league and its causes, if any, of market imperfection.

Section 2 seeks to prevent one firm's ability to raise prices and restrict output, and is more concerned with monopoly activity in general, regardless of whether the objectionable conduct involves a plurality of actors. The distinction between the two phases of Sherman Act liability can be simplified by saying that section 1 seeks to outlaw restraints on trade while the sole purpose of section 2 is to eliminate harmful monopolies.<sup>45</sup> Even in situations where an entity can prove that it achieved its market position without resort to anticompetitive conduct, the Sherman Act, under section 2, still provides a remedy when either entry barriers, predatory conduct, or other forms of exclusionary behavior has prevented an emerging competitor from entering the market.<sup>46</sup>

### **The Parties' Contentions**

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<sup>41</sup> Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several states . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished . . ." 15 U.S.C. § 1 (1982).

<sup>42</sup> 21 U. Miami L. Rev. 729.

<sup>43</sup> *Id.* at 753.

<sup>44</sup> Section 2 of the Sherman Act provides in relevant part: "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, and upon conviction thereof, shall be punished . . ." 15 U.S.C. § 2 (1982).

<sup>45</sup> 21 U. Miami L. Rev. 729, 754.

<sup>46</sup> *Id.* at 751.

Outlined below, most of the antitrust issues raised in *USFL v. NFL* did not exist in the pioneer days of sports league antitrust litigation, when in the 1960's and 1970's, the American Football League, World Hockey Association, and players on behalf of the American Basketball Association brought similar antitrust challenges against their more established competitors. In these earlier cases, rival leagues claimed that years of entrenched and deliberate exercises of market power had prevented any form of meaningful market penetration to take place.<sup>47</sup>

The USFL contended at trial that the NFL maintained a monopoly in the market for major league professional football. The USFL also contended that the NFL willfully established and maintained a monopoly in the crucial submarket for the network broadcasting rights to football by the following allegedly predatory tactics:

- a. Signing multiyear contracts with the three major television networks in an attempt to block USFL access to a network television contract;
- b. Pressuring the major networks to abstain from televising USFL games in the spring or fall, and successfully preventing any network telecasts of the USFL in the fall, by threatening not to renew NFL contracts or by assigning unattractive NFL games under existing contracts;
- c. Establishing contracts with the networks for artificially high rights fees that, because of the so-called "dilution effect" on demand for advertising during NFL games, precluded network broadcasts of the USFL;
- d. Seeking to prevent any of the three major networks from signing a contract for the USFL's initial 1983 spring playing season;
- e. Rotating the Super Bowl among the three networks and not submitting the Super Bowl, playoff and regular-season television rights to competitive bidding;
- f. Pursuing a strategy outlined in the so-called "Porter Presentation" to "conquer" and bankrupt the USFL, including: co-opting powerful USFL owners, such as Donald Trump and Alfred Taubman, by offering them NFL franchises; encouraging ABC not to continue USFL broadcasts; pressuring ABC by giving it an unattractive schedule for its Monday Night Football program in 1984; targeting important USFL players for signing with the NFL through means such as the NFL's Supplemental Draft and expanded roster; and attempting to bankrupt the weakest USFL teams by driving up USFL player salaries in order to diminish the USFL's size and credibility;
- g. Collaborating with the City of Oakland to destroy the Oakland Invaders of the USFL in order to hurt the credibility and image of the Invaders and the entire USFL;
- h. Threatening to move an existing NFL franchise or to create a new NFL franchise solely to injure the USFL franchise in Oakland; and
- i. Attempting to preclude the USFL's New Jersey Generals from moving to New York City.

The NFL contended that the relevant television submarket included entertainment broadcasting generally and that it had not monopolized either the market for major league professional football or the television submarket because:

- a. Its contracts with the three major networks were not exclusionary;

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<sup>47</sup> *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963), aff'g 205 F. Supp. 60 (D. Md. 1962); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

- b. The USFL's failure to secure a fall network contract was the result of the independent judgment of each network that the USFL was an inferior product, and of the USFL's self-destructive strategy of forcing a merger with the NFL;
- c. It never pressured a network by threatening non-renewal or by assigning a schedule of unattractive games;
- d. It never undertook the strategy outlined in the Porter Presentation;
- e. It never sought to injure the USFL's Oakland franchise or to preclude the New Jersey Generals from playing in New York City; and
- f. The losses suffered by the USFL were due to its own mismanagement.

#### Further Contentions Based on Television Contract

The NFL's three network contracts were a central issue at trial. The USFL claimed that the NFL intentionally set out to tie up the three networks as a means of excluding competitors. In support of its theory, the USFL introduced a memorandum from NFL general counsel Jay Moyer written during the NFL's 1973 network contract negotiations stating that "an open network may well be an open invitation to formation of a new league." Commissioner Rozelle testified, however, that in 1970, before contacting ABC and signing the Monday night football contract with it, he unsuccessfully approached CBS and NBC, both of which already televised NFL games, about their interest in prime-time football. The USFL also emphasized at trial a June 1984 CBS business study suggesting that the fall broadcast of USFL games on Sundays would reduce the network's advertising revenues from NFL games by \$49 million to \$53 million over three years. This "dilution effect," the USFL argued, created a \$50 million barrier to entry by a new league.

The USFL argued that the NFL's concern with the "dilution effect" USFL telecasts would have on advertising during NFL games had motivated the established league to pressure the networks not to televise USFL games. The USFL's dilution effect argument was based on the hypothesis that if a network carried USFL games as well as NFL games, then the increased amount of professional football on television would force the networks to charge lower prices for advertising on NFL games. In turn, the NFL would receive less money for its broadcast rights.

The USFL also sought to show that the NFL had placed unlawful pressure on the networks to prevent the broadcast of USFL games. Much of this evidence consisted of statements by USFL representatives and hearsay and speculation by third parties. Officials from the three networks and one cable network testified that the NFL had not exerted any pressure on them regarding the broadcast of USFL games. Several network officials did testify, however, that they feared that televising the USFL in the fall might jeopardize their NFL relationships - a fear somewhat at odds with the USFL claim that the NFL needed three network contracts to produce the dilution effect. Executives from all three major networks also testified that by 1986, after the USFL had left several large television markets and was encountering financial and other difficulties, the USFL was not an attractive entertainment product.

#### Other Predatory Tactics of the NFL

The USFL also sought to prove monopolization by the NFL through predatory tactics unrelated to television. It introduced a memorandum prepared by NFL labor negotiator Jack Donlan entitled "Spending the USFL dollar," which urged NFL owners to bid for USFL

players to drive up USFL costs. The USFL's proof of predatory behavior, however, consisted primarily of allegations concerning the recommendations of the so-called "Porter Presentation," and of the so-called Oakland and New York "conspiracies."

The Porter Presentation was a two-and-one-half hour presentation, entitled *USFL v. NFL*, by Harvard Business School Professor Michael Porter to sixty-five NFL executives attending a multi-day seminar on labor negotiations. Porter's presentation, which was not previewed by anyone in the NFL, set out a strategy for the NFL to "conquer the USFL." The USFL claimed that the NFL implemented a recommendation of the Porter Presentation by attempting to "co-opt" USFL owners with promises of an NFL franchise. Donald Trump, owner of the USFL's New Jersey Generals, testified that he was offered an NFL franchise by Commissioner Rozelle in exchange for his blocking the USFL's proposed move to the fall and his preventing the league from filing the instant action. Rozelle denied that he made such an offer to Trump. In addition, hearsay testimony by Al Davis, owner of the NFL's Los Angeles Raiders, a team not sued by the USFL, indicated an attempt to co-opt Alfred Taubman of the Michigan Panthers. Taubman, however, denied that he was offered an NFL team.

Al Davis, the managing general partner of the Los Angeles Raiders, was the only NFL-affiliated witness who agreed to testify for USFL without a subpoena. Six years before the USFL suit, Davis had himself been in a legal battle with the NFL as he sued both the league and the city of Oakland when his attempted to move of the Raiders to Los Angeles was blocked by a court injunction. In June 1982, a federal district court ruled in Davis' favor and the Raiders officially relocated to Los Angeles for the 1982 NFL season. At the *USFL v. NFL* trial, Davis testified that he believed the NFL and the city of Oakland conspired illegally to cripple the USFL's Oakland Invaders – the so called "Oakland conspiracy". Davis said the Invaders filled the void left by his team when it moved. He said the city suddenly removed its support from the Invaders, and he implied the NFL was involved as a way of forcing the Raiders back to Oakland, or at least preserve the territory for another NFL franchise.

The USFL also claimed that the NFL followed Professor Porter's recommendation to "dissuade" ABC from continuing its USFL contract. Supporting evidence consisted largely of hearsay introduced to show the state of mind of the networks. The declarants denied making any such statements. Jim Spence of ABC did testify, however, that the NFL informed him that the NFL owners were "not enamored" with the network's USFL contract. Nevertheless, ABC subsequently offered the USFL a four-year, \$175 million contract for spring football beginning in 1986.

The USFL's next claim was that NFL used a method recommended by Porter to pressure ABC by offering it unattractive Monday night games that would and did earn low ratings in 1984. In response, NFL officials testified that the 1984 *Monday Night Football* schedule was settled before the Porter Presentation, that "weak" teams such as Buffalo and Cincinnati appeared on that schedule fewer times than in prior years, and that any change in ABC's ratings was due to economic conditions that affected the entire sports television marketplace.

Furthermore, the USFL claimed that the NFL followed Porter's recommendations for competing for players. This evidence consisted of the NFL's decision to conduct a supplemental draft of players still under USFL contract in March 1984, an increase in NFL roster size from forty-five to forty-nine, conversations between the Dallas Cowboys and



USFL star Herschel Walker, and NFL salary offers to relatively unknown USFL players such as Todd Fowler.

The "New York conspiracy" involved a claim that the NFL and the NFL's New York Jets conspired to mislead New York City and State officials into believing that the Jets were willing to return from New Jersey to New York. The purpose of this conspiracy was to block the USFL's New Jersey team from moving to a new domed stadium in New York. Proof of this conspiracy consisted of testimony by Senator Alphonse D'Amato and Vincent Tese, Chairman and Chief Executive Officer of the New York State Urban Development Corporation, that Leon Hess, owner of the Jets, had promised to return his team to New York. In addition, Al Davis testified that there was an "understanding" reached at a 1983 NFL owners' meeting to keep a USFL team out of New York. Other participants in this meeting denied any such understanding or agreement.

### **Jury Verdict**

After five days of deliberations, the jury found that the NFL had maintained monopoly power in a market consisting of major-league professional football in the United States. However, the jury found that the USFL had only suffered nominal damages from the NFL's unlawful conduct and, therefore, was entitled to only \$1.00 in damages, a spectacular amount that, even when trebled, did not offer much consolation for the USFL. Essentially, the award of nominal damages suggested that the USFL's failure to secure further revenue from television contracts or otherwise came at the fault of its own league owners and officials, rather than from the alleged anti-competitive actions of the NFL.

The jury found that the NFL did not commit any overt act in furtherance of a conspiracy to monopolize. While the jury would later go on to find that an NFL monopoly on the sport of football existed – establishing a violation of Section 2 and the subsequent three dollar award of damages - the monopoly was not the result of anti-competitive practices of the NFL. In addition, the jury found that even though "one or more defendants [had] participate[d] in a contract, combination or conspiracy to exclude competition within major league professional football", that combination was not an unreasonable restraint of trade in violation of Section 1. The fatal blow was the complete rejection of the USFL's television claims. The jury found that the NFL had not *willfully* acquired or maintained a monopoly in a relevant television submarket. It further found that the NFL's contracts with all three television networks for the right to broadcast the league's regular season and championship games through the 1986-87 season were not an unreasonable restraint of trade violative of Section 1.

Finally, the jury rejected the USFL's "essential facilities" claim, specifically finding that "defendants [did not] have the ability to deny actual or potential competitors access to a national broadcast television contract", although it also found that such a contract was "essential to the ability of a major league professional football league to compete successfully in the United States" and "that potential competitors of the NFL, cannot as a practical matter, duplicate the benefits of a network contract" (Question No. 32). This particular decision of the jury may be viewed as a confused or inconsistent one given the recognized importance of television contracts for football. The jury's verdicts can best be described as a recognition that the USFL, at the time at which suit was brought, was not an economically viable entity, and as a result the jury was hesitant to award any significant damages as a result of any activity on the part of the NFL.

Judge Leisure denied the USFL's motions for judgment notwithstanding the verdict on its claims of monopolization of the television submarket, attempted monopolization, unreasonable restraint of trade by means of the network television contracts and essential facilities, and for a new trial on damages on the monopolization of professional football claim, or in the alternative for a new trial.<sup>48</sup>

### **Appeal**

On appeal, the USFL claims that a "litany of erroneous opinions, rulings and instructions" by Judge Leisure resulted in a "verdict of confusion" that "sent one of the most egregious violators in the history of the federal antitrust laws on its way with a pat on the back." Specifically, the USFL contended that the NFL could not legally enter into a pooled-rights agreement with all three networks; that Judge Leisure's jury instructions "destroyed" the effectiveness of the USFL's proof of its television claims and set improperly high standards of liability; that he improperly allowed the NFL to introduce evidence that the USFL was mismanaged; that he excluded other evidence critical to establishing the USFL's claims; and that his incorrect rulings and instructions on damages prevented the USFL from receiving appropriate relief.

The U.S. Court of Appeals for the Second Circuit affirmed the District Court decision, finding that the jury was clearly entitled by the evidence to find that the NFL's fall contracts with the three networks were not an anticompetitive barrier to the USFL's bidding against the NFL to acquire a network contract. Moreover, the Court held there to be ample evidence that the USFL failed because it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league.

The Second Circuit found numerous flaws in the USFL's dilution effect argument. First, no "dilution effect" was present when the NFL's network contracts expired and negotiations started anew. At that time, each professional league was free to compete on the basis of the quality of its product without regard to prior contracts. With respect to the USFL's 1986 fall season, the NFL's network contracts expired in 1986 so that, regardless of its magnitude in past years, whatever "dilution effect" existed at that time could not have affected the USFL's negotiations with the networks.

Second, the USFL had assumed that the "dilution effect" was the same for each network and calculated its losses solely on the "dilution effect" estimates CBS had made in 1984. The USFL's assumption was erroneous, especially with regard to the potential "dilution effect" suffered by ABC, the network with which the USFL had the greatest probability of securing a fall television contract. Since ABC only had the right to show NFL games primarily during prime time on Monday nights, its "dilution effect" would have been considerably less than the "dilution effect" of CBS or NBC, which televised NFL games on Sunday afternoons. Moreover, two ABC executives had testified that the major cause for the diminished value of the USFL's product for 1986 was the USFL's exodus from major television markets.

Even if the "dilution effect" theory was legitimate, the court believed that the jury could have found that this factor had not caused the USFL's failure to procure a network contract for fall 1986. Numerous events had occurred after the 1984 study on which the USFL based its "dilution effect" argument. For instance, the United States Supreme Court's

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<sup>48</sup> *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986). The district court also denied the USFL's request for injunctive relief.

ruling in *NCAA v. Board of Regents* had dramatically increased the amount of college football on television. Throughout the 1980s, sports programming in general had dramatically increased. By 1986, the USFL was simply facing increased competition from other programming options. The USFL, through mismanagement, had significantly damaged its product. In sum, the evidence showed that the expected revenues from telecasting USFL games were so low that a network could have reasonably decided not to purchase the league's rights irrespective of any possible dilution effect.

Turning to the remaining claims of damages sustained due to anti-competitive behavior of the NFL, the court focused on evidence that the USFL abandoned its original strategy of patiently building up fan loyalty and public recognition by playing in the spring. The original plan to contain costs by adherence to team salary guidelines was discarded from the start. Faced with rising costs and some new team owners impatient for immediate parity with the NFL, the idea of spring play itself was abandoned even though network and cable contracts were available.

Plans for a fall season were therefore announced, thereby making 1985 spring play a "lame-duck" season. The record established that these actions were taken in the hope of forcing a merger with the NFL through the threat of competition and this litigation. The merger strategy, however, required that USFL franchises move out of large television markets and into likely NFL expansion cities. Because these moves further eroded fan loyalty and reduced the value of USFL games to television, the USFL thereby ended by its own hand any chance of a network contract.

Notwithstanding the jury's evident conclusions that the USFL's product was not appealing largely for reasons of the USFL's own doing and that the networks chose freely not to purchase it, the USFL "asked [the Court] to grant sweeping injunctive relief that will reward its impatience and self-destructive conduct with a fall network contract. [The USFL] thus sought through court decree the success it failed to achieve among football fans." Absent a showing of some unlawful harm to competition, "[the Court] cannot prevent a network from showing NFL games, in the hope that the network and fans will turn to the USFL." The Court held that the Sherman Act does not outlaw an industry structure simply because it prevents competitors from achieving immediate parity. And this is particularly so in the case of major-league professional football because Congress authorized a merger of the two leagues existing in 1966 and thus created the industry structure in question.

### **Aftermath**

In the aftermath of the court's ruling, the USFL stopped all operations and the ownership was left to cover the collective losses of the league as well as the individual losses of their respective teams. All totaled, the USFL lost an estimated \$163 million during its three years of operation. On the bright side, The USFL finally received a check for \$3.76 in damages in 1990, the additional 76¢ representing interest earned while litigation had continued. Notably, that check has never been cashed. A small number of USFL owners did later purchase stakes in NFL teams<sup>49</sup>, but most would move on to other sports or business ventures.

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<sup>49</sup> Two prominent USFL owners with alter ties to the NFL include Marvin Warner and Edward DeBartolo. Marvin Warner, former owner of the Birmingham Stallions purchased a 48% share of the Tampa Bay Buccaneers. Edward J. DeBartolo Sr., the late former owner of the Pittsburgh Maulers, was the father of former San Francisco 49ers owner Edward John DeBartolo Jr.

The NFL, on the other hand, would continue to find success – with billions in revenue pouring in from its television contracts. The television rights to broadcast National Football League (NFL) games are the most lucrative and expensive rights of any sport – totaling in at over \$20 billion. Under the current NFL television contracts, regional games are covered by CBS and FOX. The regional Sunday afternoon games are broadcast on CBS and FOX. CBS has broadcast rights to all regional AFC intra-conference games, and FOX has all rights to regional NFC intra-conference games. Inter-conference games are broadcast by the network that is the normal broadcast partner for the away team's conference. National broadcasts of marquee match-ups usually occur on Sunday and Monday nights, and later in the season (after the completion of the NCAA football season) on Thursday and Saturday nights as well. National broadcasts are aired Fox, CBS, NBC, or the NFL network depending on the night of the week and time of the game. Also, satellite broadcast company DirecTV offers NFL Sunday Ticket, a subscription-based package that allows most Sunday daytime regional games to be watched.

### **Conclusion - What Could Have Been**

As discussed earlier, the financial situation of the USFL doomed the fledgling league even before owners voted to move the league into a fall schedule. A more competitive strategy – founded largely on the initial blueprints of league founder Dennis Dixon – would have been to slowly grow the league while minimizing direct competition with the NFL. Given the great fan support that the game of football has received in the United States, a professional football league which can control player salaries and other league costs has an excellent chance of succeeding as a profitable venture.

One example of a successful league would be the Arena Football League (AFL). Since its inception, the league has operated under relative obscurity but AFL's attendance has increased dramatically over the last few years, rising to an average of 12,415 people per game in 2007. The league has even developed a minor league program from player development called af2. Currently AFL games are broadcast on ESPN and FSN, but the list of past carriers includes CBS and NBC. The league has drawn fans with an offensive-minded and fan-friendly style of play, and a key to the league's success has been the lack of competition between it and the NFL. Despite playing in predominantly NFL markets and during the same season as the NFL, the AFL has survived because it offers football fans a slightly different product which for the most part does not compete for NFL-caliber talent. The AFL has maintained profitability by strictly controlling expenses while slowly growing a loyal base of fans for its innovative product. The AFL can serve as an example of what the USFL may have been able to accomplish had it followed through on a spring scheduling format and modest player expenses.

The possibilities for success are even more glaring with today's new media market. In addition to its contracts with national and regional television providers, the NFL broadcasts games through its own network – NFL network – as well as through DirecTV satellite service. Game audio and video can also be accessed via the internet. Between 2001 and 2006, CBS spent an estimated \$120 million for the rights to maintain the NFL's official website – NFL.com. Today, a league such as the USFL would not have to rely solely on national television broadcasts for revenue. Increased cable viewership coupled with the immense power of the internet could provide a league with sufficient revenue options. A plaintiff bringing an antitrust suit against the NFL today would have an even more difficult time

convincing the court that the NFL has monopolized the available television markets and advertising sources.