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Forming a Single Entity: A Recipe for Success for New Professional Sports Leagues

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Forming A Single Entity: A Recipe for Success for New Professional Sports Leagues

by Karen Jordan

Americans will not soon forget the image of Brandi Chastain triumphantly tearing off her jersey to celebrate the U.S. victory in the 1999 Women's World Cup. Thanks to Wheaties and *Sports Illustrated*, the women of soccer have become true icons of sport, as recognizable as the heroes of the National Basketball Association (NBA) or the National Football League (NFL). And for good reason: despite a disappointing silver-medal performance at the 2000 Sydney Olympics, they are still regarded as the dominant soccer team in the world. Now they're looking to add another accomplishment to their already impressive list – the successful founding of the Women's United Soccer Association (WUSA), a professional women's soccer league here in the United States.

The women of the WUSA are not alone; the new millenium marks the beginning for several new sports leagues. For instance, the World Wrestling Federation's (WWF's) Vince McMahon recently created the XFL, which he bills as an exciting, extreme alternative to the NFL.[1] Meanwhile, the Women's Professional Football League (WPFL) will start its second season this year, while women's volleyball had edged closer to the professional ranks by gaining corporate sponsorship and setting a 2001 exhibition schedule. Even professional men's basketball is getting into the game, resurrecting the American Basketball Association (ABA) to compete with the Continental Basketball Association (CBA) and International Basketball League (IBL) for minor league fan support. For sports fans, these new leagues represent expanded options for Friday nights at the stadium or Sunday afternoons in front of the tube, as well as the promise of the never-ending season.

The single-entity sports enterprise features one central organizational body with which all of the players in the league contract; this body then allocates those players to the respective teams. The league itself is owned equally and collectively by all teams and is backed financially by investors who invest in the league as a whole, rather than in individual teams.

For attorneys, they may represent something different altogether. In Fraser v. Major League Soccer,[2] Major League Soccer (MLS) faced an antitrust claim brought by a group of players. The players alleged that the league's corporate scheme, through which the owner-investors imposed various restraints on competition among the teams for players, violated the Sherman Act. While the MLS has survived so far in Fraser, the challenge refuses to go away, and the case is continuing to work its way through the Massachusetts federal court system.

Whatever its ultimate outcome, Fraser presents just the latest of several lawsuits challenging the business practices of the various professional sports leagues. Such a suit will commonly charge that the league restrains trade in violation of the Sherman Antitrust Act or Clayton Act, by allowing owners or teams to dictate collectively its rules and regulations.[3] The Sherman Act covers monopolies or attempts to monopolize as well as any contract, combination, or conspiracy to restrain trade or commerce.[4] The Clayton Act, on the other hand, addresses actual practices that effectively restrain trade, such as price discrimination, while providing the remedies of injunctive relief and damages for any anti-competitive act under either the Sherman or Clayton Acts. Between the two Acts, professional sports leagues, which deal everyday in balancing team competitiveness with league unity, face critical legal traps that must be avoided to ensure survival, let alone success.[5]

The approach favored by new sports investors is to structure the league as a single entity in order to escape the reach of the Sherman and Clayton Acts.[6] The single-entity sports enterprise features one central organizational body with which all of the players in the league contract; this body then allocates those players to the respective teams.[7] The league itself is owned equally and collectively by all teams and is backed financially by investors who invest in the league as a whole, rather than in individual teams. The investors then operate individual teams and handle local concerns.[8]

This Note begins by introducing some of the more recently founded professional sports leagues, identifying their background and single-entity structures. It then provides a general background of antitrust issues in sports, followed by explanations of the possible defenses, including the single-entity structure. Next, it discusses Fraser as a potential landmark case for professional sports leagues, showing how its lessons contribute to the current mode of antitrust analysis. Finally, this Note illustrates why single-entity structuring may be essential for leagues in their infancy, but of little use to well-established professional sports leagues.

GENERAL ANTITRUST BACKGROUND

Basic Antitrust Law

Virtually every antitrust suit begins with the Sherman Antitrust Act. Section 1 of the Act prohibits "every contract, combination . . . , or conspiracy in restraint of trade or commerce;"[9] section 2 makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" trade or commerce.[10] Simply put, §1 prohibits independent economic entities agreeing not to compete by artificially altering or fixing the price or quality of their separate products.[11] Most §1 claims in sports involve alleged diminished competi-

tion between member clubs of a league resulting from league governance, rules of ownership, or franchise restrictions.[12] Many of these cases involve a court upholding a league's application of a rule, such as requiring supermajority approval of the league members before a new club can be granted an expansion franchise[13] or transfer majority ownership interest in a member club.[14]

However, §1 claims also arise over league player restraints.[15] Players sometimes allege that certain league rules evidence a conspiracy by the member clubs not to compete with each other with respect to players' services. These rules often operate by either excluding certain players from playing in the league or initially allocating each player to a particular team and thereafter impeding his ability to sign with a different team.[16] Section 1 claims related to such rules have addressed the legality of issues like league drafts and minimum age requirements.[17]

Section 1 claims may also be based on either "horizontal" or "vertical restraints." Horizontal restraints involve agreements among competitors not to compete but to divide markets or customers, agreements that are *per se* illegal.[18] Such restraints include the classic group boycott, that exists when a group of competitors agree to take some form of joint action to exclude other competitors from the market.[19] This boycott need not be targeted at competitors to be *per se* illegal; the same finding can result from agreements that aim at customers and suppliers.[20] The Supreme Court dealt with these issues on several occasions in the 1980s, relying on earlier precedent to hold that such activities are *per se* illegal. In Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co.,[21] the Supreme Court found that concerted refusals to deal and group boycotts "are so likely to restrict competition without any efficiency gains that they should be condemned as *per se* violations of [section] 1 of the Sherman Act." In an earlier case, Arizona v. Maricopa County Medical Society, the Supreme Court noted the need for a policy to eliminate maximum price-fixing agreements, stating "for such agreements . . . cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment . . . ; [t]he *per se* rule is grounded on faith in price competition as a market force."[22]

Suits may also be maintained on the theory of vertical restraints. These restraints in sports would involve non-pricing restrictions regarding location, customers, exclusive dealings, and unilateral refusals to deal.[23] In Continental T.V., Inc. v. GTE Sylvania, the Supreme Court applied the "rule of reason" analysis, placing such a difficult burden on plaintiffs that few claims have been brought since and even fewer vertical restraints have been held illegal. Thus, such activities are widely used by businessmen, who can rely on judicial authority to support their usefulness.[24] These claims are rare.

Also rare are claims under §2 of the Sherman Act. The few existing §2 claims have involved upstart leagues suing established leagues for monopolizing a professional sport.[25] In Swift & Co. v. United States,[26] to determine if there was an attempt to monopolize, Justice Holmes examined whether the company's plan encompassed: (1) specific intent to control prices or eliminate competition in some market; (2) predatory or anti-competitive conduct directed at accomplishing this unlawful purpose; and (3) a dangerous probability that the conduct, if permitted to run its course, would create a monopoly.[27] Thus, §2 addresses three offenses: monopolization, attempts to monopolize, and combinations or conspiracies to monopolize.[28] The Swift Court also noted that the mere existence of a monopoly is not enough to establish a §2 claim; there must also be a "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[29]

These two sections of the Sherman Act get intermingled in many claims. In United States v. Columbia Steel Co., the Supreme Court stated: "[E]ven though the restraint effected may be reasonable under §1, it may constitute an attempt to monopolize forbidden by §2 if a specific intent to monopolize may be shown."[30] Thus, monopoly power, whether lawfully or unlawfully obtained, can be condemned under §2 even if not exercised. However, violations of §2 often correlate to conduct that violates §1.[31] In any case, in order to address all possible violations, most claims plead violations of both Sherman Act sections.

In addition, most antitrust claims include reference to the Clayton Act. This Act addresses actual practices restraining trade, including price discrimination and purchase agreements among competitors, and provides injunctive relief to injured parties.[32] Players with Sherman Act claims also routinely invoke the Clayton Act's §16 for injunctive relief "against the threatened loss or damage by violation of the antitrust law."[33]

Players can also sue for treble damages under §4 of the Clayton Act, an attractive option especially when combined with injunctive relief for a Sherman Act antitrust claim.[34]

Whatever the claims made or statutes cited, current commentators suggest that a new force has taken over antitrust analysis. They suggest that the Supreme Court now considers the policy goal of enhancement of consumer welfare as the sole basis in deciding antitrust cases.[35] Today, therefore, a proper antitrust inquiry focuses solely on the economic effect a challenged practice has on consumers; whatever lowers prices and/or increases the quantity and/or quality of what is being produced is considered pro-competitive, reasonable, and lawful.[36]

History of Antitrust in Major Professional Sports

Antitrust law has been applied to professional sports since 1914.[37] Traditionally, the Supreme Court approached the subject by finding various business arrangements, including price fixing, market allocation, group boycotts, and vertical territorial restrictions, *per se* illegal.[38] Vague categories allowed the Court to condemn various forms of conduct that judges deemed *per se* illegal, including various joint venture rules, regardless of the fact that they created better quality products at lower prices for consumers.[39]

Beginning in the mid-1970s, the Supreme Court altered its antitrust stance by limiting the applicability of the *per se* rule.[40] In Broadcast Music Inc. v. Columbia Broadcasting System, Inc., the Court narrowed the *per se* approach to price fixing, holding that a blanket licensing arrangement for musical compositions which achieved major cost savings to purchasers by making individual composers unable to compete effectively did not automatically violate antitrust law.[41] Similarly, in limiting "group boycott" illegality in Northern Pacific Railway Co. v. United States, the Supreme Court decided that in order to find a *per se* antitrust violation with respect to the restraint of trade, there must be evidence of a "pernicious effect on competition and lack of any redeeming virtue."[42] Northern Pacific Railway Co. was followed twenty years later by the "rule of reason" factors established by the Supreme Court in National Society of Professional Engineers v. United States.[43] There, the Supreme Court, rejecting *per se* analysis for a price ban on engineers bidding for projects, determined that an agreement is unlawful to the extent that the anti-competitive injury it causes outweighs the pro-competitive benefits it generates.[44]

In general, the business of professional sports does not lend itself to *per se* analysis, but is better characterized in terms of the reasonableness of the allegedly restrictive practice.[45] In a 1984 case, NCAA v. Board of Regents of the University of Oklahoma,[46] the Supreme Court examined a plan in which the NCAA attempted to set prices and limit each member school's television exposure, essentially fixing prices by precluding negotiations among broadcasters and institutions. The Court refused to apply the ordinary "illegal *per se*" approach to this antitrust claim of horizontal price fixing and output limitation.[47] Instead the Court chose to apply a "rule of reason" test to examine the particular market context because the "case involve[d] an industry in which horizontal restraints on competition [were] essential if the product [was] to be available at all."[48]

Since then, the modern approach has been for courts to use the "rule of reason" test in the professional sports context. In doing so, courts first presume the anti-competitive effects of restrictions necessary, then examine them to see if they impermissibly outweigh the resulting pro-competitive effects, if any.[49] A thorough investigation of the industry under review and balancing of the arrangement's positive and negative effects must be taken; if those steps present insignificant effects on competition with legitimate business justifications, the challenged conduct does not violate antitrust laws.[50] This more deliberate inquiry for restrictions on player mobility reflects the court's skepticism of restraints contrasted with its desire to refrain from the *per se* concept because of the peculiar economics of the sports industry.[51]

Due to its unique antitrust exception, baseball has been the most litigated sport with regards to antitrust law application. Starting in 1922 with Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,[52] the Supreme Court held that baseball, as a personal effort not related to business production, did not constitute interstate commerce and therefore was not subject to federal antitrust law.[53] In this case, the Court determined that baseball was a purely state affair and the fact that the leagues "must induce free persons to cross state lines and must arrange and pay for their doing so [was] not enough to change the character of the business."[54] In the numer-

ous baseball cases that followed, the Court rigidly adhered to *stare decisis* and relied upon Congressional passivity in keeping baseball as an anomalous exception to antitrust law.[55]

Conflicts in professional league sports outside of baseball did not reach courts until New Deal era case law broadened the definition of interstate commerce, allowing greater possibilities for antitrust violations and the means for the Court to escape its contradictory treatment of baseball.[56] In Radovich v. NFL, for instance, the Supreme Court held that football was, unlike baseball, subject to antitrust law.[57] Around the same time period, lower courts ruled that issues in professional basketball, such as player mobility, could be analyzed under antitrust law.[58] In the 1971 case Haywood v. National Basketball Association, the Supreme Court apparently agreed, noting in dicta that basketball should be subject to federal antitrust law.[59]

Although the NFL has limited exemptions for television deals,[60] the only professional sports to maintain player antitrust exemptions have been baseball and soccer. The 1998 Curt Flood Act removed these exemptions for baseball.[61] Thus, only the MLS's antitrust exemption remains.[62]

Single Entity Defense

The Supreme Court expounded the so-called single-entity theory in Copperweld Corp. v. Independence Tube Corp.[63] There, the Court held that a parent and its wholly owned subsidiary were incapable of an "agreement" within §1 of the Sherman Act. In Copperweld, a corporation conspired with one of its wholly owned subsidiaries to exclude one of the subsidiary's competitors from the market. The Copperweld Court recognized, however, that such "agreements" did not deprive "the marketplace of the independent centers of decision making that competition assumes and demands."[64] Rather, it determined that these agreements merely constituted a form of "unilateral behavior flowing from the decisions of a single enterprise." [65] Thus, the single-entity structure would preserve existing independent decision making when it exists but also classifying certain decisions as strictly unilateral decisions of a single entity.[66]

Thus repudiating the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries, Copperweld also established that one center of decision-making exists where a single entity has the legal authority to control day-to-day operations of all other entities.[67] The parent's legal control of the subsidiary preserves single-entity status because the subsidiary will act for the benefit of the parent, its sole shareholder, in a unified economic interest.[68] The subsidiary of the corporation, although legally distinct, does not violate §1 of the Sherman Act if, in coordination with the corporation, it pursues these common interests of the whole rather than interests separate from those of the corporation itself.[69] Moreover, the Court went beyond the form of the business structure, examining the substance to determine whether the agreement threatened competition.[70] In all, then, the Copperweld test requires a court to determine if there is a "complete unity of interest," such that the parent corporation and its wholly owned subsidiary have common objectives and agree to a single course of action.[71] The two factors to consider are: (1) whether the entity has a "complete unity of interests,"[72] and (2) whether the alleged act brings "formally independent economic factors into a common plan."[73]

So far, professional sports leagues trying to apply the single entity defense in antitrust suits have failed. Two notable failures in the early 1980s involve the NFL. The first case, North American Soccer League (NASL) v. NFL,[74] challenged the NFL's cross-ownership ban under §1 of the Sherman Act.[75] NASL argued that an agreement between members of the NFL to prohibit its members from making or retaining any capital investment in any other league violated §1 of the Sherman Act as an attempt to "combine" or "conspire" since it served as a group boycott in unreasonably restricting this pool of investors.[76] The Second Circuit rejected the NFL's single-entity argument and instead characterized the league as a joint venture, due to its structure as an unincorporated organization of twenty-eight individually owned teams.[77] While the court acknowledged that the unique nature of professional sports requires economic cooperation and interdependence to ensure success, it pointed out that individual franchises possess independent decision-making characteristics, as well as separate profit and expense systems that cannot be overlooked.[78]

Later, in Los Angeles Memorial Coliseum Comm'n v. NFL,[79] the Ninth Circuit examined the NFL's single-entity defense under §1 of the Sherman Act, attempting to justify a league rule requiring approval by three-fourths of the other teams for any member team to relo-

cate to a new city. The court noted that immunizing the NFL from §1 scrutiny would show a willingness to "tolerate such a loophole [as to] permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anti-competitive effects."[80] Thus, the court rejected the NFL's claims of single-entity structure and held that all league conduct would satisfy the plurality requirement of a joint venture and the "rule of reason" standard.[81]

The Ninth Circuit based its decision in Los Angeles Memorial Coliseum Comm'n on Supreme Court cases dealing with single-entity and joint-venture theories in other business areas. For example, Timken Roller Bearing Co. v. United States found divisions of markets between competitors where sellers mutually agreed not to invade each other's sales territories to be *per se* illegal.[82] After looking at Timken Roller Bearing, the Ninth Circuit found other business organizations with products equally unitary, requiring the same kind of cooperation from the organization's members and thus violates §1 of the Sherman Act.[83] In Perma Life Mufflers, Inc., v. International Parts Corp.,[84] the Supreme Court reiterated its position that common ownership is not sufficient to preclude the application of §1 of the Sherman Act. As commentators note, however, the Ninth Circuit recognized an exception to conspiracy under §1 if "corporate policies are set by one individual or by a parent corporation."[85] The Supreme Court did not deem cooperation sufficient to preclude §1 scrutiny, and thus the Ninth Circuit in Los Angeles Memorial Coliseum Comm'n did not exempt the NFL from scrutiny under §1 of the Sherman Act.[86] Rather, the court examined the facts, focusing on the variance in profits and losses from team to team and the fact that there are separate identities for marketability.[87]

The NFL tried the single-entity defense again, trying to distinguish unfavorable holdings in NASL and Los Angeles Memorial Coliseum Comm'n from the Supreme Court's favorable decision in Copperweld, in McNeil v. NFL.[88] In McNeil, NFL players whose contracts had expired challenged the NFL's "Plan B" proposal to set up a standard wage scale as a horizontal price-fixing arrangement, a per se violation of §1 of the Sherman Act.[89] The NFL contends the Copperweld decision—concluding that a parent and its wholly owned subsidiary are capable of conspiring—controls to immunize its actions as a common enterprise engaged in the production and marketing of professional football from antitrust liability.[90] The district court rejects the NFL's "single economic entity" argument, relying on NASL and Los Angeles Coliseum since the NFL's structure has not changed since identical arguments were made in those earlier cases.[91]

Refusing to give up, the NFL asserted the single-entity defense against a §1 restraint of trade challenge to the rule prohibiting an owner from selling shares of his team to the public in Sullivan v. NFL.[92] The court stated that the common interests pursued by the parent and subsidiary in Copperweld to form a single-entity were not applicable to this case since the football teams do not pursue common interests off the playing field, more specifically in the market for ownership interests at issue.[93] The court cited McNeil for the proposition that Copperweld provides no help for the NFL and its member clubs, established professional sports leagues that tried to masquerade as corporations.[94]

Any claim brought under §1 of the Sherman Act will undoubtedly fail against a newer professional league such as the MLS, initially organized as a single-entity corporation. If §2 suits are brought against such leagues, history dictates a finding of no violation, as the claims brought under §2 of the Sherman Act have had very little impact on the structure or operation of the sports industry. For instance, to date, the predatory monopolization defense has had no effect on sports

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exclusionary or unfair means.[97] Although the single-entity defense did not work for the NFL, Copperweld "breathed some life into the single entity defense" and provided hope for better results for the newer leagues' defense.[98]

FRASER V. MAJOR LEAGUE SOCCER

By structuring itself as a single limited liability company, the MLS gives each team operator a financial stake in the league as a whole, not just in an individual team. Owner-investors share with the league local revenues while receiving dividends on profits from league operations.[99] Player contracts are also owned by the MLS rather than the individual team; the league assigns the players to certain teams and has options on their contracts for two years after the contract expires. In other words, under this structure, the teams really only compete with each other in one place—on the field.

Under its current design, the MLS also has vast powers in areas outside players' services. The corporation can: (1) limit financial inequalities between large and small teams; (2) gain economies of scale through cost control and purchasing power; and (3) more closely regulate sponsorship, through a licensing program and integrated sponsorship.[100] The MLS also controls a group license concerning the players, for which each player receives a percentage of his annual salary. In return, the league retains the ability to veto a player's endorsement or commercial choices without additionally compensating the player under its standard player contract.[101] Fraser presents the first challenge to this MLS structure.

Fraser also provides the latest antitrust challenge to the Copperweld single-entity defense. In Fraser, MLS players sued the league, objecting to the reserve clause and salary cap. Like the NFL in previous cases, the MLS responded merely by claiming to be "exempt." The players denied the league's single-entity claims, maintaining that the supposed single entity structure is really just a "sham," that restricts player movement as it prevents salary increases.[102] Since the MLS operates with centralized control, and all of the investors share in the returns of the league instead of an individual team's income,[103] the players claim that the investors who operate the MLS teams have combined to restrain trade or commerce by contracting for player services centrally. In other words, using centralized decision-making eliminates the competition for those services that would take place if each team could bid for and sign players directly. This decision-making process also restricts the players' ability to move one team to another, hampering competition for their services.

However, the district court accepted the league's single-entity defense and granted summary judgement for MLS, stating that the league could not be held liable for concerted action among team operator-investors which allegedly restrained their competition for players.[104] The district court stated that these single entities can act unilaterally in ways that may, in some manner, decrease competition without violating the Sherman Act.[105] Referencing Copperweld, the court noted that the formation of the limited liability company operating in a professional soccer league created a new market, increasing the number of competitors from zero to one.[106] The players were unable to show the existence and abuse of market power since the MLS is an upstart league trying to contend with premiere soccer leagues in Europe that offer both higher quality compensation and competition.[107] However, the district court determined that there could be no Sherman Act claim "based on concerted action among a corporation and its officers, nor among officers themselves, so long as the officers are not acting to promote an interest, from which they would directly benefit, that is independent from the corporation's success."[108] The court stuck to the Copperweld axiom that coordination of business activities within a single firm is not subject to § 1 scrutiny, even if the unilateral activity tends to restrain trade.[109]

Notably, the Fraser court followed the trend in professional sports of applying the "rule of reason" standard of scrutiny, followed by other cases in the First Circuit. The First Circuit Court of Appeals had previously cautioned against applying the *per se* analysis too readily to situations that do not fit the traditional model: "A claim of boycott . . . invites particular caution: boycotts are not a unitary phenomenon." [110] Since the courts have no experience with these restraints in the professional sports realm, the exemption is currently under examination by the court using a "rule of reason" standard of scrutiny. The district court found that the transfer fee rules requiring an out-of-contract player's new club to pay a transfer fee to the player's former club were not *per se* violations of the Sherman Act's prohibition against restraint of trade.[111] In reaching this decision, the Fraser court chose to balance the anti-competitive player effects on competition in one market with

the pro-competitive consumer benefits in other markets.[112]

Looking at the implications of the decision, Fraser appears factually indistinguishable from Copperweld so the Massachusetts court is able to apply Copperweld analysis. Indeed, the MLS and its shareholders wholly own the franchises and thus should not be subject to §1 liability based on concerted actions.[113] Since player contracts are owned by the MLS, which also conducts the draft, §1 of the Sherman Act does not apply since no other party exists to meet the requirement of a conspiracy in restraint of trade.[114] Therefore, the league's owner-operators could not be found to have conspired with each other so as to subject themselves to the Sherman Act. This argument against concerted action appears stronger since many of the investor-operators own multiple teams and would damage their investments in one team by spending freely for another team.[115] Fraser thus legitimates Copperweld and extends it to the professional sports leagues, a nontraditional market.

Jury deliberations for the latest trial started December 7th. In the words of the players' attorney, "[t]he future of soccer, in a very real sense, is what the jury is going to be deciding."[116] MLS Commissioner Don Garber agrees that the case will have a great impact on soccer but states that "[t]he single-entity is an important case for all sports . . . [w]e are fighting for the right to determine how to run our business."[117] In the end, it took only one day of jury deliberation to produce a unanimous verdict in favor of the MLS.[118] The key issue was whether the MLS constituted an illegal monopoly designed to depress salaries. Central to that question is the effect a second league would have on MLS, an issue over which the parties disagree. The players' attorney claimed that MLS is reliant on a lack of competition, basing its salary structure on the lack of alternatives available to players to earn other amounts. MLS countered that players are free to work in other countries.[119]

MLS also claimed a second league would drive them to bankruptcy, pointing to $250 million in purported losses since the league's inception in 1995 as evidence negating monopoly claims. Due to these monetary concerns cited in the lawsuit, the 2001 schedule consists of twenty-eight instead of thirty-two regular-season games, and is two weeks shorter than in previous years.[120] The league even took over D.C. United, the most successful franchise, in December due to an inability to find new investors during the two years the operating rights have been for sale.[121] There have been no new investors since 1997.[122]

Persuaded by the league's arguments, the jury ended the twelve-week trial with a unanimous verdict finding that MLS is not a monopoly.[123] After the April ruling that the single-entity structure was both legal and proper, the verdict confirmed the legality of the United States Soccer Federation's designation decision. The jury determined that players can move to foreign leagues and that there was not enough demand for more than one top-level professional soccer league in the United States.[124] United States soccer kept its support from the international federation with this ruling. However, the MLS players' attorney, who is also attorney for the NFL Players Association (which funded the suit), plans to appeal again.[125]

THE DEVELOPMENT OF NEW LEAGUES AS PROPOSED SINGLE ENTITIES

THE WNBA

Perhaps the most successful of the newer professional leagues, the Women's National Basketball Association (WNBA) has emerged as one of the dominant players in the growing market for professional women's sports. During the 2000 regular season, 2.3 million fans, an average of over nine thousand per game, attended WNBA events. Like fan interest, the league itself has been growing; its initial core of eight teams has doubled to sixteen, with four new additions—the Indiana Fever, Miami Sol, Portland Fire, and Seattle Storm—coming just last year. Two new teams joined the league for play this year—the Orlando Miracle and the Minnesota Lynx.[126] The WNBA has also been busy in the contractual area, signing a four-year agreement extending through the 2002 season with its players' union, as well as expanded television deals with ESPN and Lifetime for the 2001 season.[127] WNBA programming has been added to television on Thursday and Friday nights, as well as Sunday afternoons.[128]

WUSA

Hoping to take advantage of fan interest in the recent Women's World Cup, John Hendricks, founder of the Discovery Channel, heads a group planning to start a professional women's soccer league known as WUSA.

Eight initial teams set to begin play on April 14, 2001 are backed by eight investors,[129] each of whom have put up $5 million for the rights to operate one or more franchises and get local television rights. Each franchise will have a twenty-woman roster, partially consisting of three members of either the U.S. National Team or 1999 champion World Cup team who have already been assigned. In addition, the league is holding an international draft, a college draft, and tryouts at a national combine in Florida.[130]

All of the members of the 1999 World Cup Champion team signed to play with the league. Each team may have up to four foreign players. The teams will play a twenty-game schedule, with some games scheduled as double-headers with the men's professional league, MLS. Salaries will begin at $25,000 and range up to $80,000 for marquee players from the 1999 World Cup Squad.[131] The salary cap limit is set at $800,000 per team, for a $40,000 per player salary average.[132]

The XFL

Owned equally by the WWF and NBC, Vince McMahon's new $80 million dollar league just started play February 3, 2001.[133] The initial eight teams are owned by a WWF subsidiary, and players will be under contract with the league rather than with specific teams. Although no immediate expansion plans exist, the league states an interest in Canada, with Toronto having been mentioned as a possible expansion city.[134]

Both NBC and the WWF plan to cross-promote the XFL during their programming, but the league itself will remain in control of all advertising inventory sold during broadcasts. Salaries also fall under league control. Players will receive the same salaries over the ten game season, but the winning teams each week will share in a victory bonus pool, a $100,000 jackpot to be split by the thirty-eight players on the winning team after each game. The salaries are determined by position, with quarterbacks receiving between $50,000 and $55,000 at the high end of the pay scale and kickers receiving about $35,000 at the low end of the pay scale. All other players receive $45,000.[135]

The CBA

Acquired in 1999 by Isiah Thomas, the fifty-five year old Continental Basketball Association (CBA), will serve as the official referee and player developmental league of the NBA through 2001.[136] The nine current teams are organized as an association spanning from Connecticut to Washington, with approximately forty owners.[137] Nevertheless, the league is low-profile and even lower-budget; six of the nine teams have consistently lost money.[138] Salaries range from a paltry $30,000 to $50,000 per year as compared to the $2.2 million average in NBA players' salaries in 1997-1998.[139] Financial hardships ultimately motivated the sale to Thomas, as the original forty owners of the nine cash-strapped franchises sold all assets of their teams to the ex-Detroit Pistons star while staying on as "investor-owners."[140] This relinquishment of control over teams individually allows equal financing opportunities for all teams, eliminating the disparities in finances among the teams.

Essentially Thomas has attempted to transform his new league into a single-entity similar to the WNBA and MLS, rather than the NBA's or NFL's joint venture concept.[141] The league will handle all areas of all teams' operations, including player contract negotiations and marketing, except the hiring of local administrative staff and general managers.[142] If , for instance, there is a need to move a franchise or replace the existing management of a team, the league maintains the control to make this decision. Each team's "investor-owner" would have a financial stake in the league as a whole but would possess little decision-making power. Budgets would be strict and all expenses and revenues shared, including insurance and worker's compensation.[143] Salaries would be kept artificially low compared to the NBA and IBL, and salary caps could be strictly enforced as players sign standard contracts with very little variance and are assigned to their teams.[144] Thus, players' salaries are determined by the league's valuation of their worth. Thomas believes the structure will lead to better competitive balance among teams, pare expenses, and aid in soliciting corporate marketers.[145]

All of these plans have been put in jeopardy by Thomas' recent acceptance of the head coaching job with the Indiana Pacers. By mandate of the NBA, Thomas placed his ownership interest in the CBA into a blind trust, where it will reside until it can be sold.[146] The latest proposal includes the sale of the CBA to the IBL, resulting in a merger of the two leagues and subsequent folding of the least financially successful franchises in these leagues.[147] Trustee Ivan Thornton and Isiah Thomas will not comment, but Thomas will likely lose a

significant amount of the $10 million he invested to purchase the CBA.[148]

HANDLING POSSIBLE ANTITRUST CLAIMS AGAINST THE NEW LEAGUE

Should players wish to challenge any new leagues organized as single-entities, the basis for many of these challenges would be the one that failed in Fraser, namely that the league is really a group of separate economic parties acting in combination in restraint of trade. While each team will operate independently regarding personnel and facilities issues, the league office for both the WUSA and XFL, as well as the CBA, plans to negotiate player contracts, handle marketing and endorsement deals, and deal with other organizational issues.[149]

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Under the CBA player contracts, players fall under a strict salary cap, the rules of which are only known to the CBA officials.[150] Under §1 of the Sherman Act, this salary cap, as well as the centralized player allocation system and standard reserve clause, will prevent CBA teams from freely competing for the services of an individual player, violating federal antitrust law. WUSA players also face a strict $800,000 team salary cap and centralized player allocation system.[151] Thus, the players in both leagues can assert Sherman Act §1 charges of player restraint due to the restriction of the labor market and their ability to move from team to team after assignment to a certain team.[152] The standard league contract the CBA players are forced to sign prohibit them from shopping their services and skills to any other team and leaves them with salaries unilaterally determined by a league official. Their only alternative is to sign with an IBL club, which will limit their chances to "graduate" to the NBA. The women in the WUSA do not even have an alternative since no other women's professional soccer league exists.

As seen through the creation of Major League Soccer clubs, "star" players in single entity leagues often are claimed to be given the chance to influence their destination while other players do not have similar opportunities.[153] The XFL and the CBA have no such worries since neither league attracts such "star players." This prevention from any choice could constitute a Sherman Act §1 group boycott "being exercised by unrelated competitors refusing to do business" with the players unless the agreements were under the authority of rules promulgating the restraints.[154] Following Supreme Court precedent set in Northwest Wholesale Stationers and Maricopa County Medical Society, the league's attempts to establish maximum prices under a salary cap should be illegal *per se* with no further inquiry.

Courts have not been persuaded by the counter-argument that the *per se* rule should not apply because the judiciary has little antitrust experience in the industry at issue.[155] As noted, the league's overwhelming restraints on trade and price might disqualify it as a single entity since "you can't create separate markets and get all the advantages of individual ownership and then price fix on salaries."[156] In Fraser, the soccer players maintain that the single entity structure violates §1 of the Sherman Act, preventing salary increases and restricting player movement in an attempt to limit players' legal challenges to weak §2 claims.[157] Since they lost their suit, any of the new leagues' possible §1 claims seem destined to fail.

The only possible effective claims against the single-entity defense for the CBA or XFL players when fighting their ownerships' internal decision-making processes would be §2 claims of monopolization.[158] However, the claims of a CBA or XFL attempt to monopolize would be difficult to prove because players would first have to show that the relevant product and geographic market is the labor market for elite professional basketball or football players in the United States.[159] This task would be difficult for either league's player since the truly elite basketball players play in the NBA just as the truly elite football players play in the NFL.

The CBA and XFL players would also have trouble proving under §2 that, if the CBA and XFL were considered monopolistic leagues imposing wage restrictions that depressed their wages by a significant amount, they would have no option but to sign with the CBA or XFL.[160] The IBL offers an alternative to playing in the CBA, as do other roughly equivalent professional basketball leagues around the world. Similarly, XFL players could play in the Canadian Football League or the Arena Football League. Since these other

ANTITRUST ON THE WORLD STAGE

The MLS received its sanctioning from not only the United States Soccer Federation (USSF), but also the international governing body of soccer, the Federation Internationale de Football Association (FIFA).[1] For years, FIFA had seen the existence of a professional soccer league in the United States as crucial for the global expansion of the sport's popularity. As such, the governing body conditioned its decision to allow the United States to host the 1994 World Cup on the development of such a league.[2] FIFA approved the specific plan for the MLS partly because of its single-entity structure, which included features like transfer rules and a foreign player limit—in other words, the sorts of restrictions at issue in Fraser. As a result, international implications could have arisen had the district court decided, or should any future court decide, in favor of the MLS players.

But such a result may not have come as a total surprise to FIFA. FIFA has already had its transfer rules and restrictions on foreign players determined illegal under European community law in Bosman v. URBSFA.[3] Bosman involved Union Royale Belge des Sociétés de Football Association (URBSFA) rules that inhibited a French player (Bosman) from securing a contract with a French division team after refusing to sign with his Belgium club. After the European Court of Justice ruled in favor of Bosman, FIFA had to amend its rules to allow players to test their values on the market at the end of their contracts by changing teams within the European Union absent transfer fees.[4] The international body took one step further, however, and enacted a rule to keep clubs and associations from going to court, where rules such as that at issue in Bosman—or in Fraser—could come under fire.[5]

[1] "About MLS ," available at http://www.mlsnet.com/about (last visited Feb. 20, 2001).
[2] Id.
[3] 1996 E.C.R. at I-5081.
[4] See Mark D. Mako, Rules Restricting Player Movement Under the Federation Internationale de Football: Do they Violate U.S. Antitrust Law? 18 N.Y.L. Sch. J. Int'l & Comp.L. 407,419 (1999).
[5] See Rob Atherton, Fraser v. Major League Soccer: The Future of the Single-Entity League and the international Transfer System, 66 UMKC L.Rev. 887, 917 (1998).

leagues do exist, neither the CBA nor the XFL would probably garner the minimum fifty percent of the professional basketball and football market respectively required to prove market power, much less any abuse of that power, so any §2 claim would be dismissed.[161] It would likewise be hard to prove that a restraint on the players by any CBA or XFL decisions were not just ancillary to an overall legal agreement of the CBA or XFL teams acting together as a single entity to produce professional basketball or football.

The players' best legal strategy to address such future issues would be to form a union, which would have wide latitude under the Clayton Act to challenge antitrust practices. The nonstatutory labor exemption in antitrust law shields the results of these union collective bargaining activities from scrutiny after "good-faith and arms-length negotiation between the employer and the union on mandatory subjects of collective bargaining," such as wages, hours, and restrictions on player mobility.[162] Union success in standardizing wages and organizing the players ultimately affects price competition among the teams and allows them the powerful tools of strikes and boycotts effectively used by other leagues to challenge unfair salaries.[163]

Another option is to form an association to challenge any suspected antitrust practices. Associations do not subject themselves to the restrictive procedural process unions face since they deal with the National Labor Relations Board upon first bringing charges and then simply wait for the ruling.[164] An association would bypass four or five years of legal wrangling by avoiding the government, a strategy the NBA players used dealing with their recent 1998 lockout.[165]

Although a lockout normally works to exempt owners from antitrust law, a simple claim by a Players Association that it is not a labor union that acts as the exclusive bargaining agent, but rather an association just acting to represent the players, can gain the play-

ers access to antitrust laws.[166] This threat keeps the owners and players' association negotiating frantically to avoid lawsuits, as seen by the all-night work sessions in the NBA lockout. For these reasons, a blanket exemption from the Sherman Act and antitrust liability is desirable when determining a league's structure to defend against these antitrust claims.

The WNBA, the only fledgling women's professional league, has flourished arguably because the players formed the Women's National Basketball Players Association (WNBPA), which has been able to bargain successfully with the WNBA president. According to WNBA President Ackerman, the four-year agreement, as detailed above, "reflects our commitment to providing WNBA players with a first-class working environment."[167] The players' association director of operations also agreed that the deal was "a significant step forward for WNBA players in many respects, including salaries, job security, and benefits."[168] Thus, the XFL and WUSA should form an association to handle these topics of negotiation, the sensitive topics which have prompted antitrust suits in the past when players have not had an association and felt powerless to bargain with the professional sports league corporation.

Any suit against the WNBA, XFL, or WUSA with these antitrust notions of uncompetitive restraint actions could be defended on Copperweld's single-entity theory,[169] as currently formulated by Fraser. Under the "rule of reason" standard applied to these antitrust cases, the court examines "consumer output" and "undiminished welfare," both of which provide valid policy reasons for these three leagues to be treated as a single entity exempt from antitrust laws.[170] The "rule of reason" approach weighs the nature and purpose of the rule, its effect on competitors and on competition, and the existence of less restrictive alternatives to the approach adopted.[171] The true test of legality is whether the restraint imposed merely regulates competition, or in fact suppresses or destroys it.[172]

The WUSA will run risks in operating the team as a single entity. Hendricks does not run the same risk of losing players that the CBA does, as players could easily defect to the IBL or ABA or even to foreign markets after their new chance at increased exposure to NBA scouts fades.[173] McMahon similarly risks losing players to the Canadian Football League or Arena Football League. These players will resist playing for such low salaries if these new leagues become more popular and generate more revenue for owners, claiming an entitlement to some of the increased revenue. They will attempt to challenge the existing single-entity structure using some of the claims stated previously. However, the WUSA and XFL should prevail.

In examining the pro-competitive effects, Hendricks and McMahon meet the requisite unity of ownership interest and totality of control of the WUSA and XFL respectively that the MLS needed to assert its successful single entity defense. As a single-entity, these leagues would enjoy immunity from §1 of the Sherman Antitrust Act since they would be "incapable of contract, combination, or conspiracy."[174] The sharing of expenses and profits proposed by these leagues under their proposed structures further insulates them from liability.

In Fraser, the court notes that player contracts are owned by MLS, who also conducts the draft such that §1's "conspiracy of combination in restraint of trade" does not apply.[175] Therefore, the league's owner-operators could not be found to have conspired with each other in violation of the Sherman Act. Similarly, the XFL, WNBA, and WUSA own the player contracts and conduct the drafts in isolation. Moreover, treating these three new leagues as single-entities will advance "consumer welfare," the main purpose of antitrust laws, and is thus justified for policy reasons.[176] The single-entity provides parity, preventing the wealthy teams from signing the best players, only to attract even more fans, bring in even more revenue, and make the gap between them and the rest of the league even larger.[177]

Along with the parity arguments made in Fraser, the WUSA, WNBA, and XFL could also argue that the litmus test for antitrust legality applying the "rule of reason" standard is undiminished output, with the output of the teams defined as each league game played.[178] Applying this rationale, only decisions designed to reduce the number of games would threaten "consumer welfare" and violate antitrust rules. Therefore, this alignment would not be illegal under antitrust law since there is no indication of a reduction in the number of games scheduled.

NECESSITY OF SINGLE-ENTITY STRUCTURE FOR START-UP LEAGUES

The Fraser outcome is a necessity for struggling and start-up professional sports leagues who must form a corporation in order to survive. These new sports

leagues need the added flexibility that the single-entity organization provides because they are often sports that have not been tested before in the United States. These sports need the opportunity for financial security in order to build a fan base which will bring continued financial success. For soccer, the single-entity corporate structure will allow a sport with proven international success and fan appeal to "win over the American spectator and television viewer . . . [and contend] with the fact that every other attempt at establishing a premier league in the United States has failed."[179] Women gain opportunity to play professional basketball and soccer through the development of the WNBA and WUSA, leagues that would not be possible without single-entity structure due to a lack of immediate high demand for women's professional sports. Since there is not a tradition of success with women's professional sports that can guarantee immediate financial success, the single-entity structure allows the chance for success in the United States which can serve as a pattern for the rest of the world. Operating the new leagues as single-entities provides a unified league interest in financial success in the critical early stages where past leagues have gone bankrupt. League office decisions keep each team insulated from monetary pressures that lead to rash financially alluring decisions which undermine the integrity of the league and hurt rapport with the fans. Goodwill needs to be developed because current fan support cannot endure lockouts or other tactics related to monetary concerns that arise when players bargain with leagues.[180] Restrictions such as a "no free agency" clause and salary caps minimize team costs and maximize the salary of the average player while keeping ticket prices low.[181] Revenue-sharing allows each squad to have more balanced teams, producing parity on the field.

All of these factors promote organizational flexibility, providing justification for the single-entity structure. This structure, with its cost control strategies, provides newer leagues with their only real chance at avoiding the bankruptcy problems associated with failed leagues. Creating a single-entity would have been a practical solution to the North American Soccer League's (NASL) and United States Football League's (USFL) problems where the profligate ways of its biggest market teams relegated smaller market teams to second-class status and diminished the on-field sports product.[182] Allowing the single-entity structure recognizes the need to keep competitive balance in professional sports; absent restraints on player mobility, there arises a lack of sufficient capital to build these leagues, forcing cancellation of proposed plans or bankruptcy.[183] Under the single-entity system, management maintains control over player movement and thus can distribute the talent, ensuring parity that will create competitive matches.[184] This control over costs and balance on the field allows the single-entity league to create sufficient revenue streams early that will enable the league to pay increasingly higher salaries and compete with established leagues.[185] Decisions not affecting players are also made by the single-entity league's central office. This keeps individual teams from making decisions that benefit only their club to the detriment of the league as a whole.[186] The single-entity league can also control issues such as realignment and relocation, as well as changes in investment in each team.

Many players understand the effects playing in a single-entity league will have on their potential salary. Nevertheless, they play as an opportunity to create exposure for themselves and their sport, and to create a foothold for the sport in the American professional sports market.

Under antitrust precedent, courts seem reluctant to break up organizations using reasonable business practices which also protect against bankruptcy, especially if there is no tradition to cite for such action.[187] Barring a successful player appeal from Fraser, the single-entity structure helps the newest leagues avoid facing responsibility for player restraints under antitrust laws. Especially critical is the value of the sponsorship agreements that the league is able to take advantage of as a whole, without competition among the teams that dilutes the financial value of the sponsor's investment.[188] The single-entity corporation itself absorbs the extra costs so team operators save a great deal of time and money looking for sponsors they can then use to focus on building fan support critical to stabilizing a new league at the developmental stage.[189]

Many players understand the effects playing in a single-entity league will have on their potential salary. Nevertheless, they play as an opportunity to create exposure for themselves and their sport, and to create a

foothold for the sport in the American professional sports market. For the MLS, the single-entity structure is imperative for keeping a place within FIFA and staying eligible for FIFA-sponsored tournaments such as the 1994 World Cup Tournament that provided the greatest exposure to major soccer in the United States.[190] For women, the single-entity is imperative for providing them an opportunity to even play professional sports.

Arguably, well-established professional leagues could benefit from the single-entity structure as well. Owners in well-established professional leagues resist the appeal to relinquish control of their long-term investments for the common good of the sport. However, such relinquishment would allow an equality of financing aimed at eliminating obstacles for less wealthy teams. The large economic disparities between large and small market teams would be reduced if the league could "purchase" each team for its appraised value and "sell" it back to its original owner at the new value estimated after revenue sharing. Furthermore, teams in debt could finance earnings through future income, while retaining control over all local broadcasting contracts and sharing the national and local broadcasting revenues equally with the league.[191] A corporate league could be created with franchises either owned directly by this league or considered subsidiaries wholly owned by the parent league corporation.[192] As a corporate league, no §1 liability exists, so there is greater flexibility to adopt new rules, increase sponsorships, and enter into new arrangements with players.[193] Even the problem of taxation (owners can currently deduct operating losses of their original franchises) could be remedied as an internal league decision allowing some owners' tax gains to compensate other owners' losses.[194] The parity on the field and on the teams' financial reports would mirror each other as signs of stability and balance throughout the league.

Ultimately, although capable of producing a desirable competitive balance, the single-entity structure loses its viability for popular established professional sports. Owners—who are actually considered "owner-operators" under the single-entity system—lose financial incentive to improve their clubs since they cannot expect to realize higher earnings upon future success.[195] Under the single-entity system, owners would have difficulty maximizing profits since the free agency system is not allowed. Free agency allows owners to pay huge costs to free agent players with the hopes that revenues generated by these players will exceed the costs of their salaries, but this is not allowed.[196] Owners also worry about losing their tax-favored status. Currently they deduct the operating losses of their individual franchises, which would not be allowed under reorganization as a single-entity league. These disadvantages seem more important to individual owners within the well-established professional sports leagues than the advantages a single entity structure provides.

Reorganizing existing leagues into single-entities presents problems from a policy standpoint. If this structure is allowed for the traditional sports, antitrust issues will revert back to the Federal Baseball Club era, in which the courts refuse to recognize professional sports as a business conducting interstate commerce open to antitrust claims.[197] It is also unrealistic to expect courts to agree to changes in the corporate structure. In accordance with past litigation from the 1970s striking down judicially created antitrust immunity, courts will still be reluctant to allow existing professional sports teams to reorganize as single-entities. Members in well-established professional sports leagues must accept antitrust responsibility for restraints entered into by them that would benefit them as a whole but be detrimental to the players. Commentators agree that changing the existing laws for well-established professional leagues would undermine players' associations involving a large number of players to satisfy a small number of wealthy investors.[198] Players deserve the bargaining power they currently enjoy and to change the system would arguably be unfair to them. Such a change in league structure is unlikely since it would probably not survive a challenge from the players' association worried about losing available section 1 claims as collective bargaining leverage.[199]

CONCLUSION

Professional sports leagues asserting the single-entity defense in antitrust suits have consistently failed. However, the WUSA should be able to ride the coattails of the tentative outcome of Fraser if antitrust challenges arise due to the structuring of the women's professional sports. Hendricks's structuring of WUSA as a single-entity is a legally sound method of arrangement in order to achieve financial success.

New professional sports leagues are wary of antitrust law due to large amount of money at stake. Defending against player challenges to the league practices and the amount players can take if they win costs large amounts of money that new, struggling start-up professional leagues do not have. Thus, organizing in a typical manner where it would be vulnerable to charges of violating the Sherman Antitrust Act would drive the league to bankruptcy.

Previous league failures in bankrutpcy provide valuable lessons for these new leagues, which see many benefits in organizing as single-entities. The traditional method in which teams compete against each other for the media, sponsors, and player contracts takes away an ability to get unified concessions from owners and players in the best interests of the league. If team operators own a financial stake in the league as a whole and the league itself owns player contracts, the only place where any true competition takes place is on the playing field. The league corporation also makes necessary decisions quickly without having to build a consensus. The single-entity structure enhances opportunities for survival and eventual growth in new professional sports leagues by creating financial parity between larger and smaller market teams, setting uniform cost control policies, and providing an integrated sponsorship system.

Although capable of producing a desirable competitive balance, the single-entity structure loses its viability for popular established professional sports. An economic perspective shows the single entity's effect of equalizing revenue could actually have a detrimental effect. Disadvantages to owners of losing tax-favored status and loss of incentives to improve clubs in order to succeed and earn more individually are critical and seem more important to well-established professional sports leagues than the advantages a single entity structure provides.

The trend in the courts is to strike down immunity grants in antitrust that previously existed. Thus, there are unlikely to be any new immunity grants that would require existing leagues to reorganize into single-entities. There is no need to change a system that already works to the detriment of both players and owners. However, courts should follow Fraser and allow new professional sports leagues such as the WUSA, XFL, and WNBA to use the single-entity structure as an economic necessity for getting started and developing support.

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[1] Associated Press, WWF's McMahon Forming XFL, at http://espn.go.com/moresports/news/2000/0203/332510.html (last visited Feb. 3, 2000).

[2] Fraser v. Major League Soccer, 97 F. Supp. 2d 130 (D. Mass. 2000).

[3] Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988). The Sherman Act has been challenged numerous times by professional sports leagues, including: Flood v. Kuhn, 407 U.S. 258 (1972) (noting merit in consistency in deciding to uphold baseball's general antitrust exemption fifty years after it was established even after holding that baseball was a business and was engaged in interstate commerce); NBA v. Williams, 45 F.3d 684 (2d Cir. 1995) (holding that antitrust laws have no application to collective bargaining negotiations between appellants and the NBA teams but that, even if they did apply, they would survive scrutiny under the rule of reason standard); Kansas City Royals Baseball Corp. v. Major League Players' Assn., 532 F.2d 621 (8th Cir. 1977) (players' contracts encompassing only a limited right to renewal due to the personal nature of employment relationships and therefore Andy Messersmith and Dave McNally became baseball's first free agents by using national labor laws instead of federal antitrust laws under which baseball was still exempt); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) (subjecting the Rozelle Rule, which provided that when a player's contract to a team expires and he signs with a different club, the new club must compensate the former club, to antitrust laws since it was not a product of genuine arm's-length bargaining and thus the non-statutory labor exemption was not applicable); and McNeil v. NFL, 790 F. Supp. 871 (D. Minn. 1992)(holding that the league and member clubs were capable of conspiring for purposes of antitrust law and that these laws applied to restraints operating solely within a labor market but professional players were given standing to challenge a league-wide wage scale imposed by the owners).

[4] 15 U.S.C.A. §§ 1-2. The Sherman Antitrust Act of 1890's two main provisions are:
§1: Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.
§2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty.

[5] See Monsanto Co. v. Spray-Rite Services Corp., 465 U.S. 752, 761 (1984) (If the league is organized and functioning as a single-entity, it cannot be found subject to antitrust laws for competing against itself under §1. Thus, only §2 claims could apply to the conduct of a single entity, unlawful only when it threatens actual monopolization. §2 claims are preferable since §1 claims regarding concerted activity are judged more sternly than §2 claims applicable to unilateral activity.).

[6] Levin v. National Basketball Ass'n, 385 F. Supp. 149, 152 (S.D.N.Y. 1974); San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 971 (C.D. Cal. 1974) (Regarding assertions that professional sports leagues should be treated as single-entities to avoid antitrust laws involving these agreements, the few cases addressing the issue have simply assumed that league members did not qualify since they were

capable of agreement and the challenged conduct by the league members was found to have no anti-competitive effects.).

[7] Rob Atherton, Fraser v. Major League Soccer: The Future of the Single-Entity League and the International Transfer System, 66 UMKC L. Rev. 887, 890 (1998).

[8] Id.

[9] 15 U.S.C. § 1.

[10] 15 U.S.C. § 2.

[11] See 2 Law of Professional and Amateur Sports § 19.04[1], 19-9 (Gary A. Uberstine & Clark Boardman Callaghan eds., 1988).

[12] Id. § 19.04[2][a][i], at 19-12, 13.

[13] Mid-South Grizzlies v. NFL, 550 F. Supp. 558 (E.D. Pa. 1982).

[14] Levin, 385 F. Supp. 149.

[15] See, e.g., Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Robertson v. National Basketball Ass'n, 389 F. Supp. 853 (S.D.N.Y. 1975); and Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.,351 F. Supp. 462 (E.D. Pa. 1972).

[16] Uberstine, *supra* note 11, § 19.05[2], at 19-30.

[17] See Smith v. Pro Football, Inc., 420 F. Supp. 738 (D.D.C. 1976).

[18] See Antitrust Basics § 6.01, 6-1 (Thomas V. Vakerics ed., Law Journals Seminars-Press 1999).

[19] Id., § 6.03 at 6-7.

[20] Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[21] Sajit Singh, Welcome to the Club: Upstart Major League Soccer Gets Sued, 6 Sports Law J. 217, 235-236 (1999) (quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284, 290 (1985); See also Klor's, Inc., v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959)).

[22] Maricopa Cty. Med. Soc'y, 457 U.S. 332, 348-49 (1982) (citing Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951)).

[23] See Vakerics, *supra* note 18, § 7.01 at 7-1, 7-2.

[24] See Uberstine, *supra* note 11, § 19.02, 19-5 (discussing Continental T.V., 433 U.S. 36 (1977)).

[25] United States Football League v. NFL, 842 F.2d 1335 (2d. Cir. 1988); World Hockey League v. NHL, 351 F. Supp. 462 (E.D. Pa. 1972) (modified the NHL reserve clause); American Football League v. NFL, 205 F. Supp. 60 (D. Md. 1962).

[26] 196 U.S. 375 (1905)

[27] Id. at 396.

[28] Vakerics, *supra* note 18, § 5.01 at 5-2.

[29] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[30] 334 U.S. 495, 531-32 (1948).

[31] Standard Oil Co. v. United States, 221 U.S. 1, 61 (1910).

[32] 15 U.S.C. §§ 12-14, 22, 24-30 (1996).

[33] 15 U.S.C. § 26.

[34] 15 U.S.C. § 15.

[35] Uberstine, *supra* note 11, § 19.02 at 19-4.

[36] Id., § 19.02 at 19-6.

[37] See Am. League Baseball Club v. Chase, 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914) (holding that, although a baseball player's services were unique and a proper substitute was not available, organized baseball is not interstate commerce subject to control by Congress no injunction would be issued to specifically enforce a contract between a player and owner of a previous team after he signed with a team in a different league (in dicta on page 17, it was noted that organized baseball was an "illegal combination")).

[38] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (applying the *per se* approach to territorial restrictions); Klor's, Inc., 359 U.S. 207 (1959) (applying the *per se* approach to group boycotts); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (applying the *per se* approach to price fixing).

[39] United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967).

[40] Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

[41] Id. at 21-22.

[42] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[43] Nat'l Soc'y of Prof'l Eng'r. v. United States, 435 U.S. 679 (1978).

[44] Id. at 692-96.

[45] See Warren Friedman, Professional Sports and Antitrust 71 (Quorum Books 1987).

[46] NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

[47] Id. at 99-100.

[48] Id. at 101.

[49] Id.

[50] See Vakerics, *supra* note 18, § 1.03[2] at 1-12.

[51] See John C. Weistart and Cym H. Lowell, The Law of Sports § 5.07, at 600-01 (1978).

[52] Federal Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

[53] Id. (While the New York Supreme Court in the 1914 case Am. League Baseball Club, 149 N.Y.S. 6, held that major league baseball did not engage in interstate commerce that was subject to antitrust laws, the Supreme Court had not addressed the issue.)

[54] Federal Baseball Club, 259 U.S. at 209.

[55] See, e.g., Toolson v. New York Yankees, 346 U.S. 356 (1953) (Supreme Court upholding the Federal Baseball Club ruling exempting baseball from federal antitrust law while relying on Congressional silence to support its application in Federal

Baseball Club). The last Supreme Court ruling upholding baseball's exemption from antitrust law came in the 1972 case, Flood v. Kuhn, 407 U.S. 258 (1972).

[56]See Shant H. Chalian, Note, Fourth and Goal: Player Restraints in Professional Sports, A Look Back and A Look Ahead, 67 St. John's L. Rev. 593, 603 (Summer, 1993).

[57] Id. at 603 (citing Radovich v. NFL, 352 U.S. 445 (1957); Radovich left the NFL while under a contract and played in a rival league but was "black-listed" upon an attempted return to an NFL affiliate.).

[58] Washington Prof'l Basketball Corp. v. NBA, 147 F. Supp. 154, 155 (S.D.N.Y. 1956); Central New York Basketball, Inc. v. Barnett, 181 N.E.2d 506, 517 (Ohio Com. Pl. 1961).

[59] See Haywood v. NBA, 401 U.S. 1204 (1971).

[60] Congress created an antitrust exemption for agreements between professional sports leagues and broadcasters for the "sponsored telecasting"" of league games. Sports Broadcasting Act of 1961, 15 U.S.C.A. §§ 1291-1295 (West 1994). Shaw v. Dallas Cowboys Football Club, 172 F.3d 299 (3d Cir. 1999), goes on to hold that the NFL agreement with DirectTV for satellite transmission of games is not exempt from antitrust laws.

[61] Curt Flood Act, 15 U.S.C.A. § 27a (West Supp. 1999).

[62] See Fraser v. Major League Soccer, 97 F. Supp. 2d 130 (D. Mass. 2000).

[63] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

[64] Id. at 769.

[65] Id. at 767.

[66] See Lee Goldman, Sports Antitrust, and the Single-Entity Theory, 63 Tul. L. Rev. 751, 793 (March, 1989).

[67] Id.; See Copperweld, 467 U.S. at 777.

[68]Copperweld, 467 U.S. at 771-72; See Goldman, *supra* note 66, at 793.

[69] Copperweld, 467 U.S. at 770-71.

[70] Id. at 769.

[71] Id. at 771.

[72] Id.

[73] Id. at 772-73.

[74] North Am. Soccer League (NASL) v. NFL, 670 F.2d 1249 (2d Cir. 1981).

[75] See id. at 1250.

[76] Id. at 1253, 1258.

[77] See id. at 1251.

[78] See id. at 1251-52.

[79] See Los Angeles Memorial Coliseum Comm. v. National Football League, 726 F.2d 1381, 1387 (9th Cir. 1984).

[80] Id. (quoting NASL, 670 F.2d at 1257).

[81] Id. (emphasis added).

[82] See Timken Roller Bearing Co. V. United States, 341 U.S. 593 (1951).

[83] Los Angeles Memorial Coliseum Comm'n, 726 F.2d at 1388 (quoting Timken Roller Bearing, 341 U.S. at 598).

[84] See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968).

[85] Brad McChesney, Professional Sports Leagues and the Single Entity Defense, 6 Sports Law J. 125, 132 (1999) (citing General Business Systems v. North American Philips Corp., 699 F.2d 965, 980 (9th Cir. 1983)).

[86] Los Angeles Memorial Coliseum Comm'n, 726 F.2d at 1389 (citing Associated Press v. United States, 326 U.S. 1 (1945)).

[87] Los Angeles Memorial Coliseum Comm'n, 726 F.2d at 1389-90.

[88] McNeil v. National Football League, 790 F.Supp. 871, 880 (D. Minn. 1992).

[89] Id. at 875.

[90] Id. at 878, 880.

[91] Id. at 878-79.

[92] See Sullivan II v. National Football League, 34 F.3d 1091, 1099 (1st Cir. 1994).

[93] See id. at 1097, 1099.

[94] See id. at 1098.

[95] See Uberstine, *supra* note 11, § 19.03 at 19-7, 8.

[96] Id., § 19.03 at 19-6, 7.

[97] See American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963).

[98] McChesney, *supra* note 85, at 134; See, e.g., Chicago Professional Sports Ltd. Partnership v. NBA, 95 F.3d 593, 598 (7th Cir. 1996) (holding that the lack of a complete "unity of interest" is not dispositive of the single entity issue while stating the need for a fact-specific inquiry).

[99] See Edward Mathias, Comment, Big League Perestroika? The Implications of Fraser v. Major League Soccer, 148 U. Pa. L. Rev. 203, 221 (1999).

[100] Major League Soccer: About MLS, at http://www.mlsnet.com/about/index.html (last visited Dec. 20, 2000).

[101] Id.

[102] Fraser, 97 F. Supp. 2d at 132.

[103] See Mark D. Mako, Rules Restricting Player Movement Under the Federation Internationale de Football: Do They Violate U.S. Antitrust Law? 18 N.Y.L. Sch. J. Int'l & Comp. L. 407, 424.

[104] See Fraser, 97 F. Supp. 2d at 130.

[105] Id.

[106] Id. at 142.

[107] Singh, *supra* note 21, at 230.

[108] Fraser, 97 F. Supp. 2d at 135.

[109] Id.

[110] Fraser v. Major League Soccer, L.L.C., 7 F. Supp. 2d 73, 78 (1998) (quoting M & H Tire Co., Inc. v. Hoosier Racing Tire Corp., 733 F.2d 973, 977 (1st Cir. 1984)).

[111] Fraser, 7 F. Supp. 2d at 76.

[112] Id. at 79.

[113] See Mathias, *supra* note 99, at 224.

[114] Singh, *supra* note 21, at 227, 231.

[115] Id. at 228-29.

[116] Future of soccer could be on the line, at http://www.espn.go.com/soccer/news (on file with the Vanderbilt Journal of Entertainment Law and Practice).

[117] Id.

[118] Grahame L. Jones, Jury Rules in Favor of League in Player Suit, L.A. Times, Dec. 12, 2000, at D3.

[119] MLS Cuts Schedule, Claims Huge Losses, Milwaukee J. Sentinel, Dec. 8, 2000, at 02C.

[120] Grahame L. Jones, MLS Schedule Shorter, Sweeter, L.A. Times, Dec. 8, 2000, at D3.

[121] Major League Soccer Takes Over Troubled D.C. United, Houston Chron., Dec, 15, 2000, Sports, at 11.

[122] Id.

[123] Major League Soccer wins Lawsuit, at http://www.mlsnet.com/content/00/mls1211lawsuit.html (last visited Dec. 20, 2000).

[124] Frank Dell'Apa, Soccer, Boston Globe, Dec. 13, 2000, at F10.

[125] Id.

[126] Val Ackerman, Conference Call, at http://www.wnba.com/news/val_cba.html (last visited Apr. 14, 2000).

[127] ESPN to Televise More WNBA Games, at http://www.wnba.com/news/espn_games_001215.html (last visited Dec. 20, 2000). ESPN will televise more WNBA games in 2001, with ESPN2 carrying a WNBA game as part of its Sunday afternoon lineup. Lifetime will switch the games to Thursday nights in order to make room for a new Friday night magazine show highlighting the WNBA players and coaches.

[128] Id.

[129] These include Time Warner, Inc., Comcast Corp., Continental Cablevision Inc. and Cox Communications. In addition, Hyundai Motor America signed a four-year category exclusive deal as the first official sponsor, gaining rights to trademarks, logo, and on-air advertising. Lastly, Turner Sports will televise 15 games while its CNN/Sports Illustrated affiliate will air seven more. See Turner Sports Sales Signs Hyundai Motor America as First Official Sponsor of Women's United Soccer Association, Business Wire, September 5, 2000.

[130] Susan Bickelhaupt, WUSA Team Hires Coach, Boston Globe, Oct. 25, 2000, at F7.

[131] Bill Ward, It's Pro Soccer Just For Women, Tampa Trib., Oct. 30, 2000, Sports, at 6.

[132] Grahame L. Jones, Women's League Reveals Names, L.A. Times, Nov. 3, 2000, at D16.

[133] NBC Joins Forces with WWF, at http://www.espn.go.com/nfl/news (on file with the Vanderbilt Journal of Entertainment Law and Practice).

[134] http://www.espn.go.com/moresports/news (on file with the Vanderbilt Journal of Entertainment Law and Practice). Current teams boast such names as the Los Angeles Xtreme, Las Vegas Outlaws, New York-New Jersey Hitmen, Orlando Rage, Chicago Enforcers, San Jose Demons, Birmingham Thunderbolts, and Memphis Maniax. Eight teams reveal nicknames, logos, at http://www.espn.go.com/moresports/news (on file with the Vanderbilt Journal of Entertainment Law and Practice).

[135] Curry Kirkpatrick, X-Rated: Vince McMahon Thinks He'll Show the NFL How to Run a Football League, ESPN- The Magazine, Nov. 27, 2000, at 116.

[136] Isiah Thomas Announces CBA Acquisition, at http://www.nba.com/news/thomas_cba.html (last visited Sept. 10, 1999).

[137] Id.

[138] Derek Samson, Buying CBA Just Became Easier for Isiah, Idaho Statesman, Sept. 24, 1999, at 1C.

[139] See Grant Wahl & L. Jon Wertheim, Paternity Ward: Fathering Out-of-Wedlock Kids Has Become More Commonplace Among Athletes, Many of Whom Seem Oblivious to the Legal, Financial, and Emotional Consequences, Sports Illustrated, May 4, 1998, at 62.

[140] Id.

[141] See Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 499 U.S. 990 (1984) (stating that the joint venture structure exists when teams are independent and separately owned, with each making separate managerial and player decisions; they share some revenue but not profits).

[142] See Roscoe Nance, Thomas' Hoop Dreams are Grand, USA Today, Aug. 11, 1999, at 3C.

[143] See Atherton, *supra* note 7, at 891.

[144] Id.

[145] See Derek Samson, Isiah Thomas to Begin Taking Steps to Create Parity in CBA, Idaho Statesman, Oct. 14, 1999, at 1C.

[146] Group Considers Purchase of CBA, Indianapolis Star, Nov. 29, 2000, at 4D.

[147] Dave Lewandowski, Sale of CBA may be costly for Paces Coach Thomas, Indianapolis Star, Jan. 28, 2001, at 6C.

[148] There are currently plans for a merger with the IBL, owned by Ralph Rossi, Jr. At the time of writing, the new owner's plans cannot be determined. See CBA still working toward merger with IBL, at http://www.espn.go.com/moresports/news/2001/0201 (on file with the Vanderbilt Journal of Entertainment Law and Practice). For the purposes of the Note, Thomas's restructuring is presumed, providing a good example of how the restructuring within an older, struggling

league could occur using the single-entity concept.

[149] John Lindsay, Hendricks Determined to Make Women's Soccer Fly," at http://www.espn.go.com/soccer (last visited May 5, 2000); See Atherton, *supra* note 7,at 912; See also Kirkpatrick, *supra* note 135.

[150] See Atherton, *supra* note 7, at 912

[151] Christopher Lawlor, Women's Professional League Gets Ball Rolling, USA Today, Nov. 3, 2000, at 17C.

[152] See Mathias, *supra* note 99, at 223.

[153] See Atherton, *supra* note 7, at 891.

[154] See Singh, *supra* note 21, at 235.

[155] Maricopa Cty. Med. Soc'y, 457 U.S. at 348-49.

[156] Singh, *supra* note 21, at 243 (quoting sports lawyer Mark S. Levinstein).

[157] Fraser, 97 F. Supp. 2d at 132.

[158] See John C. Weistart, League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry, 1984 Duke L.J. 1013, 1018 (1984).

[159] See Mathias, *supra* note 99, at 230.

[160] Id.

[161] Id. at 230-31.

[162] See Note, Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption, 104 Harv. L. Rev. 874, 877 n.27 (1991) (arguing that union consent must be a prerequisite to the availability of nonstatutory labor exemption).

[163] See Singh, *supra* note 21, at 239.

[164] Id.

[165] See Richard Justice and Mark Asher, Labor Deal Done, Time to Play Ball, Washington Post, January 21, 1999, at D01 (stating that the NBA lockout began on July 1, 1998 due to problems between players and owners in dividing their $1.7 billion yearly operational returns and lasted 204 days, ending January 20, 1999); See also Jackie MacMullan and Phil Taylor, Lockout Limbo, Sports Illustrated, July 20, 1998, at 44 (stating that the NBA owners initiated the lockout after disagreeing over a proposed middle-class salary cap exception, which allows clubs to exceed the salary cap to add a modestly priced veteran player in the first three years of a player's contract, as well as over league discipline authority over player agents).

[166] See, e.g., Brown v. Pro Football, 518 U.S. 231 (1996).

[167] Sides Reach a Deal, at http://www.wnba.com/news (on file with the Vanderbilt Journal of Entertainment Law and Practice).

[168] Id.

[169] Copperweld overruled the intraenterprise conspiracy doctrine that stood for the proposition that a "conspiracy" as defined under section 1 of the Sherman Act did not allow intracorporate relationships to bar determination that two related corporations had conspired. Copperweld, 467 U.S. 752 (1984) (Professional sports leagues argue that the Copperweld decision requires that uniqueness be recognized as a compelling reason for according a league single-entity status.).

[170] Under charges of price-fixing within Sherman Act §1, the "rule of reason" standard is applied to test the exchange of information facilitated by a trade association to see if it is trade restraint, as established in Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579, 586 (1925); See also Chicago Board of Trade v. United States, 246 U.S. 231, 238-40 (1918).

[171] See Uberstine, *supra* note 11, § 19.04[3][d], at 19-27.

[172] Chicago Board of Trade, 246 U.S. at 292-96.

[173] See Atherton, *supra* note 7, at 892-93.

[174] McChesney, *supra* note 85, at 126.

[175] See Singh, *supra* note 21, at 227, 231.

[176] See Michael S. Jacobs, Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo, 67 Ind. L.J. 25, 53-54 (1991).

[177] Reynolds v. NFL, 584 F.2d 280, 287 (8th Cir. 1978) (The court noted that a complete freedom of movement would result in the best franchises acquiring most of the top players.).

[178] See Jacobs, *supra* note 176, at 53-54.

[179] Singh, *supra* note 21, at 244.

[180] See Mako, *supra* note 103, at 431-32.

[181] See Singh, *supra* note 21, at 243,245; See also Chalian, *supra* note 56, at 638.

[182] See Mathias, *supra* note 99, at 237.

[183] See Atherton, *supra* note 7, at 918.

[184] McChesney, *supra* note 85, at 144.

[185] Singh, *supra* note 21, at 247.

[186] See Mathias, *supra* note 99, at 220.

[187] Id. at 246.

[188] Id. at 220.

[189] See Atherton, *supra* note 7, at 891-92.

[190] See Mako, *supra* note 103, at 422.

[191] Jeffrey A. Rosenthal, The Football Answer to the Baseball Problem: Can Revenue Sharing Work?, 5 Seton Hall J. Sport L. 419 (1995).

[192] See Mathias, *supra* note 99, at 220, 233.

[193] Id.

[194] Id. at 234.

[195] See Chalian, *supra* note 56, at 628-29.

[196] Id. at 630.

[197] See Federal Baseball Club, 259 U.S. 200 (1922).

[198] See Goldman, *supra* note 66, at 797.

[199] Mathias, *supra* note 99, at 234.