

THE FLIGHT FROM SINGLE-ENTITY STRUCTURED SPORT LEAGUES

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INTRODUCTION

Traditionally, sport leagues¹ have been structured as a type of unincorporated joint venture among individual teams.² Because of their traditional structures, sport leagues, such as the National Football League (NFL), National Basketball Association (NBA), and the National Hockey League (NHL), have been vulnerable to federal antitrust liability under Section 1 of the Sherman Act.³ Courts have repeatedly rejected their arguments about being “single entities” for purposes of federal antitrust laws and on many occasions have found them in violation of the law.⁴

In recent years, new professional sport leagues have conducted an experiment that is now coming to an end. Sports leagues such as the Women’s National Basketball Association (WNBA), Women’s United Soccer League (WUSA), and Major League Soccer (MLS) organized themselves as “single entities” when they first came into existence. In attempt to avoid antitrust litigation, they tried to centralize and control their respective sports by having the league own all teams, hold all player and coaching contracts and pay those salaries, and maintain sponsorship deals and broadcasting rights. Within the past two years, either by choice or by

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¹ For purposes of this paper “sport league” will mean a team-oriented structure with a central office overseeing operations and enforcing rules of a professional sport. Examples of a “sport league” are National Football League, National Collegiate Athletic Association, and Women’s National Basketball Association. This paper will not explore amateur/collegiate sports and individual-based professional sports such as golf, tennis, and auto racing.

² PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW, at 498 (2d ed. 1998).

³ Sherman Act of 1890, 15 U.S.C. § 1 (1994). It is important to note that the professional sport of baseball has enjoyed a unique antitrust status. *See* Fed. Baseball Club v. Nat’l League, 259 U.S. 200 (1922); Flood v. Kuhn, 407 U.S. 258 (1972); Curt Flood Act of 1998, 15 U.S.C. § 26b (Supp. 1999).

⁴ *See e.g.* N. Am. Soccer League v. Nat’l Football League, 670 F.2d 1249 (2d Cir. 1982); Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381 (9th Cir. 1984); McNeil v. Nat’l Football League, 790 F. Supp. 871 (D. Minn. 1992); Sullivan v. Nat’l Football League, 34 F. 3d 1091 (1st Cir. 1995); Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n, 961 F.2d 667 (7th Cir. 1992). There was one case that was the exception to the long history of courts rejecting the “single-entity” defense for traditionally structured sport league. *See* San Francisco Seals v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974).

judicial decision, the WNBA, WUSA, and MLS have moved towards the more traditional structure of individually owned teams with a league office to oversee those teams.

This paper will explore why “single-entity” structured sport leagues are becoming obsolete.⁵ Part II of this paper will explore the history of the “single-entity” defense. It will provide an overview of the Section 1 of the Sherman Act and the judicially created immunity from such antitrust litigation known as the “single-entity” defense, and a summary of why the defense has been rejected repeatedly by the courts when examining antitrust issues about sport leagues. Part III addresses the problems with the single-entity structure and why such a defense to Section 1 of the Sherman Act is impractical and not needed. It will analyze what the single-entity defense really means to sport leagues. Included will be an exploration of why the advantages of such a business structure are illusory in nature and are outweighed by the disadvantages of a “single-entity” structure. Although sport leagues could face more antitrust suits because they do not enjoy a blank exemption from Section 1 of the Sherman Act, they have other avenues of protection available. Other areas of protection from antitrust liability are explored.

II. BACKGROUND

In order to understand why there has been a flight from single-entity structures in the sports world, this section will provide an examination of the evolution of the Section 1 of the Sherman Act, the advent of the judicially created “single-entity” defense, the application of that defense to traditionally structured sport leagues, and the rise and fall of “single-entity” structured leagues.

A. Section 1 of the Sherman Antitrust Act

In 1890, the United States Congress passed the first statutory antitrust regulation.⁶ In

⁵ This paper will not explore all of the possible antitrust liability that a sport league could face under Section 1. For purposes of this paper, it will be generally assumed that a traditionally structured sport league will face antitrust challenges without the sweeping protection provided by the “single-entity” defense.

⁶ Sherman Act of 1890, 15 U.S.C. §§ 1-7 (1994).

passing the Sherman Act,⁷ Congress relied on its Constitutional power to regulate interstate commerce.⁸ It “wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . .”⁹ and thus “mandat[ed] for this nation a competitive business economy. . . .”¹⁰ It is believed that such an economic scheme yields “the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”¹¹ The antitrust laws are not meant to regulate the size, growth, or power of a particular business, but only regulate unreasonably uncompetitive methods that may be used to obtain or maintain market power.¹²

Of all the federal antitrust legislation enacted,¹³ a sport league’s decision to structure as a single entity only affects liability under one particular statutory provision. Section 1 of the Sherman Act states, “Every contract, combination in the form of a 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.”¹⁴ Section 1 focuses on concerted activity that unreasonably restrains interstate commerce.¹⁵

There are two tools of analysis for Section 1 claims, but only one tool has been used in the sport-related cases.¹⁶ Because of the unique nature of the business of sports, courts have rejected

⁷ *Id.*

⁸ U.S. CONST. art. I, § 8, cl. 3.

⁹ *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (quoting *United States v. South-Eastern Underwriters Ass’n.*, 322 U.S. 533, 558 (1944)).

¹⁰ *Gough v. Rossmoor Corp.*, 487 F.2d 373, 375 (9th Cir. 1973).

¹¹ *N. P. R. Co. v. United States*, 356 U.S. 1, 4 (1958).

¹² *United States v. New York Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626, 642 (E.D. Ill. 1946), *aff’d*, 173 F.2d 79 (7th Cir. 1949).

¹³ *See generally* 15 U.S.C. §§ 1-37 (1994) (includes the Sherman Act of 1890 and the Clayton Act of 1914).

¹⁴ *Id.* § 1.

¹⁵ *See Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1484 (D. Or. 1987) (“[t]he essence of a Section 1 action is concerted rather than unilateral action”); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) (needing a “plurality of actors . . . for a § 1 conspiracy”).

¹⁶ *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984).

application of *per se* violations to the sports world.¹⁷ A *per se* violation is a business “practice [that] facially appears to be one that would always or almost always tend to restrict competition and decrease output.”¹⁸ With a *per se* violation, the particular market context is not considered. Instead, courts consistently apply the “rule of reason”¹⁹ and give leagues the chance to balance anticompetitive injuries with procompetitive benefits.²⁰ Courts give leagues the opportunity to provide business justifications for what on the surface might appear to be an unreasonable restraint of trade.²¹ Under such a test, it must be shown that “(1) an agreement or conspiring among two or more persons . . . ; (2) by which the persons . . . intend to harm or restrain competition; and (3) which actually restrains competition.”²² Although sport leagues enjoy some judicial nicety by having the “rule of reason” applied, they are still often found to be in violation of Section 1²³ because application of either *per se* rules or the “rule of reason” “does not change the ultimate focus of [the] inquiry”²⁴ which measures the “competitive significance of the restraint.”²⁵

Sports leagues have sought sweeping protection from such liability, because they have faced many antitrust suits under Section 1 of the Sherman Act.²⁶ Traditionally structured sport leagues have sought the safety of being declared single entities for purposes of Section 1 and have failed in

¹⁷ *See id.*

¹⁸ *Broad. Music, Inc. v. Columbia Broad. System, Inc.*, 441 U.S. 1, 19-20 (1979).

¹⁹ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. at 103-04. The Supreme Court did not apply a *per se* analysis to college football. Realizing that because of the nature of sports, the “rule of reason” analysis should be used. If not, sport leagues would always be in violation of antitrust by the *per se* violation of horizontal restraints on competition. *Id.* at 100-01. For a criticism of the “rule of reason” test *see Regents of Univ. of California v. Am. Broadcasting Company*, 747 F.2d 511 (9th Cir. 1984) (commenting on the use of the “rule of reason” in price-fixing and group boycotts charges and suggested that the *per se* analysis would be better).

²⁰ *Nat’l Society of Prof’l Engineers v. United States*, 435 U.S. 679, 695-96 (1978).

²¹ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. at 104.

²² *Oltz v. St. Peter’s Community Hospital*, 861 F.2d 1440, 1445 (9th Cir. 1988).

²³ *See e.g. United States Football League v. Nat’l Football League*, 842 F.2d 1335 (2nd Cir. 1988); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667 (7th Cir. 1992).

²⁴ *Nat’l Collegiate Athletic Association v. Bd. of Regents*, 468 U.S. at 103.

²⁵ *Id.* (quoting *Nat’l Soc. of Prof’l Engineers v. United States*, 435 U.S. 679, 692 (1978)).

²⁶ Cases have involved areas such as labor-management, competing leagues, stadium and team relocation, and broadcasting rights.

their quests.²⁷

B. *The Single Entity Defense and its Rejection for Traditionally Structured Sport Leagues*

1. *“Traditionally” Structure Sport Leagues and Attempts at Protection from Section 1*

Following in Major League Baseball’s (MLB)²⁸ example, traditional professional sport leagues tend to be structured in a similar, “traditional” way. Leagues are generally unincorporated joint ventures, in which there is a central office that oversees the individually owned teams.²⁹ It is essentially an “economic joint venture” because individual teams cannot produce games without other competing teams.³⁰ Although leagues have different systems of revenue sharing, each team has a different financial bottom line produced through non-shared revenues and expenses.³¹ Depending on league rules, non-shared revenues and expenses might include salary compensation of employment contracts, such as players, coaches, and management; sponsorship deals with local companies; local broadcasting rights; gate, parking, and concession receipts; stadium leases, maintenance, and other costs; and merchandising.

In 1982, the single entity defense was brought in front of United States Court of Appeals for the Second Circuit.³² In *North American Soccer League v. National Football League*,³³ the North American Soccer League (NASL) filed suit against the National Football League (NFL) claiming the NFL’s

²⁷ See e.g. *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249 (2d Cir. 1982); *Los Angeles Memorial Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984); *McNeil v. Nat’l Football League*, 790 F. Supp. 871 (D. Minn. 1992); *Sullivan v. Nat’l Football League*, 34 F. 3d 1091 (1st Cir. 1995); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667 (7th Cir. 1992).

²⁸ Major League Baseball, which has teams that date as far back as 1871, consists of two “leagues,” the American League (AL) and the National League (NL). See Major League Baseball, Team Histories, at http://mlb.mlb.com/NASApp/mlb/mlb/history/mlb_history_teams.jsp (last visited October 30, 2003). Prior to 1997, AL and NL teams only met during the World Series, the MLB’s championship game, but now interleague play exists during the regular season. See Mark Newman, *Interleague Play Again a Big Hit*, MLB.com, available at http://mlb.mlb.com/NASApp/mlb/news/interleague/index_03.jsp (June 30, 2003).

²⁹ See *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1250 (2d Cir. 1982).

³⁰ *Id.* at 1251.

³¹ E.g. Leagues might split revenue equally among teams such as national television contracts, but teams tend to keep most or all of their gate receipts. Each team has the responsibility to pay their own expenses such player and coach salaries.

³² *N. Am. Soccer League*, 670 F.2d at 1249.

³³ *Id.*

ban on owners “making or retaining any capital investment in any member of another league of professional sports teams” violated Section 1 of the Sherman Act.³⁴ In deciding the issue before it, the court rejected NFL’s argument that Section 1 did not apply to it because it was a “single economic entity.”³⁵ Although the NFL had full responsibility for such business matters as national promotion of the game, employment of officials, pooled broadcasting rights, and the scheduling of games, the teams had a “discrete legal entity” because they are separately owned and operated with non-shared expenses, revenues, profits, losses, and capital expenditures.³⁶ The court noted that, “To tolerate such a loophole would 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 anticompetitive effects.”³⁷ Thus, the court labeled the NFL as a “joint venture.”³⁸

Two years later, the United States Court of Appeals for the Ninth Circuit also faced the issue of sport leagues and single entities.³⁹ In *Los Angeles Memorial Coliseum Commission v. National Football League*,⁴⁰ the court likened the NFL to a Supreme Court case involving the Associated Press⁴¹ in which the Court rejected immunity from Section 1 simply because “it was a necessary cooperative of independent [entities] which produced a product its individual members could not.”⁴² And although the “product” of a professional sport could not be made without cooperation among individual

³⁴ *Id.* at 1250. The court did find the NFL’s “cross-ownership ban” violated Section 1 of the Sherman Act. *Id.*

³⁵ *Id.* at 1256-57. The Second Circuit noted that such a “combination of actors” receiving an exemption from Section 1 liability had been repeatedly rejected by lower courts and the Supreme Court itself. *Id.* at 1257.

³⁶ *Id.* at 1251-52.

³⁷ *Id.* at 1257.

³⁸ *Id.*

³⁹ *Los Angeles Memorial Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984) (reviewing the challenge to the NFL’s rule that there must be unanimous approval by all team owners for the relocation of a team into the “home territory” of another team).

⁴⁰ *Id.*

⁴¹ The Associated Press is a not-for-profit news organization owned by daily newspapers in the United States which provides news and media to radio, television, newspapers subscribers in the United States and 121 other countries. THE ASSOCIATED PRESS, Facts & Figures, at <http://www.ap.org/pages/aptoday/index.html> (last visited Nov. 20, 2003).

⁴² *Los Angeles Memorial Coliseum Comm’n*, 726 F.2d. at 1389 (comparing with *Associated Press v. United States*, 326 U.S. 1 (1945)).

teams and a league, the teams have independent value and separate identities on and off the field of play.⁴³ The NFL teams were found to compete for personnel; whether players, coaches, or management; fan support; and media space.⁴⁴ The court noted that the league was in existence “to promote and foster the primary business of League members.”⁴⁵ And although the business interests of a league will often overlap with that of its teams, the court noted that same “commonality of interest” exists in a cartel.⁴⁶

After having the lower federal courts reject the traditionally structure sport league’s argument about being “single economic entities,” the leagues were given an new opportunity to argue its case under a Supreme Court decision.

2. The Single-Entity Defense Under the Supreme Court’s Copperweld Doctrine

In 1984, two years after the Second Circuit and a few months after the Ninth Circuit rejected the NFL’s single-entity argument, the United States Supreme Court officially acknowledged a Section 1 exemption for parent corporations and its wholly-owned subsidiaries.⁴⁷ In *Copperweld Corporation v. Independence Tube Corporation*,⁴⁸ the Court noted, “Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a ‘contract, combination ... or conspiracy’ between separate entities. It does not reach conduct that is ‘wholly unilateral.’”⁴⁹ The Court held,

[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of

⁴³ *Id.* at 1389-91.

⁴⁴ *Id.* at 1390.

⁴⁵ *Id.* at 1389 (quoting Article I of the National Football League Constitution).

⁴⁶ *Id.*

⁴⁷ *Copperweld Corp. v. Indep. Tube Corp.* 467 U.S. 752 (1984).

⁴⁸ *Id.*

⁴⁹ *Id.* at 768 (citing *Albecht v. Herald Co.* 390 U.S. 145, 149 (1968)).

the parent, its sole shareholder. If a parent and a wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.⁵⁰

The Court noted that there is always a “unity of purpose or a common design” for a single entity such as a parent company and its subsidiaries.⁵¹ The parent company does not have to keep “a tight rein over the subsidiary,” because it can decide to claim full control at any time it wishes, especially when the subsidiary failed to act in the best interests of the company.⁵²

Under such language as “unity of interests” in *Copperweld*, traditionally structured leagues attempted but failed to establish themselves as single entities in the eyes of the courts.⁵³ The courts continued to find that sport leagues were susceptible to Section 1 of the Sherman Act because the reasoning in pre-*Copperweld* cases was found to be sound coordination of the Supreme Court’s “unity of purpose or common design” analysis.⁵⁴ Leagues have contended that “the business relationship among [its] member clubs is not that of independent economic competitors but rather that co-owners engaged in a common business enterprise, the production and marketing of professional [sports] entertainment.”⁵⁵ But courts have found that “[m]ember clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under [Section] 1.”⁵⁶

C. Formation and Destruction of “Single-Entity” Leagues

Because the courts have consistently rejected the idea that traditionally structured leagues

⁵⁰ *Id.* at 771.

⁵¹ *Id.*

⁵² *Id.* at 771-72.

⁵³ See e.g. *McNeil v. Nat’l Football League*, 790 F. Supp. 871 (D. Minn. 1992) (antitrust suit brought by players for restraints on the labor market); *Sullivan v. Nat’l Football League*, 34 F.3d 1091 (1st Cir.), *cert denied*, 513 U.S. 1190 (1995) (challenging the NFL’s rule barring owners from selling shares to the public). The District Court of Minnesota also noted that league’s argument in relying on *Copperweld* is irreconcilable with the subsequent Supreme Court decision in *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents. Sullivan*, 34 F.3d at 880 (construing *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85 (1984)).

⁵⁴ See e.g. *McNeil*, 790 F. Supp. at 871; *Sullivan*, 34 F. 3d at 1091.

⁵⁵ *McNeil*, 790 F. Supp. at 878.

⁵⁶ *Sullivan*, 34 F.3d at 1099.

were single entities for purposes of Section 1 of the Sherman Act, new professional leagues began to structure themselves with the purpose of being “single entities.” However, problems soon arose with such structuring and leagues have moved away from single-entity type structures.

1. Men’s Soccer and the Judicial Destruction of It as a “Single Entity”

In 1995, Major League Soccer (MLS) began its first season formed as a limited liability company under Delaware law.⁵⁷ At first, a board of governors of the MLS had centralized control over the league and all of its teams.⁵⁸ The board was to run all of the teams; handle all player contracts and allocation; employ all coaches, general managers, and staff; and set prices for concessions, broadcasts, merchandise, and tickets.⁵⁹ But it soon became apparent that such a highly centralized structure was not as effective as hoped and “investor/operator” positions for teams were created to attract money to the league.⁶⁰ The “exclusive right and obligation to provide [m]angement [s]ervices for a [t]eam within it [h]ome [t]erritory” was granted to each “investor/operator.” This right included some control over the front office, player decisions (although the contracts were still held by the league), coaching decisions, location of the games, local media rights, and local marketing.⁶¹

In 2002, the United States Court of Appeals for the First Circuit was faced with the issue of whether the MLS qualified as a single entity and, thus, exempting it from Section 1 of the Sherman

⁵⁷ *Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002), *rev’g* 7 F. Supp. 73 (D. Mass. 1998) (reviewing a challenge to the MLS’s player reserve system). Major League Soccer was formed in 1993 because of U.S. Soccer’s promise to FIFA and began its inaugural season in 1996 with ten teams. Major League Soccer, *MLS Timeline—Prelude (1993-1995)*, at http://www.mlssoccer.com/archives/timeline_prelude.html (last visited Oct. 30, 2003); Major League Soccer, *MLS Timeline—1996*, at http://www.mlssoccer.com/archives/timeline_1996.html (last visited Oct. 30, 2003). In 2002, the MLS returned to a ten-team format by ceasing operations in Miami, Florida and Tampa Bay, Florida. Major League Soccer, *MLS Year-by-Year Season Overview*, at <http://www.mlssoccer.com/archives/year-by-year.html> (last visited Oct. 30, 2003).

⁵⁸ *Fraser*, 284 F.3d at 53.

⁵⁹ *Id.*

⁶⁰ *Id.* at 53-54; WEILER, *supra* note 2, at 629.

⁶¹ *Fraser*, 284 F.3d at 53-54.

Act.⁶² In finding that corporate integration is not conclusive of *Copperweld* protection from antitrust liability, the court stated that the MLS was a “hybrid arrangement” that was somewhere between the *Copperweld*’s parent company analysis and a “cooperative arrangement between existing competitors.”⁶³ The MLS’s structure was different from the *Copperweld* structure in two ways: (1) the separate contractual relationship between the MLS and its “operators/investors” giving rights to oversee individual aspects of teams was more similar to that of a traditionally structured sport league such as the NFL, and the “existence of [such] distinction entrepreneurial interests” did not gel with *Copperweld*’s “complete unity of interests” standard,⁶⁴ and (2) the relationship between the MLS and its “operators/investors” was not a servant type contemplated in *Copperweld*, but a relationship in which the “operators/investors” effectively controlled the league because they had a majority on the board of governors.⁶⁵ The court was unsure whether the *Copperweld* doctrine should be expanded to encompass the MLS’s unique structure.⁶⁶ While strongly implying that the MLS was not a “single entity,” it left the question open because plaintiffs failed to define a relevant market, an element required to find liability under Section 1.⁶⁷

2. *Women’s Basketball and Women’s Soccer*

The American Basketball League (ABL) was an attempt to bring professional women’s

⁶² *Id.* at 47.

⁶³ *Id.* at 58.

⁶⁴ *Id.*

⁶⁵ *Id.* The First Circuit noted that effectively the MLS had two roles: “one as an entrepreneur with its own assets and revenues” and “the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e., limiting the competition among operator/investors.” *Id.*

⁶⁶ *Id.* at 59. The First Circuit was concerned that, “Once one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point to even decide the proper functional criteria for hybrid cases.” *Id.* For a discussion of whether *Fraser* opened up a new opportunity to reopen the “single entity” defense for traditionally structured sport league see Clifford Mendelsohn, *Fraser v. Major League Soccer: A New Window of Opportunity for the Single-Entity Defense in Professional Sports*, 10 *SPORTS LAW J.* 69 (2003).

⁶⁷ *Fraser*, 284 F. 3d at 59 (“The case for expanding *Copperweld* is debatable and, more so, the case for applying the single entity label to MLS. But even if we assume that [S]ection 1 applies, it is clear to us that the venture cannot be condemned by per se rules and presents at best a debatable case under the rule of reason. More significantly, as structured by plaintiffs themselves, this case would have been lost at trial based on the jury’s rejection of plaintiffs’ own market definition.”).

basketball to the American public.⁶⁸ From its opening season in 1996-97, the ABL was owned and operated from one office in California with general managers, coaches, and players hired and assigned by the ABL.⁶⁹ By the end of 1998, the ABL had ceased operations with appropriately twenty-five million dollars in debts.⁷⁰

Almost at the same time as the formation of the ABL, the Women's National Basketball Association (WNBA) was formed.⁷¹ From its advent in 1997, the league was structured to be a pure "single entity."⁷² Each team was to be operated by a NBA team, but NBA Development⁷³ had ultimate control over the league and its ownership of assets and financial returns.⁷⁴ The revenues and costs of the league were equally shared by all of the teams.⁷⁵ However in 2003, the WNBA decided to forego the single entity structure⁷⁶ and the safety net that was provided by being owned by NBA Development.⁷⁷ WNBA teams were to be owned individually by their respective NBA teams.⁷⁸ With the change in structure and ownership, the WNBA was also free to explore franchising opportunities in non-NBA cities.⁷⁹ Citing possible labor unrest and dropping two money-losing franchises, the WNBA decided to allow teams to manage themselves thereby giving them the opportunity to seek more local sponsorship deals.⁸⁰ A former NBA executive and chief operating officer of a WNBA team believed that the new structure was one in which "teams should

⁶⁸ The ABL originally consisted of eight teams. WEILER, *supra* note 2, at 497.

⁶⁹ WEILER, *supra* note 2, at 497.

⁷⁰ The Association for Professional Basketball Research, History of the American Basketball League, at <http://hometown.aol.com/bradleyrd/abl9699.html> (last visited Oct. 30, 2003).

⁷¹ Like the ABL, the WNBA consisted of eight teams for its inaugural season. WEILER, *supra* note 2, at 497.

⁷² *Id.*

⁷³ NBA Development is a spin-off entity of the NBA in which the twenty-nine NBA teams each own an equal share in the corporation. WEILER, *supra* note 2, at 497.

⁷⁴ WEILER, *supra* note 2, at 497.

⁷⁵ *Id.*

⁷⁶ Sarah Talaly, *WNBA Takes on New Look*, SUN-SENTINEL, May 4, 2003, at 10C.

⁷⁷ Jeff Metcalfe, *Changes Strengthen WNBA; Ownership to Energize Mercury*, ARIZONA REPUBLIC, Mar. 2, 2003, at 8C.

⁷⁸ Wendy Carpenter, *WNBA Has Taken the Fork in the Road; New Model: Foundation, Landscape Have Changed Since Last Year for Women's Pro League Approaching Its 7th Season*, NEWS TRIBUNE, Jan. 29, 2003, at C01.

⁷⁹ Metcalfe, *supra* note 77.

⁸⁰ Talaly, *supra* note 76.

have a better chance to survive.”⁸¹ Similarly, a NBA and WBNA owner believed that “the teams will be accountable where they weren’t totally in the past and that accountability will result in better decision and better results.”⁸²

In 2001, the Women’s United Soccer Association (WUSA), structured under the single-entity model, played its first season.⁸³ However, the league was receiving “insufficient revenue from . . . core areas of the business”⁸⁴ and failed to attract the sponsorship support needed to achieve its goal to break even by its fifth season.⁸⁵ In 2003, before its decision to suspend operations,⁸⁶ the WUSA had decided to restructure away from a single-entity league to individual team ownership in the 2004 season.⁸⁷ The WUSA is currently in the process of reorganizing with the hopes to play soccer in 2004.⁸⁸

III. ANALYSIS

This section will address the problems with the single-entity structure and why such a defense to Section 1 of the Sherman Act is impractical and not necessarily needed.⁸⁹ Traditionally structured leagues have enjoyed success throughout their histories, and although it would be an advantage for them to be labeled as “single entities,” it is not necessary for their

⁸¹ *Id.* The former Portland Fire chief operating officer and NBA executive, Harry Hutt, stated, “I think the model is there where teams should have a better chance to survive, but the proof is in the pudding. Can you close the deals? Can you sell the tickets, the broadcasting?” *Id.*

⁸² Carpenter, *supra* note 78.

⁸³ Melissa Sedlak, *WUSA Timeline*, STREET & SMITH’S SPORTS BUSINESS JOURNAL, Sept. 22-28, 2003, at 4.

⁸⁴ WOMEN’S UNITED SOCCER ASSOCIATION, *WUSA Suspends Operations*, at http://www.wusa.com/press_room/383744.html (Sept. 15, 2003) (article quoting John Hendricks, Chairman of the WUSA Board of Governors).

⁸⁵ *Id.*; Jennifer Lee, *Thin Ratings, Lack of Sponsors Trip WUSA*, STREET & SMITH’S SPORTS BUSINESS JOURNAL, Sept. 22-28, 2003, at 4.

⁸⁶ WOMEN’S UNITED SOCCER ASSOCIATION, *supra* note 84.

⁸⁷ Sedlak, *supra* note 83.

⁸⁸ WOMEN’S UNITED SOCCER ASSOCIATION, *WUSA Reorganization in Planning*, at http://www.wusa.com/press_room/390123.html (last visited Nov. 20, 2003).

⁸⁹ The purpose of this section is not to explore all possible antitrust suits that could be brought against a sport league not a single entity and how they would be decided. For an exploration of some possible antitrust suits that could be brought against sport leagues *see generally* Thomas A. Piraino, Jr., *A Proposal For The Antitrust Regulation Of Professional Sports*, 79 B.U.L. REV. 889 (1999); Stephen F. Ross, *Antitrust Options To Redress Anticompetitive Restraints And Monopolistic Practices By Professional Sports Leagues*, 52 CASE W. RES. 133 (2001).

continued success. The protection from Section 1 of the Sherman Act that new professional leagues gain by being structured as “single entities” are outweighed by the disadvantages of such a structure. Furthermore, many of the apparent advantages are illusory.

A. The Illusory Advantages of Being a Single Entity

This section will analyze what the single-entity defense really means to sport leagues and if it is advantageous to structure themselves as single entities. Included will be an exploration of why the advantages of such a business structure are either outweighed by the disadvantages such as the relinquishment of local control and financial stability or are illusory because of other antitrust decisions regarding sport leagues.

1. The Narrow Construction of Immunity from Section 1 of Sherman Act

The United States Supreme Court has decreed that exemptions from the federal antitrust laws must be construed narrowly.⁹⁰ The courts have done just that in narrowly construing the single-entity defense under *Copperweld*.⁹¹ Although the “single-entity” structure provides a safe harbor from Section 1 of the Sherman Act, it is harder to meet the requirements to be considered a single entity than once was thought.⁹²

The *Copperweld*'s “unity of interests” standard does not apply merely because it is recognized that teams do not compete in a “normal” business sense.⁹³ “If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure.”⁹⁴ Although teams need each other to compete on the field and they do not seek to drive other teams out of business, teams still compete off-the-field for players, management

⁹⁰ See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1991).

⁹¹ See e.g. *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992); *Sullivan v. Nat'l Football League*, 34 F. 3d 1091 (1st Cir. 1995).

⁹² See e.g. *Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002).

⁹³ *United States v. Nat'l Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (holding the National Football League's restriction on broadcasting of out-of-market games while the home team was playing away violated Section 1 of the Sherman Act).

⁹⁴ *Id.*

personnel, sponsorship money, broadcasting revenue, merchandise income, and other areas.⁹⁵

When sport leagues such as Major League Soccer (MLS), Women's National Basketball Association (WNBA), and Women's United Soccer Association (WUSA) organized to escape antitrust liability under the *Copperweld* doctrine, but they did not realize how hard it would be to qualify for the exemption and meet the "unity of interests" standard. Because of the narrow judicial construction of the "single-entity" defense, MLS found out firsthand how the courts could be. Although MLS technically owned all of the teams, player contracts, coaching contracts, and controlled all business decisions, its creation of "operator/investor" doomed its attempt for immunity. Although the federal district court was willing to accept MLS's assertion that it was a "single entity" at face value, the Court of the Appeals refused to accept MLS's understanding of the *Copperweld* decision. Because the teams were given some control through the creation of the "investor-operator" position, the court doubted that the "unity of interests" needed to qualify for the *Copperweld* exemption was present.

2. *Local Control and Financial Security*

New leagues do not enjoy the fan base, sponsorship opportunities, broadcasting revenue, and stadium revenue that established sport leagues do. Newly formed sport leagues have to be content with limited success at least for the first few years.⁹⁶ Because of the main concern when starting a new sport league is establishing the financial stability for the teams. Because single-entity structures provide the league an opportunity to share revenues and losses among its members, it is able to support weaker market teams and promote competitive balance among the teams.⁹⁷ Sport

⁹⁵ *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1995).

⁹⁶ *See Fraser*, 284 F.3d at 52.

⁹⁷ *See Piraino*, *supra* note 89, at 893, 923-24 (stating that every team has an opportunity to compete for a championship because of league rule such as revenue sharing, salary restrictions, and the player draft system); *United States v. Nat'l Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (acknowledging that "if all the teams

leagues that maintain centralized control over both league and individual team operations are able to ensure that teams do not compete with each other off the playing field.⁹⁸

However, centralized control also affects business relations with investment and sponsorship groups, which are essential for a sport league's survival.⁹⁹ As Howard Schultz, owner of the National Basketball Association's (NBA) Seattle Sonics and the Women's National Basketball Association's (WNBA) Seattle Storm, stated, "The teams will be accountable where they were [not] totally [accountable] in the past and that accountability will result in better decisions and better results."¹⁰⁰ In implementing the change in structure, the WNBA Commissioner, Val Ackerman, believed that teams could make "a real honest assessment . . . about the prospects in their markets" for such things as investment and sponsorship opportunities.¹⁰¹

One major source of financial security is investment money, especially at the local level of each team.¹⁰² By having each team controlling local sponsorship packages, it promotes friendlier business relations and allows smaller, local businesses to become involved in the promotion of the team.¹⁰³ The Women's United Soccer Association (WUSA) found this out the hard way. The WUSA had realized its error in structuring as a single entity and the negative impact it has on the ability to get sponsorship deals locally.¹⁰⁴ It tried to rectify the situation, but it was too late and the league was forced to suspend operation.¹⁰⁵ The WUSA hoped that teams would be free to pursue local revenue streams such as local sponsorship. The advantage of being free from Section 1 of the

should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure"); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH L. REV. 1, 24 (1982) (suggesting that "one of the major causes of the failure of the All-America Conference, a league that competed with the NFL in the 1940's, was the near-total domination of the Conference by the Cleveland Browns").

⁹⁸ Piraino, *supra* note 89, at 893, 923-24; *Nat'l Football League*, 116 F. Supp. at 323.

⁹⁹ See e.g. Lee, *supra* note 85.

¹⁰⁰ Carpenter, *supra* note 78.

¹⁰¹ *Id.*

¹⁰² See e.g. WOMEN'S UNITED SOCCER ASSOCIATION, *supra* note 84.

¹⁰³ See Carpenter, *supra* note 78.

¹⁰⁴ Lee, *supra* note 85.

¹⁰⁵ WOMEN'S UNITED SOCCER ASSOCIATION, *supra* note 84.

Sherman Act did not outweigh the damage such a structure had on sponsorship relations.

Even the unique financial situation of the Women's National Basketball Association (WNBA) was not enough to outweigh the drawbacks of being a "single entity." During the first years of its existence, its successful and powerful brother, the National Basketball Association (NBA), financially controlled the WNBA.¹⁰⁶ And although the NBA will continue to subsidize the WNBA, the league realized that the financial stability the NBA provided was not enough to support it. Teams had to be free to pursue outside ownership in both NBA and non-NBA cities and to market themselves as individuals.¹⁰⁷ WNBA teams now have the ability to shop for better deals.¹⁰⁸

Like the WUSA and the WNBA, Major League Soccer (MLS) also noticed the problems its structure was having on its bottom line, but it tried to rectify them by allowing some local control while trying to remain a "single entity."¹⁰⁹ Because team owners and investors tend to want to feel as if they have some control over the teams they support, MLS created the "investor-operator" position for some of its teams.¹¹⁰ Because each "investor-operator" was given "exclusive right and obligation to provide [m]anagement services for a [t]eam" and was allowed to benefit individually from such decisions, the "investor-operator" position does not fit clearly into the *Copperweld* exemption.¹¹¹ The "unity of interests" standard is found to be in doubt when the courts determine that the teams compete with each other in some way "off-the-field."¹¹² Although MLS still controlled all player contracts and made business decisions that involved all of its teams, giving individual teams some over sponsorship and personnel and allowing individual teams to benefit

¹⁰⁶ WEILER, *supra* note 2, at 497.

¹⁰⁷ Metcalfe, *supra* note 77.

¹⁰⁸ *Id.*; Carpenter, *supra* note 78.

¹⁰⁹ See Denise Kiernan, *MLS: Living Single?*, VILLAGE VOICE, at 133.

¹¹⁰ See *Fraser v. Major League Soccer*, 284 F.3d 47, 53 (1st Cir. 2002).

¹¹¹ *Id.* at 53-54. The court did not find the MLS was a "single entity" because of problems with the relevant market requirement for Section 1 violations. *Id.* at 57.

¹¹² See *e.g. id.* at 53-55, 57.

from their decisions opened up a competitive market between the teams.¹¹³ Thus, a sport league determined to be a “single entity” must sacrifice such local control, no matter how small. Although under the *Copperweld* exemption the league does not have to keep “a tight rein over the [team],” the league must be able to claim full control over the team at anytime it wishes.¹¹⁴ MLS could exercise such control because the “investor-operator” could license local broadcasting rights, market locally, and sell game tickets without any type of prior approval by the league.¹¹⁵ The MLS lost the ability to claim full control over a team’s business deals by allowing some local control over such things like sponsorship and investment.

There are other ways to impose revenue sharing to promote competition within a league besides exercising full control over all business aspects of both the league and its teams. For example, provisions can be placed right into constitution and the bylaws of a new league that bind owners into sharing all or a percentage of its revenues in order to promote the financial stability of the league as a whole. These figures could always be adjusted later to insure that the league is functioning as it should by promoting the sport and competitive balance among its teams.

3. *Liability under Section 2 of the Sherman Act*

The protection of being a “single entity” can also be illusory because “single entities” are only immune from Section 1 claims.¹¹⁶ Leagues are still liable under other provisions of the Sherman Act, such as the monopoly provision of Section 2.¹¹⁷ However, Section 2 of the Sherman Act can also play an important role in antitrust litigation, it has not been a problem for traditionally structured leagues.¹¹⁸

Section 2 of the Sherman Act focuses on monopolies and their power to impact interstate

¹¹³ *Id.* at 57-58.

¹¹⁴ *See Copperweld Corp. v. Indep. Tube Corp.* 467 U.S. 752, 771-72 (1984).

¹¹⁵ *Fraser*, 284 F.3d at 54.

¹¹⁶ *See Copperweld Corp.*, 467 U.S. at 752.

¹¹⁷ *Copperweld Corp. v. Indep. Tube Corp.* 467 U.S. 752 (1984).

¹¹⁸ *See United States Football League v. Nat’l Football League*, 842 F.2d 1335 (2d Cir. 1998).

trade.¹¹⁹ It states, “Every person¹²⁰ 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...”¹²¹ The purpose of the monopoly provision is to prohibit anyone from having monopoly power or attempting to gain monopoly power of any part of commerce.¹²² “Hence the existence of power ‘to exclude competition when it is desired to do so’ is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power.”¹²³ In order to prove a violation of Section 2, two elements must be shown: 1) the league must have monopoly power in the product and geographic markets and 2) the league misused that power by either acquiring the monopoly by illegal means or maintaining the monopoly by illegal means.¹²⁴ Monopolies gained or maintained “from growth or development as a consequence of a superior product, business acumen, or historic accident” are not illegal.¹²⁵

Section 2 was intended to supplement Section 1¹²⁶ and although they may overlap in terms of the objectives of the person involved in antitrust activity, they are legally distinct offenses.¹²⁷ Thus, monopoly power is “species of restraint of trade”¹²⁸ and the “same kind of predatory practices may show violations of [both].”¹²⁹ However, both provisions may be found independent of each

¹¹⁹ See *Standard Oil Co. v. United States*, 221 U.S. 1, 102-03 (1991).

¹²⁰ For purposes of antitrust, “person” is defined “to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.” Sherman Act of 1890, 15 U.S.C. § 7 (1994).

¹²¹ Sherman Act of 1890, 15 U.S.C. § 2 (1994).

¹²² *United States v. Griffith*, 334 U.S. 100, 106-07 (1948).

¹²³ *Id.* at 107. (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946)).

¹²⁴ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States Football League v. Nat’l Football League*, 842 F.2d 1335, 1358 (2nd Cir. 1988).

¹²⁵ *Grinnell Corp.*, 384 U.S. at 571.

¹²⁶ *Standard Oil Co.*, 221 U.S. at 60. “[T]he second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded.” *Id.*

¹²⁷ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946).

¹²⁸ *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600, 602 (8th Cir. 1942) (quoting footnote 69 in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940))

¹²⁹ *Maryland & Virginia Milk Producers Ass’n v. United States*, 362 U.S. 458, 463 (1960).

other.¹³⁰ One of the main differences between Section 1 and Section 2 violations is the requirement of two or more actors for a Section 1 violation but not a Section 2 violation.¹³¹ Thus, being structured as a “single-entity” would not protect sport leagues, no matter if they are traditionally structured or structured with the purpose of being a “single entity, from antitrust liability under Section 2.

Although an assertion of a Section 2 violation is often brought with an assertion of Section 1, Section 2 has had little impact on sport leagues.¹³² Sport leagues have repeatedly not been found in violation of Section 2.¹³³ Furthermore, in cases where the court has found a violation of Section 2, sport leagues do not have to worry about the possibility of damages. For example, in *United States Football League v. National Football League*,¹³⁴ the United States Football League (USFL) filed suit against the National Football League (NFL) claiming that the NFL monopolized the television market and its broadcasting contracts were unreasonable restraints of trade.¹³⁵ The United States Court of Appeals for the Second Circuit affirmed the jury’s decision that the NFL did willfully acquire or maintain monopoly power in professional football within the United States and that the USFL was injured by the NFL’s monopoly power.¹³⁶ However, the jury only awarded the USFL one

¹³⁰ *Am. Tobacco Co.*, 328 U.S. at 788; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940). It is not a violation of the Fifth Amendment’s double jeopardy to be convicted under both Section 1 and Section 2 for the same activity. *See Am. Tobacco Co.*, 328 U.S. at 787-788.

¹³¹ *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 484 (5th Cir. 1966); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1972).

¹³² Karen Jordan, *Forming a Single Entity: A Recipe for Success for New Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC. 235, 240 (2001).

¹³³ *See e.g. Am. Football League v. Nat’l Football League*, 323 F.2d 124 (4th Cir. 1963); *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir. 1974); *Mid-South Grizzlies v. Nat’l Football League*, 550 F. Supp. 558 (E.D. Pa. 1982); *Shayne v. Nat’l Hockey League*, 540 F. Supp. 1023 (E.D.N.Y. 1980); *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139 (3d Cir. 1981).

¹³⁴ *United States Football League v. Nat’l Football League*, 842 F.2d 1335 (2nd Cir. 1988), *aff’g* 634 F. Supp. 1155 (S.D.N.Y. 1986), *cert. denied* 493 U.S. 1071 (1990). The United States Football League (USFL) competed with the Nat’l Football League (NFL) for three seasons in the 1980s. *Id.* at 1340.

¹³⁵ *Id.* at 1341. At the time of the case, the National Football League had contracts with three major television networks. *Id.*

¹³⁶ *Id.*

dollar in damages (trebled to a whopping three dollars).¹³⁷ The jury declined to find that the NFL's television contracts were restraints of trade and the contracts interfered with the USFL's lack of a television contract.¹³⁸ The NFL did not deny the USFL access to the "essential facility" of network television because

"television contracts [are] not unreasonable restraints of trade[,] . . . the NFL did not control access to the three major television networks[,] . . . and [] the NFL did not interfere either with the USFL's ability to obtain a fall television contract or with its spring television contracts."¹³⁹

Although the NFL had a monopoly in professional football, the NFL did not monopolize the television market or attempt to do so.¹⁴⁰ Therefore, the USFL were not damaged by NFL's position as a natural monopoly.

With such judicial indifference to the plight of other leagues, there is no use in challenging leagues. The judicial branch assumed that leagues with television contracts received them because of their superior business practices and not by an illegal monopolistic nature.¹⁴¹ Therefore, a sport league may be a natural monopoly in its respective sport, but still have protection from federal antitrust liability. Being a "single entity" would not help or hurt a sport league when Section 2 claims are brought against it.

B. Other Protections from the Section 1 of the Sherman Act for Sport Leagues

Although traditionally structured sport leagues may be liable under Section 1 of the Sherman Act, a variety of business decisions and restrictions placed on such things as entry into the league and player movement do enjoy some protection from Section 1 even without the "single-entity" defense. Along with the illusory advantages of the "single-entity" defense, sport leagues can be traditionally structured and still enjoy other protections from federal antitrust

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

legislation. This section of the paper focuses on protections available to sport leagues and shows that not having the “single-entity” defense does not cripple a sport league’s operations. Although these sources of immunity would not be needed for a “single-entity” sport league, they are important because the experiment of “single-entity” leagues under the *Copperweld* doctrine is now coming towards an end.

1. The Allowance of the “Rule of Reason” for Sport Leagues

Technically, the application of the “Rule of Reason” is not an antitrust exemption for sport leagues, but it does help to protect them from Section 1 liability.¹⁴² By applying the “Rule of Reason,” courts always allow sport leagues the opportunity to explain why certain noncompetitive restraints may be reasonable. And although the application of the “Rule of Reason” still looks at the “competitive significance of the restraint,” the unique business nature of sports can be examined and taken into account was looking at the reasonableness of the particular restraint.¹⁴³ It has been realized that if *per se* violations are applied to sport leagues, then they would always be in violation of Section 1 of the Sherman Act because restrictions tend to horizontally restrain teams.¹⁴⁴ Sport leagues are given flexibility because the need for competitive balance among its teams in order to insure survival of all its teams.¹⁴⁵

2. Labor/Management Relations

One of the major protections from antitrust liability that sport leagues benefit from is the nonstatutory, judicially created “labor exemption.” First recognized by the United States Supreme Court in *Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*, any restraint

¹⁴² See e.g. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 100-01 (1984).

¹⁴³ *Id.* (quoting *Nat’l Soc. of Prof’l Engineers v. United States*, 435 U.S. 679, 692 (1978)).

¹⁴⁴ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. at 103-04.

¹⁴⁵ See e.g. Grauer, *supra* note 97.

that involves a mandatory subjects of bargaining¹⁴⁶ are exempt from antitrust law, no matter how unreasonable and uncompetitive the restraint is.¹⁴⁷ Therefore, if the players are organized into a labor union under the National Labor Relations Act (NLRA),¹⁴⁸ then provisions of a collective bargaining agreement may be exempt from antitrust.¹⁴⁹ In *Mackey v. National Football League*, United States Court of Appeals for the Second District refined the Supreme Court's exemption by making collective bargaining agreement provisions only exempt when the 1) restraint primarily affects the parties of the agreement, 2) provision is a mandatory subject of bargaining under the NLRA, and 3) restraint was a product of bona fide arms-length bargaining.¹⁵⁰ Thus, if the restraints placed on players and their marketability are products of a collective bargaining agreement, then such restraints cannot be challenged under federal antitrust law if the restraints are properly bargained for. For example, restraints on the labor market such as salary caps, drafts, and wage scales cannot be challenged and are used extensively by sport leagues to place restrictions on the labor market without fearing antitrust liability. Furthermore, a sport league is protected from antitrust liability for restraints on labor even after the collective bargaining agreement has expired. As long as a league and a union are involved in a "labor dispute" under the Norris-LaGuardia Act,¹⁵¹ then courts cannot issue injunctions against restraints on the labor market.¹⁵²

Therefore, under the "labor exemption," sport leagues only have to worry about the

¹⁴⁶ Although "mandatory subject of bargaining" is not found in the National Labor Relations Act, it is generally considered to be "wages, hours and other terms or conditions of employment." See *Nat'l Labor Relations Bd. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

¹⁴⁷ *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965).

¹⁴⁸ National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69 (1988).

¹⁴⁹ Section 6 of the Clayton Act of 1914 provides that the "labor of a human being is no commodity or article of commerce;" thus creating a "labor exemption" to federal antitrust laws. Clayton Act of 1914, § 6, 15 U.S.C. § 17 (1994).

¹⁵⁰ *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

¹⁵¹ Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-15 (1994).

¹⁵² See *Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989).

language of the collective bargaining agreement itself¹⁵³ and player unions decertifying to end the “labor dispute” in order to bring an antitrust suit.¹⁵⁴ With such a broad exemption from antitrust liability for all labor-related disputes for sport leagues that are contained within a collective bargaining agreement, the “single-entity” defense would only be redundant for such sport leagues.

3. *Broadcasting Rights*

The four major professional sports of baseball, basketball, hockey, and football enjoy a special antitrust exemption. In granting the special interests legislation,¹⁵⁵ Congress stated in Section 1291 of the Sports Broadcasting Act (SBA) that:

“The antitrust laws, as defined in [S]ection 1 of the [Sherman] Act[,] . . . shall not apply to any joint agreement . . . by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the sponsored telecasting of the games . . . engaged in or conducting by such clubs.”¹⁵⁶

The scope of the SBA has been narrowly construed as with every antitrust exemption. Along with only exempting the four major professional sports when they pool broadcasting rights,¹⁵⁷ the meaning of “sponsored telecasting of the games” in Section 1291 of the SBA has been narrowly construed in cases not involving air channels.¹⁵⁸

Although leagues outside of the four major professional leagues do not enjoy some

¹⁵³ *E.g.* The National Football League is currently facing an antitrust suit against its draft system because certain rules were not included explicitly in the collective bargaining agreement.

¹⁵⁴ *See* *McNeil v. Nat’l Football League*, 790 F. Supp. 871 (D. Minn. 1992).

¹⁵⁵ The Sports Broadcasting Act of 1961 was enacted to overrule the Eastern District of Pennsylvania’s holding that the pooling of broadcasting rights for a national package by National Football League violated Section 1 of the Sherman Act. *See* *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953); 196 F. Supp. 445 (E.D. Pa. 1961).

¹⁵⁶ *Id.* § 1291.

¹⁵⁷ *Id.*

¹⁵⁸ *See e.g.* *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667 (7th Cir. 1992), *aff’g* 754 F. Supp. 1336 (N.D. Ill. 1991) (holding that the NBA’s reduction of number of games individual teams could sell to superstations was an unreasonable restraint of trade); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 808 F. Supp. 646 (N.D. Ill. 1992) (denied the NBA’s partial summary judgment motion to the antitrust challenge of the “NBA Superstation Same Night Rule”); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593 (7th Cir. 1996), *rev’g* 874 F. Supp. 844 (N.D. Ill. 1995) (looking at the single entity defense to Section 1 of the Sherman Act).

antitrust immunity for pooled broadcast rights, they can still enter into league-wide contracts.¹⁵⁹ For example, in *Kingray, Inc. v. National Basketball Association*,¹⁶⁰ the court examined whether “out-of-market” game packages sold to satellite companies were a violation of antitrust.¹⁶¹ The plaintiffs, private individuals and commercial establishments in a class-action suit, sued the National Basketball Association (NBA) and DirecTV¹⁶² over the satellite-programming package of “NBA League Pass™.”¹⁶³ The plaintiffs alleged four theories under Section 1 of the Sherman Act, all of which were rejected by the court.¹⁶⁴ First, the plaintiffs argued that the contract between the NBA and DirecTV was a vertical price fixing scheme.¹⁶⁵ Because the NBA did not tell DirecTV what to charge for the service only a wholesale price to be paid by DirecTV to the NBA, the United States District Court for the Southern District of California found that the plaintiffs failed to show vertical price fixing by the defendants.¹⁶⁶ Second, the plaintiffs argued the NFL and DirecTV vertically conspired to limit output of live broadcasts.¹⁶⁷ Because games “black outs” only occurred when the game was available on another channel, the court found that defendants did not limit the number of games normally available on television.¹⁶⁸ Third, the NBA and DirecTV unlawfully restrained trade by entering into an exclusive distributorship of

¹⁵⁹ See Sports Broadcasting Act of 1961, 15 U.S.C. § 1291-95 (1994).

¹⁶⁰ *Kingray, Inc. v. Nat’l Basketball Ass’n*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

¹⁶¹ *Id.*

¹⁶² DirecTV is a satellite subscription service. See generally SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, *Satellite Services Overview*, at <http://www.sbca.com/mediaguide/satservices.htm> (last visited Nov. 24, 2003).

¹⁶³ *Kingray, Inc.*, 188 F. Supp. 2d at 1188.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* A vertical price fixing scheme “occurs when a supplier attempts to fix the prices charged by those who resell its products.” *Id.* For a difference between vertical and horizontal restraints see *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) (“Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.”).

¹⁶⁶ *Kingray, Inc.*, 188 F. Supp. 2d at 1191-92.

¹⁶⁷ *Id.* at 1188.

¹⁶⁸ *Id.* at 1195.

“NBA League Pass.”¹⁶⁹ The court found that trade was not restrained because an exclusive agreement is not *per se* violation of antitrust,¹⁷⁰ DirecTV was not the exclusive provider of “NBA League Pass™”,¹⁷¹ and the agreement between the defendants did not intend to harm competition.¹⁷² An exclusive agreement is not a violation unless it was “intended to or actually does harm competition in the relevant market.”¹⁷³ Finally, the defendants horizontally conspired to fix prices and divide the market.¹⁷⁴ The court found that the NBA and DirecTV were not competitors; therefore, they could not horizontally conspire.¹⁷⁵ The court in *Kingray* allowed a sport league to pool its broadcasting rights although the SBA did not apply to the situation.

However, a sport league must be careful because the outcome could be different if one of its own teams filed an antitrust lawsuit because the league restricted the team from selling broadcasting rights.¹⁷⁶ In *Chicago Professional Sports Limited. Partnership v. National Basketball Association*, the Chicago Bulls and WGN challenged the National Basketball Association’s (NBA) restriction on the number of games the Bulls could sell its broadcasting rights. The United States Court of Appeals for the Seventh Circuit applied the “rule of reason” and ruled that the NBA has to allow individual teams to sell their rights to games that were not included in the national package; therefore, the NBA could not limit the number of games teams are allowed to telecast on superstations although the broadcasting on a superstation might

¹⁶⁹ *Id.* at 1188.

¹⁷⁰ *Per se* analysis is generally not applied to sport cases because of the nature of the business. See e.g. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984).

¹⁷¹ “NBA League Pass™” was also available to cable customers through iN Demand, a pay-per-view system. *Kingray, Inc.*, 188 F. Supp. at 1198.

¹⁷² *Kingray, Inc.*, 188 F. Supp. at 1197-98.

¹⁷³ *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987).

¹⁷⁴ *Kingray, Inc.*, 188 F. Supp. at 1188.

¹⁷⁵ *Id.* at 1198.

¹⁷⁶ See *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667 (7th Cir. 1992), *aff’g* 754 F. Supp. 1336 (N.D. Ill. 1991); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 808 F. Supp. 646 (N.D. Ill. 1992); *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593 (7th Cir. 1996), *rev’g* 874 F. Supp. 844 (N.D. Ill. 1995).

“compete” with the national broadcasting package.¹⁷⁷ The case was eventually settled outside of the court system.

So depending on who the plaintiff is, sport leagues within and outside the scope of the SBA may enjoy protection from federal antitrust liability. And as discussed early a league’s television contracts do not interfere with a competing league’s ability to get a television contract of its own.¹⁷⁸ The “single-entity” defense might not be needed in order for a sport league to be protected from antitrust liability when a league seeks a television contract.

4. *Baseball’s Exemption*

Although baseball’s special situation does not apply to any other sport, it does warrant a look when considering protection from federal antitrust legislation for sport leagues. The sport of professional baseball has also enjoys additional protection from federal antitrust legislation. In 1922, in *Federal Baseball Club v. National League*, professional baseball benefited from a United States Supreme Court victory when the Court declared America’s pastime immune from the antitrust legislation.¹⁷⁹ In 1972, the Supreme Court acknowledged this illogical immunity but refused to overrule the exemption and stated that it is up to Congress to fix the inconsistency.¹⁸⁰ The scope of the exemption has been challenged on several occasions,¹⁸¹ and in 1998 the United States Congress did finally confronted and removed baseball’s antitrust exemption for issues dealing with “employment of major league baseball players.”¹⁸²

Thus, baseball’s antitrust exemption is still essentially in place. The Curt Flood Act only addressed labor issues and baseball’s exemption remains for league’s decisions such as

¹⁷⁷ *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.2d 667 (7th Cir. 1992) (finding that the antitrust exemption under the Sports Broadcasting Act of 1961 did not apply because cable television is not “sponsored” under meaning of Section 1291).

¹⁷⁸ *United States Football League v. Nat’l Football League*, 842 F.2d 1335 (2nd Cir. 1988)

¹⁷⁹ *Federal Baseball Club v. Nat’l League*, 259 U.S. 200 (1922).

¹⁸⁰ *Flood v. Kuhn*, 407 U.S. 258 (1972).

¹⁸¹ *See e.g. Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993).

¹⁸² *Curt Flood Act of 1998*, 15 U.S.C. § 26b (Supp. 1999).

ownership restraints and team relocation.¹⁸³ On top of that, baseball enjoys the collective bargaining agreement exemption discussed earlier in the paper. Therefore, in the present situation, baseball does not have to worry about seeking the “single entity” defense.

IV. CONCLUSION

Although a sport league faces more antitrust liability without being held as a “single entity,” the advantages of such a structure are outweighed by the illusory nature of the defense. “Single entity” leagues, such as Major League Soccer (MLS), Women’s National Basketball Association (WNBA), and Women’s United Soccer Association (WUSA), have been restructured because the experiment has failed because of the narrow judicial construction of the “single entity” exemption and the loss of local control and financial opportunities. Furthermore, being a “single entity” only exempts sport leagues from Section 1 of the Sherman Act, but they can still be liable under other antitrust legislation, such as the monopoly provision of Section 2 of the Sherman Act. And although traditionally structured sport leagues do not enjoy a blanket exemption from Section 1 of the Sherman Act, they still enjoy protection from antitrust suits, such as application of the “Rule of Reason,” the Sports Broadcasting Act of 1961, and the “labor exemption.” In the end, the traditional structure for sport leagues has won the battle over the “single-entity” structure.

¹⁸³ See generally Marc Chapin, *It Ain't Over 'Til[sic] It's Over: The Century Long Conflict Between The Owners And The Players In Major League Baseball*, 60 ALB. L. REV. 205 (1996); Peter M. Macaluso, *Bang The Gavel Slowly: A Call For Judicial Activism Following The Curt Flood Act*, 9 B.U. PUB. INT. L.J. 463 (2000).