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Lewis Kurlantzick
University of Connecticut School of Law

B.J. Pivonka
University of Connecticut School of Law

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League Ownership of Teams, Conflicts of Interest, and Personnel Exchanges[1]

Lewis Kurlantzick* & B.J. Pivonka†

National Basketball Association (NBA) Commissioner David Stern's controversial "veto" in December 2011 of the trade that would have sent Chris Paul from the New Orleans Hornets to the Los Angeles Lakers raises fundamental conflict-of-interest issues. These issues are rooted in the league's ownership of the Hornets franchise, and the resulting multiple roles played by the league's chief executive. More precisely, this situation puts at risk the commissioner's neutrality—his commitment not to favor one team over another. Though perhaps unsurprising because of the rarity of a league owning a team, what is striking in the NBA—and in Major League Baseball and the National Hockey League as well—is the apparent absence of attention to the problem and the lack of a structural or informal response that both recognizes and looks to limit the potential conflict of interest.

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* Zephaniah Swift Professor of Law, University of Connecticut School of Law. I wish to thank Robert Cane for invaluable research assistance.

† J.D. 2012, University of Connecticut School of Law; MBA 2008, Salve Regina University; B.A. 2008, Salve Regina University.

Moreover, the reaction of league owners to the Chris Paul episode points to a broader matter: the existence of a collective interest in the personnel exchanges between individual franchises and the manner in which that collective interest might be expressed. In this Article, we address the conflict-of-interest issues. In a postscript, we comment on the collective league interest in personnel exchanges.

I. THE TALE OF LEAGUE OWNERSHIP AND THE CHRIS PAUL TRADE

The New Orleans Hornets were a team in serious financial distress in 2010. For a number of years the team ranked among the lowest in attendance in the NBA.[2] In addition, ownership was at or near its maximum credit limit. And the team's recent financial history was marked by negative cash flows, recurring operational losses, and partner deficits.[3]

That the Hornets' economic woes caused concern for the league and ultimately led to the acquisition of the franchise in December 2010[4] is unsurprising since the fortunes of the member franchises are linked.[5] After all, the financial distress of a member club can

2 *See NBA Attendance Report—2010*, ESPN, http://espn.go.com/nba/attendance/_/year/2010 (last visited Apr. 7, 2014) (the Hornets changed their name to the Pelicans in 2013).

3 *See* Tommy Craggs, *The New Orleans Hornets' Sad Financial Documents*, DEADSPIN (Dec. 7, 2010, 4:00 PM), http://deadspin.com/5708313/the-new-orleans-hornets-sad-financial-documents.

4 The league purchased 100% of the team. The NBA's objective was to quickly identify a buyer for the team (and hopefully turn a profit). However, it took a year and a half before the sale of the Hornets. *See Saints Owner Agrees to Buy Hornets*, ESPN (Apr. 14, 2012, 1:19 PM), http://espn.go.com/nba/story/_/id/7809655/new-orleans-saints-owner-tom-benson-agrees-buy-new-orleans-hornets.

5 *See* Larry Coon, *2011 Collective Bargaining Agreement*, *Question 24: How Does Revenue Sharing Work? How Is It Different from the Luxury Tax?*, NBA SALARY CAP FAQ, http://www.cbafaq.com/salarycap.htm#Q24 (last updated Jan. 15, 2014). Similar concern for the protection of asset values and the maintenance of stability led to the league purchases of the Phoenix Coyotes in the NHL and the Montreal Expos in MLB. *See* Barry M. Bloom, *MLB Selects D.C. for Expos*, MLB (Sept. 29, 2004), http://mlb.mlb.com/news/article.jsp?ymd=20040929&content_id=875100&vkey=news_mlb&fext=.jsp&c_id=null; *NHL Submits Bid to Buy Coyotes out of Bankruptcy*, NHL (Aug. 25, 2009), http://www.nhl.com/ice/news.htm?id=487025. Leagues have taken steps short of ownership with respect to distressed franchises, such as the Buffalo Sabres, Ottawa Senators, and Dallas Stars in hockey and the Texas Rangers and Los Angeles

lead to disruption of the team's business as the owner seeks a solution to his financial problems. A distress sale of a team may lower the perceived value of other teams.[6] Moreover, involvement of a bankruptcy court can limit the league's ability to control the eventual disposition and new ownership of the team.[7]

In December 2011 the league-owned Hornets were looking to trade its star guard, Chris Paul. Under the terms of a three-team, six-player deal, Paul would have moved to the Los Angeles Lakers. In exchange, the Lakers would have sent Pau Gasol to the Houston Rockets and Lamar Odom to the Hornets. New Orleans also would have received Rockets' guards Kevin Martin and Goran Dragic and forward Luis Scola. In addition, the Hornets would have received the New York Knicks' first-round draft pick in 2012, which the Rockets had acquired in a previous trade.[8]

Dodgers in baseball. In these situations the leagues exerted varying levels of control over operations while they sorted out disputes with creditors and shopped for new owners. *See* Richard Sandomir, *Examples of How Clippers Could Benefit from League Takeover*, N.Y. TIMES, May 7, 2014, at B14; Bill Shaikin, *Nine of 30 Teams Reportedly in Violation of MLB Debt Service Rules*, L.A. TIMES, June 2, 2011, http://articles.latimes.com/2011/jun/02/sports/la-sp-0603-baseball-debt-20110603; *see also* Damien Cox, *NHL: Absence of Franchise Woes a New Reality for Commissioner Gary Bettman*, STAR (Dec. 17, 2013, 7:29 AM), http://www.thestar.com/sports/the_spin/ 2013/12/absence_of_franchise_woes_a_new_reality_for_bettman.html. Interestingly, in 1935 the Boston Braves franchise was forfeited to the National League because of the club's failure to fulfill its contractual obligations over an extended period of time. While the league was prepared to appoint a general manager and operate the team, within two weeks controlling interest in the club was sold to a former Red Sox and Dodgers executive. *See* John Drebinger, *National League Takes over Affairs of Braves at Meeting of Club Owners*, N.Y. TIMES, Nov. 27, 1935, at 25; Michael Bates, *Random Thursday: The 1936 Bees and the 2011 Dodgers*, PLATOON ADVANTAGE (Apr. 21, 2011, 3:27 PM), http://platoonadvantage.com/2011-articles/random-thursday-the-1936-bees-and-the-2011-dodgers.html.

6 *Cf.* Fishman v. Estate of Wirtz, 807 F.2d 520, 548 (7th Cir. 1986) (determining the fair market value of an NBA franchise by looking at the recent sales prices of comparable franchises; therefore, a depressed sale price would negatively affect the valuations for the rest of the league).

7 *See*, *e.g.*, *In re* Dewey Ranch Hockey, L.L.C., 414 B.R. 577 (Bankr. D. Ariz. 2009) (Phoenix Coyotes bankruptcy proceeding) (rejecting a bid by the NHL to purchase a team in bankruptcy); David Wharton & Bill Shaikin, *Bankruptcy Filing Changes the Playing Field for Frank McCourt's Struggle with Major League Baseball*, L.A. TIMES, June 29, 2011, http://articles.latimes.com/2011/jun/29/sports/la-sp-dodgers-mccourt-bankruptcy-20110630.

8 Howard Beck, *N.B.A Rejects Trade Sending Paul to Lakers*, N.Y. TIMES, Dec. 8, 2011, http://www.nytimes.com/2011/12/09/sports/basketball/paul-set-to-join-lakers-as-part-of-3-team-deal.html?_r=0.

The deal appeared to be an equitable one for New Orleans, particularly since Dell Demps, the Hornets' General Manager, had little leverage with possible trade partners as Paul was able to opt out of his contract in the summer of 2012 and had informed the Hornets that he intended to leave.[9] The exchange would have yielded the team a generous package of talent. Martin was among the top scorers in the league; Odom was "a versatile big man"[10] who had been named the Sixth Man of the Year in 2010–11; and Scola was a "skilled and rugged power forward."[11] The terms of the exchange surely did not suggest any abnormality in the process nor did they differ in some obvious way from Demps' prior transactions with which the league did not interfere.[12] Nor could one argue that Stern had greater knowledge about league personnel than Demps, as it is Demps' full-time job to deal in such matters.

Dan Gilbert, the owner of the Cleveland Cavaliers, though, deemed the trade a "travesty" and reportedly expressed his disapproval to Stern: "I just don't see how we can allow this trade to happen. I know the vast majority of owners feel the same way that I do. When will we just change the name of 25 of the 30 teams to the Washington Generals?"[13] Apparently, a number of other

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[9] *See id.*

[10] Dave McMenamin, *Laker's Lamar Odom Top Sixth Man*, ESPN (Apr. 20, 2011, 9:25 AM), http://sports.espn.go.com/los-angeles/nba/news/story?id=6389586.

[11] Beck, *supra* note 8.

[12] From October 23, 2010 to December 9, 2011, the New Orleans Hornets (now known as the Pelicans) acquired five players by trade and twelve players by signing. *See New Orleans Hornets Transactions*, REALGM BASKETBALL, http://basketball.realgm.com /nba/teams/New_Orleans_Hornets/19/Transaction_History (last visited May 31, 2014). Apparently, in none of these cases did the league office, as owner, intervene in any way with respect to a trade or signing or treat the actions as "franchise-altering decisions" which required the exercise of review authority over the general manager's judgments. *See* David Aldridge, *Free Agency's Frantic Start Sets Tone for Coaches, Teams*, NBA (Dec. 12, 2011 1:13 PM), http://www.nba.com/2011/news/features/david_aldridge/12/12/free-agency-tests-teams/index.html

[13] Mike Bresnahan & Broderick Turner, *Lakers' Deal for Chris Paul Is a No-go, the NBA Rules*, L.A. TIMES, Dec. 8, 2011, http://articles.latimes.com/2011/dec/08/ sports/la-sp-lakers-paul-20111209. There is good reason to believe that Gilbert was as much concerned about the impact of the trade in reducing the Lakers' luxury tax liability, and therefore decreasing the Cavaliers' luxury tax receipts, as about competitive balance within the league. Under the CBA, luxury-tax revenues are divided among non-tax-paying teams, such as Cleveland, with lower payrolls. *See* Coon, *Question 22: Where Does the Escrow and Luxury Tax Money Go?*, *supra* note 5. Had the Paul trade

small-market owners registered similar concerns with the commissioner about the move of another star to a big-market team.[14] In explaining the decision to block the trade, Stern insisted that the communications from small-market owners had no effect on his judgment.[15] He stated:

> Since the NBA purchased the New Orleans Hornets, final responsibility for significant management decisions lies with the commissioner's office in consultation with team chairman Jac Sperling. All decisions are made on the basis of what is in the best interests of the Hornets. In the case of the trade proposal that was made to the Hornets for Chris Paul,

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been consummated, the Lakers would have cut payroll while also acquiring a star guard. Los Angeles would have "shed $41 million in salary and luxury taxes in two seasons if the trade had been approved." Mark Medina, *NBA's Rejection of Chris Paul Trade Hurt Lakers in Several Ways*, L.A. TIMES, May 31, 2012, http://articles.latimes.com/2012/may/31/sports/la-sp-ln-la-nbas-rejection-of-chris-paul-trade-hurt-lakers-in-several-ways-20120531. Gilbert's effort to use his position as part-owner of the Hornets to urge Stern to exercise his power as the Hornets' fiduciary to make a ruling that would benefit the Cavaliers presents an obvious conflict of interest. *See* Larry Coon, *Dan Gilbert's Letter Misses the Mark*, ESPN (Dec. 9, 2011), http://espn.go.com/nba/story/_/id/7336526/nba-critique-dan-gilbert-letter. The article argues that "Gilberts's logic was as flimsy as his motives were suspect." *Id.* The article goes on to suggest that the Hornets were the least of Gilbert's concern because he instead complained about "the Lakers receiving the best player in the trade while saving money, not giving up any draft picks, and receiving a large trade exception to boot." *Id.* Finally, the article argues that the luxury-tax system "is supposed to decrease spending, yet owners like Gilbert depend on teams like the Lakers continuing to spend like they used to . . . ." *Id.*

14 *See* Bresnahan & Turner, *supra* note 13. Apparently, these owners were particularly upset because they believed that a prime objective of the recent labor lockout was to limit the ability of large-market teams to leverage small-market teams for star players pending free agency. *See* Chris Broussard & Marc Stein, *Sources: Teams Revisit Chris Paul Deal*, ESPN, http://espn.go.com/los-angeles/nba/story/_/id/7336597/ teams-chris-paul-trade-hopeful-revival-sources-say (last updated Dec. 10, 2011, 4:19 PM) (quoting Dallas Mavericks owner Mark Cuban as saying that "[t]here's a reason that we went through this lockout, and one of the reasons is to give small-market teams the ability to keep their stars and the ability to compete"); *Michael Jordan Opposed Chris Paul Deal*, ESPN, http://espn.go.com/nba/story/_/id/7354177/charlotte-bobcats-michael-jordan-opposed-chris-paul-los-angeles-lakers-trade (last updated Dec. 14, 2011, 9:04 PM). That the trade, in fact, would have been beneficial to the Lakers has been seriously questioned. *See* John Hollinger, *Stern Saves Lakers From Themselves*, ESPN, http://insider.espn.go.com/nba/story/_/id/7334000/nba-lakers-better-not-making-chris-paul-trade (last updated Dec. 8, 2011, 11:36 PM).

15 For a strong argument that Stern's insistence was suspect, see Coon, *Dan Gilbert's Letter Misses the Mark*, *supra* note 13.

> we decided, free from the influence of other NBA owners, that the team was better served with Chris in a Hornets uniform than by the outcome of the terms of that trade.[16]

In one interpretation, the reference to Paul's value to the Hornets as a player—"better served with Chris in a Hornets uniform"—was fatuous. Of course, the team would prefer to have an outstanding player (indefinitely) as a member of the squad. But that was not an available alternative since everyone knew that Paul planned to leave New Orleans after the 2011–12 season.[17] Thus, the task for Demps was to make the best deal possible so as to avoid the unpleasant scene of an unhappy superstar playing out a lame-duck season (as had occurred with the Nuggets and Carmelo Anthony). Indeed, Paul was traded a few days after Stern nixed the trade to the Lakers.[18]

Whatever the stimulus that prompted the veto (and whatever one believes about the extent of Demps' authority), the timing of the league action was, to say the least, peculiar.[19] The terms of the

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[16] Houston Mitchell, *David Stern Explains Why He Blocked Chris Paul Trade*, L.A. TIMES (Dec. 9, 2011, 10:31 AM), http://lakersblog.latimes.com/lakersblog/2011/12/chris-paul-david-stern.html.

[17] Paul had made it clear that he would not sign a contract extension with New Orleans and instead planned to opt out of his contract and become a free agent on July 1, 2012. Had New Orleans kept Paul on the team till the end of season, he would have departed without the Hornets receiving anything in exchange for him. The team's possible alternative to such a departure would have been to negotiate a sign-and-trade deal with a team of Paul's choice, in the same manner as the Phoenix Suns signed and then traded Amare Stoudemire in 2010. *See* Broussard & Stein, *supra* note 14.

[18] Paul was traded to the Los Angeles Clippers. In return, the Hornets received shooting guard Eric Gordon, center Chris Kaman, forward Al-Farouq Aminu, and the Minnesota Timberwolves' 2012 first-round draft pick. Apparently, Stern preferred the Clippers' offer because it was loaded with young players and draft picks. Whatever the benefit to the Hornets, there is no doubt about the positive effects of the trade for the Clippers. *See* Lee Jenkins, *Finally, It's Hip to Be a Clip*, SPORTS ILLUSTRATED, Jan. 30, 2012, http://cnnsi.com/vault/article/magazine/MAG1194180/index.htm.

[19] If Demps' authority was, in fact, significantly limited and trades were subject to more than cursory review by Stern and Sperling, it would appear to make little sense not to have run the proposed trade by Sperling and the league office so as to avoid the negative fallout from announcement and then invalidation. *See generally* Jonathan Feigen, *Did NBA Commish Lie About Failed Three-team Trade That Involved Rockets?*, HOUSTON CHRONICLE, http://www.chron.com/sports/rockets/article/Source-NBA-commish-lied-about-failed-three-team-2409742.php (last updated Dec. 18, 2011, 5:16 PM) (reporting on

three-team trade had already been publicly reported, and Stern's action, therefore, produced significant fallout.[20] Lamar Odom, for example, was so disturbed by the knowledge of his inclusion in the scuttled exchange that he requested that the Lakers trade him, a request that the team honored by sending him to Dallas in a lopsided deal.[21] The Lakers were left fuming by the intervention and its effects.[22] In addition to facing the task of dealing with Scola and Martin (the players the team just tried to trade), the center-desperate Houston Rockets were seriously distressed as the acquisition of Pau Gasol was apparently part of a broader plan to sign free-agent Nene Hilario; this gave the team one of the better front lines in the league.[23] Indeed, Les Alexander, the Rockets' owner, remains personally bitter with Stern.[24] Dell Demps supposedly considered resigning from his job, and had to be talked out of a resignation.[25]

While we have no hard evidence, it is difficult not to suspect that the Clippers' change of position—whereby the team exhibited willingness to give up players whom it previously had adamantly

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confidential sources who claimed that David Stern's statement that the trade he nixed was never considered a done deal is not true).

20 The players' union and Chris Paul expressed dissatisfaction with Stern's pronouncement and suggested possible legal action in response. But they never indicated what the legal grounds for their challenge would be. *See* Kurt Helin, *Chris Paul Reportedly Considering Legal Action Against League,* NBC SPORTS (Dec. 9, 2011, 2:19 AM), http://probasketballtalk.nbcsports.com/2011/12/09/chris-paul-reportedly-considering-legal-action-against-league (detailing how Chris Paul considered legal action against Stern, possibly in the form of damages for restraint of trade and lost wages).

21 *See* Dave McMenamin, *Lamar Odom Dealt to Dallas*, ESPN (Dec. 12, 2011, 12:02 PM), http://espn.go.com/los-angeles/nba/story/_/id/7341952/los-angeles-lakers-lamar-odom-dealt-dallas-mavericks-asking-trade.

22 *See* John Friel, *Lakers Rumors: Los Angeles Front Office Upset with Clippers Chris Paul Trade*, BLEACHER REPORT (Dec. 15, 2011), http://bleacherreport.com/articles/984279-lakers-rumors-los-angeles-front-office-upset-with-clippers-chris-paul-trade.

23 *See* Ken Berger, *Lakers Pull out of Paul Talks*, CBS SPORTS, http://www.cbssports.com/mcc/blogs/entry/11838893/33792495/3 (last updated Dec. 11, 2011 2:36 AM).

24 *See* Feigen, *supra* note 19.

25 *See* Adrian Wojnarowski, *Teams Still Pushing for Paul Trade*, YAHOO! SPORTS (Dec. 9, 2011, 11:50 AM), http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_chris_paul_lakers_hornets_nba_120811. Officials involved in the trade talks said that there was never an indication from the league office, which was consulted during the negotiations, that Demps did not have authority to make a deal. "[S]everal teams negotiating with New Orleans to get Paul asked the league office and were told Demps had full authority to execute a trade." *Id*. The investment made by the teams negotiating the deal is consistent with such an assumption about Demps' authority.

resisted including in the trade—reflected, at least in part, a concern about the possibility of future payback by the commissioner in light of the importance of the central league office. After all, the result of Stern's scuttling of the trade to the Lakers was that the Hornets had less leverage. The Lakers were one of a few teams with which Paul would entertain staying for the long term, and the Hornets were essentially told that they could not deal with the Lakers.[26] Thus, the Lakers were not present to drive up the bid for Paul.[27]

Notably, Chris Paul desired to exit New Orleans despite the fact that the Hornets could offer him a longer and larger contract.[28] Indeed, the new collective bargaining agreement contains a number of provisions that permit an existing team to offer a more generous financial package than a new team and, therefore, makes free agency less attractive.[29] The end result of the scenario, which still reflected Paul's leverage as a soon-to-be unrestricted free agent does not make owners such as Gilbert and Jordan much happier.[30] To a considerable extent, the complaints of owners such

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26 *See* J.A. Adande, *Leave It to NBA to Undercut Own Team*, ESPN (Dec. 8, 2011), http://espn.go.com/nba/story/_/page/cp3dealhold-111208/quashing-cp3-deal-shows-nba-least-bright.

27 *See id. See generally* Howard Beck, *On Basketball: N.B.A. and Its Conflicts Cloud Getting Best Deal for Hornets*, N.Y. TIMES, Dec. 14, 2011, at B13 (noting that the Lakers should have been able to acquire Chris Paul, the same way Carmelo Anthony and Deron Williams were involved in lopsided trades, as a trade generally involves a certain amount of risk).

28 *See* Ken Berger, *CP3 Not Sure If He Would Have Left New Orleans on His Own*, CBS SPORTS (Feb. 14, 2014, 3:55 PM), http://www.cbssports.com/nba/writer/ken-berger/24443441/cp3-not-sure-if-he-wouldve-left-new-orleans-on-his-own.

29 Under the present collective bargaining agreement, a team can offer its free agent a five-year contract with 7.5% raises. Other teams may offer him only a four-year agreement with 4.5% raises. *See* Larry Coon, *Breaking Down Changes in New CBA*, ESPN (Nov. 28, 2011), http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one. This is known as the Larry Bird exception, which also permits teams to exceed the salary cap to re-sign their own free agents at an amount up to the player's maximum salary. *See* Coon, *Question 25: What Are Salary Cap Extensions?*, *supra* note 5.

30 To the extent Commissioner Stern, in fact, was acting simply as the owner of the Hornets and pursuing its interests, his trade assessments would not include consideration of effect on competitive balance within the league, an effect about which Gilbert and other small-market owners expressed concern. In fact, whether the new collective bargaining agreement lays a foundation for a future in which smaller-revenue teams have more equitable chances to compete for the biggest prize players is questionable. *See* Eric Shulz, *The Effect of the New CBA on the Utah Jazz & Small Market NBA Teams*, YAHOO! VOICES (Nov. 30, 2011), http://voices.yahoo.com/the-effect-cba-utah-jazz-small-market-105

as Gilbert indicate a fundamental dislike for the institution of free agency and its expression in the present collective bargaining agreement. Some owners simply disapprove of players' opportunity for mobility and its consequences.[31] However, as long as a significant measure of free agency exists, owners cannot control players' desires to move to a team that includes other players with whom they want to play.[32]

Whatever one makes of Stern's veto and criticisms of it, amidst the maneuverings and explanations about Chris Paul's employment destination, a central difficulty was ignored or downplayed—the issue of conflict of interest.[33] This conflict is one of the fundamental issues at hand whenever a league steps in to manage an individual franchise. A conflict of interest exists when two or more interests of an individual seem incompatible.[34] The concern is that the existence of a conflict of interest will tend to make the person's judgment in that situation less reliable than it would normally

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65417.html (pointing out that even if a small-market team can offer a player slightly more money, major markets offer players significant opportunity for incremental cash from personal sponsorships and endorsements, and the real chance of winning a championship).

31 *See* Wojnarowski, *supra* note 25 (noting that several owners, and even David Stern, do not like that players are essentially able to dictate where they are traded). *See also* Bennett Corcoran, *James Harden Trade: Why the CBA Accomplished Nothing*, BLEACHER REPORT (Oct. 28, 2012), http://bleacherreport.com/articles/1387503-james-harden-trade-why-the-cba-accomplished-nothing (pointing out that the new CBA did not prevent James Harden from leaving a smaller market team for a larger market); Chad Ford, *Franchise Player Tag in the NBA?*, ESPN (Jan. 21, 2011), http://espn.go.com/blog/truehoop/post/_/id/24106/franchise-player/tag (noting that players like Chris Paul and Dwight Howard have forced their way from smaller to larger markets, and perhaps the institution of a "franchise tag" would fix this situation).

32 *See* Henry Abbott, *Chapter 1: The Family,* ESPN (July 19, 2012), http://espn.go.com/new-york/nba/story/_/id/8180308/nba-jeremy-lin-six-degrees-separation-family (mentioning that the most publicized, contemporary example of this behavior was the 2010 decision by Lebron James, Chris Bosh, and Dwyane Wade to move to, or remain with, the Miami Heat, agreeing to play for less than they could have made elsewhere).

33 *See* Russell Scibetti, *Updated: Leagues as Team Owners and Operators*, BUSINESS OF SPORTS (Dec. 9, 2011, 9:08 AM), http://www.thebusinessofsports.com/2011/12/09/updated-leagues-as-team-owners-and-operators (noting that this is not only an NBA issue, but has existed in the MLB with the Texas Rangers and Los Angeles Dodgers).

34 *See, e.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining a conflict of interest as a "real or seeming incompatibility between one's private interests and one's public or fiduciary duties" in the context of attorney–client relations).

be.[35] Here, the conflict runs in two directions. The team may be operated to serve the interests of the league,[36] and the league may be operated to benefit the team.[37] A striking example of a situation that raises the second type of tension is when a team files a tampering charge against another team. Such a charge alleges that the second team has had impermissible contact with a player on the first team.[38] Indeed, to underline the point: Imagine New Orleans had filed a charge against another franchise—the Lakers, for example—claiming that the other franchise had tampered with Chris Paul. In such a scenario, the commissioner would not only be wearing multiple hats as owner of the Hornets and adjudicator of claims alleging violation of league rules, but his decision would likely raise suspicion that these conflicting interests affected his judgment. It is to avoid such suspicion that judicial codes of ethics require a judge to excuse himself from decisions in similar situations.[39] Similarly, a failure by the commissioner to avoid or respond to the conflict would bespeak a lack of attention to or

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35 *See* Michael Davis, *Introduction*, *in* CONFLICT OF INTEREST IN THE PROFESSIONS 6–11 (Michael Davis & Andrew Stark eds., 2001).

36 *See* Roy Blount, Jr., *Plight of the Humblebees*, SPORTS ILLUSTRATED, Feb. 20, 2012, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1194899/index.htm ("A league owning a team is like a country owning one of its political parties. Unless the owner wants to crush all the other teams, neither the team nor its fans will ever believe the owner has their interests at heart. Does anyone ever root wholeheartedly for the general good?").

37 *See, e.g.*, Sean McAdam, *Get Ready for Another Year of Endless Expos Questions*, ESPN (Feb. 11, 2003), http://sports.espn.go.com/mlb/columns/story?id=1507204. The article notes that MLB control over the Expos franchise led to inevitable problems. "No matter what the Expos did, they—or more precisely, the remaining 29 owners—opened themselves to charges of conflict of interest. When the Expos and GM Omar Minaya skillfully outmaneuvered other clubs for pitcher Bartolo Colon, there were cries that MLB had orchestrated the deal to help the Expos to win and thus, inflate the value of the franchise." *Id.*

38 *See, e.g.*, Sam Amick & Jeff Zillgitt, *NBA Fines Three Teams for Tampering*, USA TODAY, June 11, 2013, http://www.usatoday.com/story/sports/nba/2013/06/10/nba-teams-filing-tampering-charges/2409499 (reporting on a fine imposed on three NBA teams for statements made regarding players under contract to other teams who were soon to become free agents).

39 *See, e.g.*, 28 U.S.C. § 455 (2012) (disqualification of justice, judge, or magistrate). The purpose of such recusal, which insures the decision-maker is free of disabling conflicts of interest, is to insure impartiality in the resolution of disputes, to protect the judiciary's reputation, and to maintain public confidence in the fairness of the courts. *See, e.g.*, Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531, 541, 551–52 (2005).

concern for the need to ensure impartiality in resolving disputes, to protect the commissioner's reputation, and to instill confidence in affected parties in the fairness of the league processes.[40]

While the tampering hypothetical starkly presents the conflict problem, there are numerous instances where a league commissioner exercising his typical authority would face the same predicament. Think, for example, of him being called upon to exercise his authority to resolve a draft-related dispute, to approve a player trade, to sanction players, or to arbitrate a disagreement between a franchise and a coach. Obviously, the league-owned team could be involved in any of these scenarios. Here, the appropriate response is to provide for abstention by the commissioner and the appointment of an independent arbitrator to decide the matter. That arrangement is designed to serve the interests in insuring impartiality and generating confidence in the process.[41] Notably, when this kind of conflict arose in Major

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40 Interestingly, a conflict of interest is built into the structure of leagues, such as Major League Soccer, that are established as a centrally planned, single-entity arrangement. Not only does the single-entity model undermine entrepreneurial initiative and reduce interest in team ownership, it also jeopardizes the integrity and therefore the marketability of the league's product. The belief that the outcome of games is determined by the merits of competition is central to the attraction of a league's product, and therefore the prevention of conflicts of interest that might undermine this perception is imperative. But under an arrangement where all teams are "consolidated under one corporate roof," the teams would "act as local subsidiaries of the league-corporation." And consumers might well suspect the league owner of "influencing the rules of the game," and the assignment of players, in order to maximize its profits. "The possibility of doing so would therefore significantly undermine the integrity and credibility of the championship race." *See* Helmut M. Dietl et al., *Governance of Professional Sports Leagues—Cooperatives Versus Contracts* 3–4 (Inst. for Strategy & Bus. Econ., Univ. Of Zurich, Working Paper No. 59, 2007); *see also* George G. Daly, *The Baseball Player's Labor Market Revisited*, *in* DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL 11, 18 (Paul M. Sommers ed., 1992) (noting that a league's legitimacy is enhanced by independent ownership of teams and damaged by ownership integration and the potential conflicts of interest such arrangements might involve); Egon Franck, *Beyond Market Power: Efficiency Explanation for the Basic Structures of North American Major League Organizations*, 3 EUR. SPORT MGMT. Q. 221, 227–29, 230–32 (2010) (arguing that cost advantages of single entity league come at high price because such a model is at odds with signaling genuine competition among teams); Sherwin Rosen & Allen Sanderson, *Labor Markets in Professional Sports* 4–5 (NBER Working Paper 7573, 2000) (suggesting that outcomes might appear to be rigged if teams in league were commonly owned and directly coordinated).

41 Admittedly, when the commissioner rules on these kinds of disputes between other teams, he may affect the fortunes of the league-owned franchise. But there the conflict is less pronounced, and dismantling the league's administrative structure would be an

League Baseball with the Commissioner ruling on a matter that affected the interests of a team that he owned, apparently no thought was given to such a recusal.[42] League officials, including the commissioner, have a responsibility—whether denominated as a fiduciary duty or given some other appellation—to conduct their activities for the benefit of the league as a whole.[43] To behave in a way that provides deferential treatment for a league-owned franchise runs counter to that charge. Indeed, under one reading, a plausible argument can be made that moving Chris Paul to the Lakers would have benefitted the league as a whole; the NBA's popularity has been historically built not on the participation of many teams but on the brilliance of a few, particularly the Lakers and Celtics. Unlike in the NFL, parity has never been a significant force in the NBA.[44]

The point can be put more broadly—there is an inherent conflict between ownership and regulation. A recent example (in a different context) is the situation created by the United States

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unnecessary overreaction. However, recognition of the existence of a conflict even in this circumstance underlines that the best treatment of conflicts, to the extent possible, is to avoid them.

[42] *See infra* notes 43–55 and accompanying text.

[43] *See generally* Professional Hockey Corp. v. World Hockey Ass'n, 143 Cal App. 3d 410, 415 (Ct. App. 1983) (holding that franchise representatives who served on the corporate Board of Trustees of nonprofit corporation which operated a major professional hockey league had fiduciary duty to act for the benefit of the league as a whole when making decisions about common league goals). Whether sports leagues, in fact, are operated for the collective good of the business as a whole has been seriously questioned. Professors Ross and Szymanski have argued that club-run leagues, the typical structure of North American professional sports, may be anticompetitive and contrary to the public interest and that sporting competitions organized by independent unitary entities may be more efficient and beneficial for consumers. Club-run leagues, they demonstrate, suffer from significant operational inefficiencies due to the tendency of these leagues to put the interests of individual clubs above the interest of the league as a whole and the presence of substantial transaction costs that prevent optimal results. *See* Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213 (2006).

[44] *See* Michael Wilbon, *Chris Paul Veto: Vindictive and Petty*, ESPN (Dec. 9, 2011), http://espn.go.com/espn/commentary/story/_/page/wilbon-111209/david-stern-nba-owners-look-vindictive-petty-veto-chris-paul-trade (arguing that, unlike the NFL, parity "has never amounted to a hill of beans" in the NBA).

government's major equity interest in General Motors.[45] As a result of the federal financial rescue plan intended to stabilize General Motors and Chrysler, the government emerged as the owner of a controlling interest in the companies.[46] This condition of multiple interests as both owner and regulator has created suspicion that the results of safety tests have been distorted or concealed in order to support the share price.[47] And the conflict is not limited to safety issues. For example, General Motors is subject to executive pay restrictions that no private-equity owner would accept because they limit its ability to attract and retain management talent.[48] League control of a franchise begets similar owner–regulator conflicts and generates analogous suspicions.[49] One might initially think that the league owners would regard the conflict of interest—and the compromised judgment attending it—as inconsequential since each of them owns an equal fractional interest in the league-controlled team. But that is not the case because any such decision would affect teams differently. Consider the response to the proposed Chris Paul trade itself. While in a formal sense all the teams will "benefit" equally from a decision made to support the league-controlled team, in fact, any "benefit" or "harm" will not be experienced equally.[50] For most owners, the central question about any decision (or proposed change of rules) is whether it will place them ahead of their rivals.[51]

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45 *See* James B. Stewart, *Owner as Regulator, Like Oil and Water*, N.Y. TIMES, Jan. 13, 2012, at B1 ("The Obama administration . . . has a political agenda that often conflicts with ownership interests. It wants to keep unions happy, promote the environment and lift employment, among other goals, which may conflict with maximizing returns to taxpayers.").

46 *See id.*

47 *See id.*

48 *See id.*

49 *See generally* Bill King & John Lombardo, *League-owned Teams = Headache*, SPORTS BUS. J. (Feb. 20, 2012), http://www.sportsbusinessdaily.com/Journal/Issues/2012/02/20/Leagues-and-Governing-Bodies/Ownership.aspx (asserting that the most prominent problem with league ownership is the "persistent suspicion that the league might favor some teams over others when it came time to make a deal").

50 As noted previously, the effort by Cavaliers' owner, Dan Gilbert, to have Commissioner Stern exercise his authority with respect to the Hornets to benefit the Cavaliers is a prime example of the kind of conflict of interest that inheres in the existing structure. *See supra* note 13 and accompanying text.

51 *See generally* King & Lombardo, *supra* note 49 (reporting that some of the heads of NHL teams were irritated both by the success of a league-owned team and its decision to

Ownership of a sports team is mostly about relatives, not absolutes.[52]

II. BASEBALL'S OWNER-COMMISSIONER: AN EXAMPLE NOT TO BE FOLLOWED

In 1992, following the resignation of Fay Vincent,[53] Allan "Bud" Selig, owner of the Milwaukee Brewers, was selected to be the acting Commissioner of Major League Baseball.[54] Midway through the 1998 season, baseball's owners voted to give Selig the commissioner title on a permanent basis.[55] Here the presence of a

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compete for talent). More generally, as a league-owned team improves and wins more games, other teams will lose more games, potentially decreasing revenues for those team owners as result of a decision made in the best interest of the league-owned team. The owners are conflicted in the sense that they are both seeking a quick return on their investment in the league-owned franchise but at the same time do not want to risk the fortunes of their individual teams. Thus, they want their own teams to do well but also seek the league-owned team to do well enough to increase its value so that they can turn a quick profit on that investment.

52 *See* Ross & Szymanski, *supra* note 43, at 233. This point is related to one reason why the traditional club-run structure of the major North American sports leagues prevents efficient changes that would enhance fan appeal and overall league profitability. Transaction costs—the inability of owners, acting in the perceived best interests of their own teams, to agree on the division of additional profits—hamper the ability to take advantage of efficient business opportunities. *See id.* at 224–25.

53 *See* Murray Chass, *Vincent, Bowing to Owner's Will, Resigns as Baseball Commissioner*, N.Y. TIMES, Sept. 8 1992, http://www.nytimes.com/1992/09/08/us/vincent-bowing-to-owners-will-resigns-as-baseball-commissioner.html. Because Vincent, invoking the best interests of baseball, had compelled the owners to open spring training camps after the March 1990 thirty-two-day lockout, they did not want him around to possibly limit their strategic options for the 1993–94 labor negotiations. Accordingly, they forced his resignation in September 1992.

54 *See* Claire Smith, *Whatever His Title, Selig's in the Hot Seat*, N.Y. TIMES, Sept. 10, 1992, http://www.nytimes.com/1992/09/10/sports/on-baseball-whatever-his-title-selig-s-in-the-hot-seat.html?ref=budselig.

55 *See* Murray Chass, *Take Away the 'Acting' Label: Selig Is Baseball's Commissioner,* N.Y. TIMES, July 10, 1998, http://www.nytimes.com/1998/07/10/sports/baseball-take-away-the-acting-label-selig-is-baseball-s-commissioner.html?ref=budselig. Over the years in congressional testimony it was common for baseball owners to assure Congress that it need not concern itself with baseball's unique exemption from the antitrust laws nor with any need for outside regulation because the "independent" commissioner would act to protect consumers from potential abuses and look after the game's best interests. *See, e.g.*, Allan Selig, *Congressional Hearing: Major League Baseball and Its Antitrust Exemption,* 4 SETON HALL J. SPORT L. 277, 278 (1994). With the appointment of Selig, any pretense of independence from the owners was dropped. The reasonable

conflict was evident, and, unsurprisingly, it did not take long for incidents that implicated the tension to arise.

First, exacerbating the conflict, Selig, while acting commissioner, continued to receive an executive salary of approximately $500,000 a year from the Brewers in addition to his generous commissioner's compensation.[56] Further, in 1995 Selig secured a $3 million loan for the Brewers from Carl Pohlad, the owner of the Minnesota Twins.[57] Baseball rule 20(c), though, bars intra-team lending, stating that owners may not loan one another money without first obtaining permission from the commissioner and the other owners.[58] The rule is designed to protect against one team having unfair influence over another—for example, in affecting trades—and its purpose is to avoid even the appearance of

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assumption that the best interests of baseball would now be more perfectly aligned with the best interests of the owners presumably influenced the thinking of the players' union as well. Indeed, while our focus is on the league and its members, league takeover of a franchise may have significant effects on another institutional actor, the players' representative. Does league ownership of a team raise distinctive concerns from the perspective of a union? In the case of MLB's purchase and operation of the Expos, the Major League Baseball Players Association (MLBPA) was principally wary of the possible facilitation of collusion in the bidding for free agents.

56 The Brewers did not prosper as a team during the 1990s, and some people suspected that it suffered from lack of attention. Michael Megna, for example, a sports-franchise appraiser who worked for the Brewers, stated, "Selig was trying to wear too many hats and was too ambitious." *See* STEFAN SZYMANSKI & ANDREW S. ZIMBALIST, NATIONAL PASTIME: HOW AMERICANS PLAY BASEBALL AND THE REST OF THE WORLD PLAYS SOCCER 127 (2005).

57 *See "It's Really Horrifying": Selig's Brewers Received $3 Million Loan from Pohlad's Firm*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/baseball/news/2002/01/08/selig_pohlad_ap? (last updated Jan. 8, 2002, 8:36 PM).

58 MAJOR LEAGUE BASEBALL RULES, Rule 20(c) (2012). The relevant portion of the rules state:

> Loans to Clubs and Other Individuals. No Club, or owner, stockholder, officer, director or employee (including manager or player) of a Club shall, directly or indirectly, loan money to or become surety or guarantor for any Club, officer, employee or umpire of its, his or her League, unless all facts of the transaction shall first have been fully disclosed to all other Clubs in that League, and also to the Commissioner, and the transaction has been approved by them.

a conflict of interest.[59] Nevertheless, Selig did not seek approval of the loan from the other owners.[60]

The next episode also involved Selig's good friend, Carl Pohlad. Following the 2001 season MLB moved to dissolve two of its thirty teams before the 2002 season began.[61] While no formal decision had been made as to which two franchises were to be contracted, the universal assumption was that the two likely candidates were the Montreal Expos and the Minnesota Twins.[62] Such a plan would have produced a very generous buyout of Pohlad in an amount much greater than what he had paid for the team.[63] More significantly, from a conflict-of-interest perspective, as a result of elimination of the Twins, the Brewers would recapture fans in western Wisconsin and parts of Minnesota and its television market would expand appreciably.[64] Contraction of a team from MLB's thirteenth largest media market would enlarge the uncontested reach of the Brewers' market to its west by several hundred miles.[65]

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[59] *See* Bob Nightengale, *Selig Stands in Against Lots of High Heat,* USA TODAY, http://usatoday30.usatoday.com/sports/bbw/2002-01-16/2002-01-16-majors.htm (last updated Jan. 15, 2002, 9:41 PM).

[60] That there was any impropriety in the transaction, in fact, is unlikely. The loan was a short-term bridge accommodation at one and a half points above the prime rate and was paid off in three months. *See id.*

[61] Elimination of teams, which proved an abortive exercise in 2001, was a notion largely unimagined in the major professional sports leagues in modern times until then. *See* Scott R. Rosner, *The History and Business of Contraction in Major League Baseball*, 8 STAN. J.L. BUS. & FIN. 265, 269 (2003).

[62] *Downsizing Owners Vote to Drop Two Clubs, but Don't Identify Them,* SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/baseball/mlb/news/2001/11/06/contraction_ap (last updated Nov. 7, 2001, 7:38 PM).

[63] *See Twins Owner Pohlad, 93, Dies,* ESPN, http://sports.espn.go.com/mlb/news/story?id=3812007 (last updated Jan. 6, 2009, 2:03 PM) (reporting on the alleged $150 million buyout price of the Minnesota Twins); Stuart Lavietes, *Carl R. Pohlad, Owner of Minnesota Twins, Dies at 93*, N.Y. TIMES, Jan. 6, 2009, at A17 (Twins bought by Pohlad for $44 million).

[64] *See* Rob Dibble, *An Open Letter to Bud Selig*, ESPN (Dec. 6, 2001), http://espn.go.com/talent/danpatrick/s/2001/1119/1280454.html.

[65] See *id.* for an instance of contemporary criticism of the proposed contraction as an example of compromised decision-making. *See also,* George Vecsey, *Twins Should Outlast Selig*, N.Y. TIMES, Jan. 9, 2002, http://www.nytimes.com/2002/01/09/sports/sports-of-the-times-twins-should-outlast-bud-selig.html (stating that the relationship between the Baseball Commissioner and the Twins' owner is "rotten" and that Selig should step aside as commissioner).

Finally, the terms and administration of the 2002 collective bargaining agreement (CBA) greatly advantaged the Brewers. That CBA introduced a new extensive revenue-sharing system, ostensibly put in place to improve competitive balance. [66] However, if the system was responsible for the achievement of greater balance, it would have been because the revenues transferred to the bottom teams were being used to increase payroll. But, in fact, that was not the case as there was no payroll rule for teams receiving money transfers, [67] and the system's incentives discouraged payroll increases, particularly for low-revenue teams.[68] The one policy in place to ensure that transfers be spent on payroll was an admonition in the CBA to be enforced by the commissioner: "[E]ach Club shall use its revenue sharing receipts . . . in an effort to improve its performance on the field. The commissioner shall enforce this obligation."[69]

However, at the time of the 2002 CBA, the Brewers were a low-revenue team.[70] If Selig enforced on other teams the provision that teams receiving transfers spend that money in an effort to improve on-field performance, he would also have had to apply it to the Brewers, thereby raising the Brewers' payroll. In fact, "the Brewers benefitted more than any other team from the 2002

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[66] *See* Paul D. Staudohar, *Baseball Negotiations: A New Agreement,* MONTHLY LAB. REV. 15, 21 (2002).

[67] The absence of a payroll rule contrasts sharply with the arrangement in the NBA where the CBA requires a minimum payroll for each team. There the league's revenue-sharing system establishes a floor as well as a ceiling on each team's payroll. That minimum amount of spending is close to the cap amount. *See* Coon, *Question 15: Is There a Minimum Amount Each Team Must Pay Its Players?*, *supra* note 5. This provision manifests the recognition that a requirement that teams that have been spending too little on talent spend more is just as necessary to the quality of the game as is the requirement that teams that have been over-spending cut back. Stipulation of a minimum payroll can guarantee that smaller-market teams do not free ride from large-market revenues by disposing of talented players in favor of cheap, low-quality labor.

[68] *See* Daniel A. Rascher & Timothy D. DeSchriver, *Smooth Operators: Recent Collective Bargaining in Major League Baseball,* 7 INT'L J. SPORT FIN. 176, 202 (2012).

[69] 2003–2006 Agreement Between Major League Clubs and the Major League Baseball Players Association, art. XXIV, *available at* http://www.steroidsinbaseball.net/cba/cba_02_06.pdf.

[70] *See* Letter from Janice Mueller, State Auditor, State of Wis., to Mary Panzer, Senate Majority Leader, State of Wis., and John Gard, Assembly Speaker, State of Wis. (May 6, 2004), *available at* http://legis.wisconsin.gov/lab/reports/04-Brewers.pdf.

CBA."[71] The club's revenue-sharing receipts rose from $1.5 million in 2001 to $9.1 million in 2002 and to $16.35 million in 2003.[72] Despite the CBA's requirement that the transfers be used to improve a team's performance, the Brewers' opening-day payroll sunk from $52.7 million in 2002 to $40.6 million in 2003 and to $27.5 million in 2004, the lowest of baseball's thirty teams.[73] Selig had no incentive to enforce the CBA's mandate on spending revenue-sharing receipts and indeed, he did not enforce it.

Selig might respond that there are different routes to team improvement and permitting teams to use revenue-sharing receipts for purposes such as reducing debt may ultimately benefit performance. He might add that each team has different needs and different approaches for building a winning franchise. But whatever the ambiguity about whether his behavior was conflicted—assuming there is an ambiguity—the fundamental point is that the appearance of a conflict of interest weakened the perception of the integrity of the office. Indeed, "any initiative by him to redistribute the game's riches [smacked] of a conflict of interest."[74]

Selig's transfer of control of the Brewers to his daughter in 1998 hardly ameliorated concerns about conflicts of interest, as she is a

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[71] SZYMANSKI & ZIMBALIST, *supra* note 56, at 181.

[72] *See* Letter from Janice Mueller to Mary Panzer & John Gard, *supra* note 70.

[73] *See* SZYMANSKI & ZIMBALIST, *supra* note 56.

[74] ANDREW ZIMBALIST, *The Commissioner's New Clothes*, *in* THE BOTTOM LINE: OBSERVATIONS AND ARGUMENTS ON THE SPORTS BUSINESS 75, 75 (2006). Another troubling episode involved application of MLB's 60/40 rule:

> [Selig] co-wrote a 1982 rule that required teams to maintain a ratio of at least 60 percent equity to at most 40 percent debt, known as the 60/40 rule. The Brewers often struggled to comply. A Wisconsin state legislative audit, which covered 1994 to 2003 and was occasioned by public displeasure over the Brewers' taxpayer-financed $392 million stadium, found the Brewers didn't meet the 60/40 standard in seven of those 10 years. The audit noted the rule's enforcement was suspended from 1994 to 1998 by the acting commissioner, who was also the Brewers' owner.

John Helyar & Scott Soshnick, *Selig Bends Rules to Fit as Baseball Attempts to Oust McCourt from Dodgers,* BLOOMBERG (Oct. 24, 2011), http://www.bloomberg.com/news/2011-10-24/selig-bends-rules-to-fit-as-baseball-attempts-to-oust-mccourt-from-dodgers.html.

close family member.[75] Moreover, he placed his shares in the Brewers in a "blind trust."[76] A blind trust is an arrangement in which a trust beneficiary authorizes trustees to have full discretion over his assets.[77] The trust beneficiary has no knowledge of the trust's holdings and no authority to intervene in its handling.[78] Typically, a blind trust is employed when a person with multiple assets is selected for public office.[79] The personal assets are placed in a trust, and during the term of the trust the officeholder has no idea what transactions are made with respect to those assets.[80] However, in Selig's case, even though others could vote his shares, only one asset was involved and Selig would inevitably know if it was sold. And he surely knew that when he left office the value of the team would have been affected by his decisions. In short, there was nothing blind about the arrangement.[81]

League commissioners have expansive authority to administer league affairs, to provide a fair and impartial forum for resolution of interclub controversies, to execute by-laws and constitutional provisions neutrally, to distribute money from discretionary funds, and to look after the overall interests of the game.[82] Having an owner occupy the position of commissioner carries implications of self-interest in the performance of these functions. Accordingly, in contrast to the MLB, all of the other major North American sports leagues have constitutional provisions designed to avoid the situation of a compromised commissioner.[83] These provisions stipulate that the commissioner cannot own a team, or a piece of a

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75 *See* Thomas Boswell, *After All the Wrongs, Selig Could Be Mr. Right*, WASHINGTON POST, July 10, 1998, at C1; *see also Bud Selig*, NNDB, http://www.nndb.com/people/226/000025151 (last visited Dec. 24, 2013) ("Selig's impartiality as Commissioner was questioned, but not nearly enough. Putting an owner in charge of baseball's integrity was like asking a team's catcher—instead of an umpire—to call balls-and-strikes.").

76 *See* Helyar & Soshnick, *supra* note 74.

77 *See* Wendy S. Goffe, *An Introduction to Lesser-Known but Useful Trusts–Part 2*, 37 EST. PLAN. 3, 8–9 (2010).

78 *See id.*

79 *See id.* at 6.

80 *See id.*

81 *See* ZIMBALIST, *supra* note 74, at 178.

82 *See* Major League Baseball Players' Association, 2012–2016 Basic Agreement art. XXIV; MAJOR LEAGUE CONST., art. II.

83 *See, e.g.*, NATIONAL BASKETBALL ASSOCIATION CONST. § 24(b); NATIONAL FOOTBALL LEAGUE CONST. art. VIII, § 8.3; CONST. art. VI, § 6.2.

team, in his own league or in any other league.[84] Thus, the NBA, NFL, and NHL constitutions state: "the commissioner shall have no financial interest, direct or indirect, in any professional sport."[85]

III. Possible Responses to the Conflicts Problem

While the existence and intensity of conflict are more apparent when the commissioner personally owns a team, a similar multiplicity of interests and roles occurs when a league, headed by a commissioner, owns a team. The difference in the two situations is one of degree. The question, then, is how the league might responsibly deal with the conflicts produced by league ownership of a franchise.

As noted previously, there are numerous instances in which the NBA commissioner might be called on to exercise his authority in matters involving the league-owned team. Thus, under the NBA Constitution and By-Laws, the commissioner has "full, complete and final jurisdiction of any dispute involving two (2) or more Members of the Association"; the power to "interpret . . . the provisions of the Constitution"; and the "power to declare null and void any Player transaction made by and between Members of the Association or by and between Members of the Association and any organization outside of the Association."[86] In a case where the commissioner is called on to adjudicate a dispute between parties one of which is the league-owned franchise, an appropriate response would be to refer the matter to an independent arbitrator. The parties should be given a voice in identifying that decision-maker, whether by authorizing them to agree on the person or by providing them a veto over the commissioner's choice(s).

Assignment of the matter to a designee of the commissioner[87] in the NBA office would be an inadequate move, as the designee

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84 *See, e.g.*, *id.*

85 *See, e.g.*, *id.*

86 National Basketball Association Const. §§ 24(d), (h), (i).

87 In the case of disciplinary matters, it is not uncommon for the collective bargaining agreement to provide that an appeal from a commissioner's disciplinary ruling will be heard by the commissioner or his designee. *See, e.g.*, Collective Bargaining Agreement Between NFL Management Council and NFL Players Association, art. 46, § 2(a) (2011);

would be aware of the interests of the league-owned disputant and would be similarly tainted. The relatively small number of executives in the NBA office also argues against the advisability of a designation. Here, there is an analogue to the negative judicial reaction to law-firm efforts to employ a "screen" or "wall" to deal with the conflicts that arise when lawyers change firms when the new firm is small.[88] In a firm where lawyers regularly interact with each other, there is a heightened possibility that inadvertent disclosures of confidences and secrets gained through the disqualified lawyer's prior representation will occur. In that setting, the assumption that any confidential information that one member of a firm has is accessible to other members of the firm and that any conflict of interest that affects a member of the firm will also affect other members has credibility.[89]

The idea that a sports-league commissioner should decline participation due to a conflict of interest when called upon to adjudicate a particular dispute is not as radical a notion as it might first appear. For example, in 1972 Julius Erving brought an action to set aside his contract with the Virginia Squires of the American

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Collective Bargaining Agreement Between National Basketball Association and NBA Players Association, art. XXXI, §§ 7(a), 8(a) (2005).

88 *See, e.g.*, Decora, Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132 (S.D.N.Y. 1995). The Model Rules of Professional Conduct recognize a principle of "imputed" disqualification. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10(a). Under this notion, if lawyers are associated in a firm and one of the lawyers—who has moved from another firm—is disqualified from handling a matter, that disqualification is imputed to bar all members of the firm. One mechanism firms have employed in an effort to avoid this result is to screen the disqualified lawyer from any involvement in the matter. Screening involves preventing the disqualified lawyer from securing profits from the matter that created the conflict, limiting his access to the files of the matter that created his disqualification, and restricting communications between him and the other lawyers in the firm working on the matter that created the conflict. Courts may well evidence more receptivity to this approach in light of the ABA adoption in 2009 of a new version of Rule 1.10(a) that permits timely screening as a way to avoid imputed disqualification as long as notice requirements are met. *See*, *e.g.*, Silicon Graphics, Inc. v. ATI Technologies, Inc., 741 F. Supp. 2d 970, 976 (W.D. Wis. 2010).

89 *See* Devika Kewalramani, *Ethical Walls: Building the Electronic Barrier*, 84 N.Y. ST. B.J. 30, 32 (2012) (noting that courts are more skeptical of the adequacy of the screening procedure when the firm is smaller). *See generally* Comment, *The Chinese Wall Defense to Law-Firm Disqualification,* 128 U. PA L. REV. 677, 708, n.146 (1980) (claiming that if bank or firm is small so that same employees perform diverse functions, it may be impossible to build a wall).

Basketball Association (ABA) for fraud.[90] The court ordered arbitration of the claims as required by the contract.[91] However, although the contract provided for arbitration by the league commissioner, the court ordered the substitution of a neutral arbitrator because the ABA Commissioner, Robert S. Carlson, was a partner in the law firm that represented Erving's employer, the Squires.[92] The conflict of interest in the Erving situation is quite similar to what would occur if the NBA Commissioner was called on to rule in a dispute involving two teams, or a team and a player, one of which was the league-owned franchise.[93] In both *Erving* and our hypothetical, the appointment of an independent decision-maker is necessary to ensure a fair and impartial hearing.[94] Disclosure of the conflict would be an inadequate response, as the parties are already aware of the conflict and therefore prevention of deception is not at stake.[95]

While recusal and substitution of an independent decision-maker is a feasible and apt response in the case of a narrow, highly focused dispute, such as that in the *Erving* case, the ongoing, pervasive conflicts inherent in operation of a franchise, exemplified by personnel decisions involving Chris Paul, require a correspondingly more comprehensive arrangement. An analogue is the institution of the independent receiver. To the extent possible, the need is to construct an arrangement guaranteeing operational independence that will assure fans of team autonomy,

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90 *See* Erving v. Va. Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972).

91 *See id.* at 1069.

92 *See id.* at 1067; *see also* Morris v. N.Y. Football Giants, Inc., 575 N.Y.S.2d 1013 (N.Y. App. Div. 1991) (holding that a neutral arbitrator should be substituted for the NFL Commissioner in order to insure an impartial hearing in a compensation dispute between professional football players and their former teams). *But see generally* National Hockey League Players' Ass'n v. Bettman, No. 93 Civ. 5769 (KMW), 1994 WL 738835, at *44 (S.D.N.Y. Nov. 9, 1994) (refusing to vacate award by league commissioner for "evident partiality" when collective bargaining agreement assigned the kind of dispute solely to the league president/commissioner for resolution).

93 One difference between the two situations is that the NBA Commissioner would not stand to receive a personal benefit from his ruling.

94 *See generally* Davis, *supra* note 35, at 13 (noting that one possible response to conflict is escape and one way to escape a conflict of interest is to redefine the underlining relationship such as a recusal by a prosecutor).

95 Disclosure, unlike escape, as a response to a conflict of interest does not terminate the conflict. "[I]t merely avoids betrayal of trust, opening the way for other responses." *Id.*

that is, that the team will function no differently from other franchises with respect to its relationship to the league. Construction and maintenance of a suitable structure is likely to be complicated by the fact that the other league members are both fractional owners of and competitors with the league-owned franchise.

The need for a prophylactic barrier to separate two parts of an organization to prevent conflicts arises in a number of settings other than sports. Often referred to metaphorically as a "Chinese wall,"[96] the segregation is designed to limit communication in order to manage conflicts of interest and to prevent the movement of confidential information. In journalism, for example, there is a screen between the newspaper's newsroom and the business (advertising) department.[97] The objective is to have news coverage decisions made uninfluenced by knowledge of who is advertising (or might advertise) with the newspaper and what those advertisers want.[98] Similarly, in a multi-function financial institution, typically a barrier is put in place to separate those giving corporate advice on takeovers from those advising clients about buying shares.[99] Here the aim is to prevent leaks of corporate inside information, which could influence the advice given to clients making investments and allow staff to take advantage of facts that are not yet known to the general public.[100] The policies and procedures are designed to stop the passage of price-sensitive information across two divisions of a firm.[101] And in the legal

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96 *See* Christopher M. Gorman, Note, *Are Chinese Walls the Best Solution to the Problems of Insider Trading and Conflicts of Interest in Broker-Dealers,* 9 FORDHAM J. CORP. & FIN. L. 475 (2004).

97 See David Segal, *Chinese Walls, Pocked With Peepholes,* N.Y. TIMES, June 12, 2010, at WK2, *available at* http://www.nytimes.com/2010/06/13/weekinreview/13segal.html.

98 *See id.*

99 *See* Gorman, *supra* note 96, at 482.

100 When firms provide a wide range of services, clients must be able to trust that information about themselves will not be exploited for the benefit of clients with different interests. Accordingly, clients must be able to believe in the effectiveness of Chinese walls. *See id.* at 483.

101 Similarly, research and investment banking units are separated so that analysts are not tempted to provide biased research reports in response to pressure from the investment bankers. The objective of the arrangement is to maintain analysts' independence by eliminating, or at least reducing, the conflict between the interests of the investment

profession, when a lawyer moves from one firm to another, a screen—whereby communication is restricted between the lawyer who has moved and the other lawyers in the firm working on the matter that created a conflict—is sometimes employed in an effort to prevent "imputed" disqualification of the second firm.[102]

However, in defending his actions in the Chris Paul affair, David Stern observed accurately that no superstar is traded in the NBA unless the owner gives his approval.[103] The challenge, then, is to create—within the overall framework of autonomy—a mechanism for handling trades that takes account of both this legitimate ownership interest and the presence of the conflict of interest. A procedure that would provide adequate distance would be to designate a retired, respected, former NBA executive to evaluate proposed trades by the league-owned team—someone with no current ties to basketball but with a background of credible expertise. The expert would have no axe to grind nor would he hold any lingering grudges against any of the other teams in the leagues.[104]

The difficulty in creating the necessary operational autonomy lies not just in its design but also in its implementation.[105] After all, the separation arrangement is self-policing; it relies on the discretion and meticulousness of the parties involved. Accordingly, even if it accomplishes some filtering, it can often be

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banking unit and those of the investors who rely on analysts' recommendations. *See id.* at 499.

[102] *See supra* notes 89–90 and accompanying text.

[103] *See* John Cherwa, *Commissioner Tries to Keep Kings in Sacramento*, L.A. TIMES, February 25, 2012, http://articles.latimes.com/2012/feb/25/sports/la-sp-nba-stars-2012 0226.

[104] This approach is not unusual. In other industries, parties avoid conflicts by seeking individuals with "independent judgment in situations in which their own judgment is compromised." In the financial services industry, for example, independent persons include "independent appraisers in determining the value of assets in cases of self-dealing, independent actuaries in the operation of corporate pension funds, and independent proxy advisory services in deciding how to vote shares held by trusts and funds." *See* John R. Boatright, *Financial Services*, *in* CONFLICT OF INTEREST IN THE PROFESSIONS, *supra* note 35, at 235.

[105] *See generally* Bolkiah v. KPMG, [1998] EWHC (Ch.) 1 (Eng.) (noting that while Chinese walls are "well adapted to deal with foreseeable or deliberate disclosure of information, they are not well adapted to deal with disclosure that is accidental, inadvertent, or negligent").

circumvented informally without much effort. Recent financial scandals involving breach of the relevant walls raise serious doubts about the general efficacy of this kind of compartmentalization arrangement.[106] The evidence, at least from this industry, indicates the porousness of Chinese walls. The literature on the subject supports skepticism about achievement of the intended objective.[107] Clearly, effectiveness requires prompt implementation,[108] embraced by upper management and vigilant enforcement.[109] And an arrangement with physical and structural separation is most likely to be effective.

How likely is it that a league and its owners will be willing to commit to the necessary separation and attendant arrangements? Leadership from the top is critical to effectiveness. The fact is that the NBA, at least, showed clear awareness of the conflicts issue in fashioning the autonomy of the

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[106] *See* Lisa Smith, *How Effective Is the Chinese Wall?*, INVESTOPEDIA (Oct. 22, 2013), http://www.investopedia.com/articles/investing/102213/how-effective-chinese-wall.asp.

[107] *See*, *e.g.*, H. Nejat Seyhun, *Insider Trading and the Effectiveness of Chinese Walls in Securities Firms*, 4 J.L. ECON. & POL'Y 369, 371 (2008) (suggesting that Chinese Walls are porous and ineffective); *see* Gorman, *supra* note 96, at 476, 490–91 (arguing that "Chinese walls . . . are inefficient, largely ineffective, and have more shortcomings than advantages" and they do more to prevent the "accidental flow of inside information" than they do to prevent disclosure due to "purposeful misconduct and conspiracies"); *see also* Lee Aitken, *"Chinese Walls" and Conflicts of Interest*, 18 MONASH U. L. REV. 91, 93 (1992) (suggesting that in context of law firms there is good ground for judicial reluctance to trust to the impermeability of a "wall" as a method of preserving confidence and avoiding conflict); Comment, *supra* note 89, at 708 (arguing that large amounts of money in transactions may present temptations too great to resist; structural, procedural, and educational methods may be no match for natural tendency of co-workers to talk shop at company-wide social gatherings or in chance encounters).

[108] In the case of law-firm conflicts, courts have considered the timeliness of erection of the screen when considering the effectiveness of the screening procedure. *See*, *e.g.*, Chinese Automobile Distribs. of America v. Bricklin, No. 07 civ. 4113(LLS), 2009 WL 47337 (S.D.N.Y. Jan. 8, 2009); Kewalramani, *supra* note 89, at 31.

[109] In the financial sector, Chinese walls are partly unsuccessful because of the absence of strong incentives for broker-dealers to establish and supervise compliance with them. *See* Gorman, *supra* note 96, at 493. One drawback of the firewall approach is that it eliminates "some of the gains from integrating different functions in one firm, and firms may lose the confidence of customers, who fear, for example, that investment advice does not represent all the information possessed by a firm." *See* Boatright, *supra* note 104, at 235. This concern, however, does not apply to the NBA situation.

Hornets' management.[110] The problem was that, in the end, the commissioner failed to respect this autonomy.[111]

The difficulty in defining the autonomy of management in a setting where the league-owned franchise is a competitor with the other league members is illustrated by the task of setting the budget for the franchise. To some extent this decision is limited by the provision in the NBA collective bargaining agreement that requires a minimum payroll expenditure by each team.[112] MLB's experience with the Expos, in a collective-bargaining framework without a required team payroll floor, though, offers a stark example of the muddle that can result. Baseball's owners regularly placed budgetary (and other) limits on the Expos in order to weaken the Expos as an on-field competitor. For example, in September 2003, with the Expos in the race for a playoff spot, the team looked to execute the standard late-season call-up of minor league players. But the owners would not approve the additional $50,000 that it would have cost to do so.[113] Similarly, at the end of the 2003

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110 The required leadership is unlikely to emerge in the MLB in light of its inattention to conflicts issues over time. *See supra* notes 53–81 and accompanying text.

111 According to one well-known commentator, Stern's intervention in the Chris Paul trade was his greatest failure as commissioner. *See David Stern, the Highs and Lows*, ESPN (Oct. 26, 2012), http://espn.go.com/nba/story/_/page/5-on-5-121026/nba-david-stern-impact-legacy-road-ahead (comment by Larry Coon).

112 *See supra* note 67. For the 2012–13 season, the minimum team payroll is 85% of the salary cap ($49.337 million). If a team does not meet its minimum payroll, it is charged at the end of the season for the shortfall, and that money is distributed among the players on that team. *See also* Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, art. 50 (2012-2022) (showing team payroll range, lower limit and upper limit), *available at* http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement.

113 *See, e.g.*, Les Carpenter, *Minaya Laid Foundation for Success*, WASH. POST, July 4, 2005, http://washingtonpost.com/wp-dyn/content/article/2005/07/03/AR2005070301106.html. MLB's oppositional behavior in 2003 stood in sharp contrast to the league's handling of the Expos in the prior year. Then it appeared that Tony Tavares, President of the Expos, and General Manager Omar Minaya had full authority to run the team and Minaya had authority to execute trades. Indeed, Minaya's signature move, the acquisition of Bartolo Colon, came as a surprise to everyone in the league, suggesting that the commissioner was unaware of the negotiations and completed deal. *See* Jonathan Leshanski, *Expos-ing the True Story*, ATHOMEPLATE (Apr. 26, 2004), http://old.athomeplate.com/montrealpt1.shtml; *Blockbuster Deal,* SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/baseball/news/2002/06/27/indians_expos_trade_ap (last updated June 28, 2002). The trade, though, ignited a negative reaction among the owners, who viewed themselves as both subsidizing and in competition with the Expos.

season, Vladimir Guerrero, the Expos' star player, was the premier offensive player on the free-agent market. Rather than let the Expos keep its best player, the owners shrunk the Expos' budget so that the team's general manager was able to make only a token offer to keep Guerrero.[114]

The absence of an institutionalized structural acknowledgment of the conflict issue in the NBA and other leagues[115] is likely due, in part, to the rareness of league ownership of a team and of the presence of situations during such ownership that highlight the conflict. Presumably, David Stern had in mind this infrequency when he (wrongly) disclaimed the existence of a conflict of interest in his role in the trade decision and referred to the incident as a "frozen moment in time."[116] Of course, the behavior of leagues

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114 *See, e.g.*, Jonah Keri, *Building the 2004 Expos*, ESPN (Dec. 8, 2003), http://sports.espn.go.com/mlb/columns/story?id=1681258. MLB's unappealing handling of the Expos' operations points to an efficiency difficulty, in addition to the conflict of interest issues. That difficulty is the increased transaction costs incurred when other league members wish to have input on any significant decision about the operation of the league-owned team. The NBA showed an awareness of this problem in the case of the Hornets in that it was decided by various committees and the Board of Governors that the league office would make the decision on what was good for the Hornets. *See* Chris Fedor, *David Stern Says That Once the Season Starts, Everyone Will Forget About That Silly Little Chris Paul Trade Veto*, DEADSPIN (Dec. 21, 2011, 10:25 PM), http://deadspin.com/5870206/david-stern-says-that-once-the-season-starts-everyone-will-forget-about-that-silly-little-chris-paul-trade-veto.

115 With respect to the NHL and the Phoenix Coyotes, it appears that no formal measures were put in place designed to prevent or mitigate conflicts of interest and guarantee autonomy in the operation of the team. However, the league was concerned about continuity of administration and deliberately maintained the existing General Manager, Don Maloney, in that position. No visible, publicized conflicts occurred. In any case, the league's focus was on stabilizing the team's finances as the team was losing large amounts of money due to an unsatisfactory venue agreement. And whatever the walling off with respect to day-to-day management, Commissioner Gary Bettman was intimately involved in the negotiations with the city of Glendale about restructuring the arena lease. More precisely, before each season the league provided Maloney with a set budget for the season. Maloney could spend an amount between that number and the salary-cap floor. With respect to trades, the team employed a dollar-for-dollar system under which all trades had to even out monetarily. Trades involving additional salary required league approval. These arrangements permitted the team to operate somewhat independently of the league. Former players, however, have said that they thought the league was dictating to the team about appropriate contract length and funds. *See* E-mail from Jaime Eisner, Assoc. Ed., Five for Howling Blog, to Lewis Kurlantzick (Jan. 29, 2013, 04:46 PM) (on file with author).

116 *See* Feigen, *supra* note 19.

might also reflect a misjudgment about how much the conflict might affect their commissioners' judgment; and, indeed, people with a conflict often credit too highly their own reliability.[117] In addition, when leagues have assumed ownership of a franchise, undoubtedly the intention was to quickly identify a new owner and arrange for a transfer of the ownership.[118] However, intention and eventuality have dramatically diverged. Thus, MLB ran the Expos/Nationals for four and a half years.[119] The NHL has owned the Coyotes for over three years.[120] And the NBA wound up owning the Hornets for a year and a half.[121]

IV. POSTSCRIPT

Commissioner Stern remarked at the time that the confusion that attended his handling of the proposed trade of Chris Paul to the Lakers was due to the media's failure to distinguish between action by him in his role as CEO of the Hornets and action by him in his

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117 *See* Davis, *supra* note 35, at 11.

118 For example, when MLB acquired the Montreal Expos in February 2002, it agreed to a one-year stadium lease with an option for a second year, evidence that the owners had no intention of keeping the team in Montreal for the long term. In fact, the Expos remained in Montreal under MLB ownership for three years. This intention creates problems for team management in that a long-term operational plan is not put in place. Team executives cannot make decisions based on the kind of long-term strategic plan of a team that projects its payroll cycle out for three or five years. Also, often the best way to produce a short-term profit is to reduce costs, whereas long-term profit may be more sustainable by investing in the team's operations. Since the other owners are likely to care only about the short term, those in charge of the league-owned franchise may be led to cut costs. *See* Russell Scibetti, *What Happens When a League Becomes the Team Owner?*, BUSINESS INSIDER (Apr. 28, 2011), http://www.businessinsider.com/leagues-as-team-owners-and-operators-2011-4. Moreover, business partners and fans are unlikely to fully embrace a franchise as long as its future is uncertain; and league management equals future uncertainty. *See* King & Lombardo, *supra* note 49.

119 *See* Joe Lapointe, *One Last Goodbye in Montreal for Expos*, N.Y. TIMES, Sept. 29, 2004, http://www.nytimes.com/2004/09/29/sports/baseball/29expos.html.

120 *See* Nicholas J. Cotsonika, *New Coyotes Ownership Supremely Confident in Franchise's Future Successes in Phoenix*, YAHOO! SPORTS (Oct. 7, 2013, 4:29 PM), http://sports.yahoo.com/news/nhl—new-coyotes-owners-supremely-confident-of-franchise-s-future-successes-in-phoenix-202912214.html.

121 *See New Orleans Hornets' Sale Completed*, ESPN, http://espn.go.com/nba/story/_/id/8058469/sale-new-orleans-hornets-new-orleans-saints-owner-tom-benson-complete (last updated June 15, 2012, 7:27 PM).

role as guardian of the league's collective interests.[122] Consider the following.

Widget manufacturers form a national trade association and select a person to serve as Widget Czar. The Czar is given authority to regulate transactions "in the best interests of the widget industry." Among other actions, the Czar has ruled that widget manufacturer C cannot buy some of the principal assets of manufacturer D. The Czar speaks in terms of "ruinous competition" and manufacturing "balance." This arrangement and the Czar's ruling would strike one as not only unusual but as illegal as a violation of the Sherman Act. The ruling runs counter to the economic interest in resource mobility. Subject to a concern about a monopoly, there is a social value in resources moving to their most highly valued use. Moreover, the reference to "ruinous competition" seems to erroneously presuppose that a business has a right to continued existence, whereas, in fact, it is for the market to make that assessment. There is no reason to mourn the demise of a company that offers a lousy product or service. And there is no efficiency interest served by a balanced widget industry.[123]

Yet professional sports leagues have been known to take action to ban, or inhibit, the transfer of assets between teams. A well-known example is the prohibition on significant cash sales of players. This restriction precipitated the confrontation in Major League Baseball between Charley Finley, the owner of the Oakland Athletics, and Commissioner Bowie Kuhn. Kuhn voided, as not in the best interests of baseball, Finley's cash sale of three of his best players to the Boston Red Sox and New York Yankees. Finley responded with a lawsuit, arguing unsuccessfully that Kuhn had exceeded his authority.[124] Similarly, the present NBA CBA limits the amount of cash a team can pay or receive each season to a

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122 *See* Mitchell, *supra* note 16 (quoting David Stern's statement that the Hornets were "better served with Chris [Paul] in a Hornets uniform than by the outcome of the terms of that trade").

123 Also, one principle of our contract law is that courts generally do not second-guess the terms of a deal. It is for the parties to fashion the bargain. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

124 Finley v. Kuhn, 569 F.2d 1193 (6th Cir. 1978).

"maximum annual cash limit."[125] This kind of restriction on asset transfers is rooted in the interdependence of members of a league.[126] The fortunes of one team affect the fortunes of the others. At the most basic level, a team needs other teams to play against. Other competitors are required to produce a competition. For example, unlike in the widget industry, where one manufacturer is uninterested in the bankruptcy of another, there is a collective interest in the financial stability of league members.

A more conspicuous, ongoing example of restriction on management authority to control a team's assets is the NBA's so-called Stepien Rule. Named after Ted Stepien, the one-time owner of the Cleveland Cavaliers who gained notoriety for his troubling pattern of trading draft picks,[127] the rule prohibits a team from trading its first-round draft pick in consecutive years.[128]

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[125] *See* Coon, *Question 94: When Can a Team Trade a Free Agent It Signs? Do They Have to Keep Him Forever?*, *supra* note 5. There are two separate ceilings, one aimed at the cash a team pays as part of trades each season, and the other at cash a team receives as part of trades each seasons. The NHL prohibition is more restrictive. *See* Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association, arts. 11.16, 50.9(e) (2005) ("There shall be no cash transactions in connection with the Assignment of Players.").

[126] That these restrictions on cash transfers in fact serve the collective interest is hardly as clear as might be supposed. *Compare* Professor Daly, *supra* note 40, at 18 (viewing the limitations as necessary to preserve public confidence in the integrity of competition on the playing field), *with* Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LIT. 1265, 1282–83 (1995) (discussing how prior to Kuhn's intervention there was a long history of cash sales in all sports leagues, so it is curious why cash sales would raise issues about integrity only in the mid-1970s and not earlier). More fundamentally, Professor Ross has argued persuasively that cash transactions can potentially benefit the less financially secure teams and facilitate more efficient allocation of players, thereby serving the collective league interest. *See* Stephen F. Ross, *Light, Less-Filling, It's Blue-Ribbon*, 23 CARDOZO L. REV. 1675, 1692–96 (2002). For a similar criticism of the 2005 NHL CBA's prohibition of the inclusion of cash as a trade asset, see *Allow NHL Teams to Trade Cash*, THE OFFER SHEET (July 24, 2012), http://theoffersheet.com/2012/07/24/allow-nhl-teams-to-trade-cash.

[127] Stepien owned the Cavaliers from 1980 to 1983. He made a habit of trading future draft choices for mediocre players and compiled a record of 66–180 during his tenure. Concerned about the devaluation of the franchise, in 1981 Commissioner Larry O'Brien informed the Cavaliers that for a period of time the team had to receive league approval before making any trades. *See* Thomas Rogers, *NBA to Take Role in Cavaliers' Trades*, N.Y. TIMES, June 30, 1981, at A21.

[128] *See* Charlie Zegers, *What Is the Ted Stepien Rule*, ABOUT, http://basketball.about.com/od/collegebasketballglossary/g/ted-stepien-rule.htm (last visited Apr. 8, 2014) (defining the rule).

In 2008, Gregg Popovich, the head coach of the San Antonio Spurs, outraged by what he viewed as a one-sided transaction that sent Pau Gasol from the Memphis Grizzlies to the Los Angeles Lakers, proclaimed:

> What they did in Memphis is beyond comprehension . . . . There should be a trade committee that can scratch all trades that make no sense. I just wish I had been on a trade committee that oversees NBA trades. I'd like to elect myself to that committee, I would have voted no to the L.A. trade.[129]

Though Popovich's proposal appears facetious, his reaction—and the attendant restriction on franchise operation—is grounded in the interdependence of teams that we have noted.

Action with respect to the disposition of assets is, in fact, a reflection of a broader league interest in the competent stewardship of teams. A team with no hope of success harms local fans and the overall attractiveness of the sport. In light of interdependence it makes sense for a league to hold each owner accountable for the management of his franchise. However, in a club-run league with the clubs enjoying perpetual monopoly status, the usual market mechanisms that would protect fans are unavailable,[130] and it is striking that team owners rarely hold a fellow owner accountable for the poor stewardship of a team.[131] The history of the Los Angeles Clippers under the ownership of Donald Sterling provides the stark example of sustained mismanagement and unaccountability.[132]

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[129] Chris Mannix, *Gasol Trade Sparks War of Words: Popovich Pops off on Grizzlies' Controversial Swap*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/2008/basketball/nba/02/08/popovich.grizzlies/index.html (last updated Feb. 9, 2008, 12:00 PM).

[130] In most other industries where companies have considerable market power and are publicly traded, inefficiently run corporations are subject to hostile takeovers by those who think the company's value would increase with new management. Most sports teams, though, are not publicly traded corporations. As a result, there is no market means to replace an incompetent owner. *See* Greg Madison, *How to Invest in Sports Teams—and Profit*, MONEY MORNING (June 3, 2013), http://moneymorning.com/2013/06/03/how-to-invest-in-sports-teams-and-profit/#.

[131] The NBA's action with respect to Ted Stepien might be viewed as a minor example to the contrary, though it does not rise to an instance of league discipline of an owner for mismanagement. *See supra* notes 127–128 and accompanying text.

[132] *See* Richard Hoffer, *The Loss Generation*, SPORTS ILLUSTRATED, Apr. 17, 2000, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1018959/index.htm (stating

that chronic incompetence and virtually uninterrupted ineptitude led to the resulted in the Clippers becoming the "losingest team in history"). As noted previously, Professors Ross and Szymanski have argued that the interests of consumers—including a lack of tolerance for inept management—would be better served if sporting competitions were organized by an independent unitary entity rather than by a club-run league. *See supra* note 43 and accompanying text.