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Restructuring Professional Sports Leagues

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Panel III: Restructuring Professional Sports Leagues

Moderator: Martin Edel¹
Panelists: Jamin Dershowitz²
Jeffrey Kessler³
Tandy O'Donoghue⁴
Kenneth Shropshire⁵

MS. COHEN: Our third and final panel is “Restructuring Professional Sports Leagues.” I will provide you with a brief summary.

With the exception of baseball for certain subjects,⁶ all sports leagues must adhere to the requirements of section 1 of the Sherman Antitrust Act.⁷ Baseball is one sport that has been immune from antitrust scrutiny since the holding of *Federal Baseball Club v. National League*.⁸ The way professional sports leagues are structured can determine whether or not a professional sports league will be subject to antitrust scrutiny.

The founders of Major League Soccer (hereinafter “MLS”) developed their league as a single entity. On April 19, 2000, in

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⁶ *See* Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200 (1922); *see also* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (affirming baseball’s exemption from federal antitrust regulation).

⁷ Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (2001).

⁸ 259 U.S. 200 (1922).

414 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* [Vol. 12

deciding the case of *Fraser v. Major League Soccer L.L.C.*,⁹ Judge O'Toole of the United States District Court for the District of Massachusetts held that as a single entity, Major League Soccer could not violate section 1 of the Sherman Antitrust Act.¹⁰

Our panelists will address the various factors affecting the league's existence as a single entity, as well as the added responsibilities that must be undertaken by a single entity in the negotiation of media and player contracts.

Our third and final panel will be moderated by Mr. Martin Edel. Mr. Edel is a Partner at Miller & Wrubel. He is also an Adjunct Associate Professor of Sports Law at Brooklyn Law School. In 1999, he became the Chairperson of the Sports Law Committee for the Association of the Bar of the City of New York and was also a member of the Association's Antitrust Law Committee.

Mr. Edel is a member of the New York State and American Bar Associations. From 1975 until 1978 he was an Associate at Cravath, Swaine & Moore.

Mr. Edel received his B.A. from Columbia College in 1972, Summa Cum Laude and Phi Beta Kappa. In 1975, he received his Juris Doctor from Harvard Law School, where he earned the Boykin C. Wright Award and was an Editor of the *Civil Rights-Civil Liberties Law Review*.

And now, on to our third and final panel, Mr. Edel.

MR. EDEL: Thank you, Jessica. I hadn't remembered half of my biography, so I was glad that you could refresh my recollection with it.

We have today what I think is one of the showcase programs of this or any other symposium, which is the concept of restructuring sports leagues. That is a bit of a misnomer, because I am not aware of any league that has been restructured. What we have had, though, in the past decade is a number of new leagues that have come into existence that have adopted a new structure, sometimes called the

⁹ 97 F. Supp. 2d 130 (D. Mass. 2000).

¹⁰ 15 U.S.C. § 1 (2001).

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 415

single-entity structure, because of advantages that the league perceives it has in terms of player relations, dealing with the media, dealing with vendors, and sometimes even dealing among the investors, who were formerly known as owners.

I am particularly delighted to moderate this panel because we have such a very outstanding panel for you this afternoon. All of the people on our panel—and this is sort of an all-star grouping of panelists who we have here today—have written, argued, or lived through the single-entity concept in some detail.

I will just spend a moment or two reflecting on what the single-entity concept is. It is a concept that was rejected by the courts in the 1960s, 1970s, and 1980s, but began to receive some grudging acceptance at the beginning of the 1990s, particularly by the Seventh Circuit in the *Chicago Bulls*¹¹ case, and has become the new model for, I think, all new sports leagues that have come into existence since the mid- or early 1990s.

More recently, as you heard Jessica talk about, in Boston, Judge O'Toole approved the format of a single-entity league and its immunity from section 1 of the Sherman Act because, as I am sure all of you remember from reading section 1 of the Sherman Act, as a single entity, you lack at least two entities and, therefore, there can be no contract, combination, or conspiracy in unlawful restraint of trade.¹²

Why would a league move to a single-entity model? We will hear some discussion from the panel and we will be able to take your questions on it later.

Just as a brief overview, one, of course, is to insulate the leagues from antitrust liability under section 1 of the Sherman Act. There is still the question of section 2, which Judge O'Toole did not address in his decision but was the subject of a ten-week trial this past fall

¹¹ *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (recognizing that the NBA might be a single entity for some purposes and not for others).

¹² *Fraser*, 97 F. Supp. 2d 130.

416 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* [Vol. 12

and winter.¹³ We have two participants on our panel who were engaged in that trial.

There is the question of unity of interests among the investors in the league: How they can deal with vendors in securing better contracts, if that is possible; and how they can deal with the media in the same way. In terms of player relations, have we tilted the playing field by removing the antitrust weapon from the players under the single-entity model? Is the single-entity model a viable way of proceeding?

I will leave that to the panel, and you will hear from the panel the enormous consequences of shifting from what has been called the traditional model to a single-entity model.

We have a very distinguished panel. Let me spend a few moments introducing them. I had the pleasure, last night and this morning, of going through everyone's biography and résumé. If I sat here and read them to you, we would probably spend at least the next two hours with listening to their achievements. I will forbear and try to give a quick summary of each of the achievements of our four panelists.

Our first speaker today will be Kenneth Shropshire. Ken is a Professor and Department Chairman at the Wharton School at the University of Pennsylvania. He is also a sports industry consultant, speaker, and author of several award-winning books, including *Agents of Opportunity: Sports Agents and Corruption in Collegiate Sports*; *The Sports Franchise Game: Cities in Pursuit of Sports Franchises, Events, Stadiums, and Arenas*; *In Black and White: Race and Sports in America*; *Sports and the Law: A Modern Anthology*; and, more recently, *Basketball Jones: America Above the Rim*.

Ken also authors columns in various media publications, has been a commentator on TV and radio, and has his own web site.¹⁴ Ken was also Program Chairman for the American Bar Association Section on Sports Law. Ken graduated from Stanford. And, lest I

¹³ *Id.*

¹⁴ See Kenneth Shropshire, at <http://www.kennethshropshire.com> (last visited Jan. 5, 2002).

forget, he also has some local roots here; he did attend the law school that is just north of Fordham.

We are very fortunate to have Ken here today. He will present an overview for us on the topic of league structuring and its economic implications, focusing on why there is a movement towards restructuring or structuring of professional sports leagues and the implications for antitrust, intellectual property, and other concerns.

Our second speaker is Tandy O'Donoghue. Tandy is an Associate with the firm of Proskauer Rose here in New York. She works in the firm's Litigation and Dispute Resolution Department. She has worked for Proskauer's clients in the sports industry, including Major League Soccer, which she will talk about at some length, the National Hockey League (hereinafter "NHL"), the National Basketball Association (hereinafter "NBA"), the Philadelphia Eagles, and the ATP Tour. Tandy recently spent a number of months in Boston, where Proskauer Rose defended Major League Soccer in the antitrust case to which Jessica referred and I talked about a few moments ago.

Tandy graduated from Cornell University and received her Juris Doctor in 1997, *magna cum laude*, from Tulane University School of Law, where she was a Senior Associate Editor of the *Tulane Law Review*.

Tandy will address from the legal perspective why the single-entity structure is attractive to new and emerging leagues. She will focus on the recent *Major League Soccer* case in Boston, where Judge O'Toole granted summary judgment in favor of Major League Soccer on the single-entity section 1 Sherman Act issue.¹⁵

Our third speaker will be Jeffrey Kessler. Jeff is the "go-to" person for all league player issues. If the players have a concern, they will go to Jeff Kessler. Jeff is a Partner at the firm of Weil, Gotshal & Manges in New York. For those of you who have read any player issues, the media inevitably seems to quote Jeff, who usually obliges. He has been involved in virtually every major sports antitrust and labor law issue over the past decade. In terms of his

¹⁵ See *Fraser*, 97 F. Supp. 2d 130.

other achievements, he also concentrates in the area of antitrust law, and trade regulation; he has litigated complex sports antitrust cases and other antitrust cases during his illustrious career at Weil, Gotshal, which is continuing—I do not mean to make this sound like it is the end of your career, Jeff.

MR. KESSLER: I feel like the casket should be opened at this point.

MR. EDEL: Some of the sports law cases that Jeff has worked on are the *Freeman McNeil* free agency trial,¹⁶ the *Reggie White* case,¹⁷ the *Junior Bridgeman* case,¹⁸ and the *Fraser* case involving Major League Soccer in Boston.¹⁹

Jeff is a member of the American Bar Association Antitrust Section; he is an Adjunct Professor of Law at Fordham University School of Law; and he is a Founding Member of the Board of Advisors of the Georgetown University Study of Private Antitrust Litigation. He has written and lectured extensively on a wide variety of antitrust, sports, and related topics. Jeff graduated from Columbia College and from Columbia Law School, where he was a Kent Scholar and Editor of the *Columbia Law Review*.

Jeff will also address the issue of the single-entity structure as reflected principally in the *Major League Soccer* case. Not surprisingly, he will come out with a different perspective from Tandy's, and it should be very interesting to the point-counterpoint that we have and the sparks that may fly there.

Our fourth speaker, and our clean-up hitter today, is Jamin Dershowitz. Jamin is General Counsel of the Women's National Basketball Association (hereinafter "WNBA") and Assistant General Counsel of the NBA. As you may know or may not know, the WNBA is structured as a single-entity league.

¹⁶ *Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1358-59 (D. Minn. 1991) (holding that the labor exemption had ended because the National Football League Players Association had decertified).

¹⁷ *White v. Nat'l Football League*, 822 F. Supp. 1389 (D. Minn. 1993).

¹⁸ *Bridgeman v. Nat'l Basketball Ass'n* (re: Chris Dudley), 838 F. Supp. 172 (D.N.J. 1993).

¹⁹ *See Fraser*, 97 F. Supp. 2d 130.

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 419

Jamin graduated from the University of Pennsylvania and from Yale Law School. He clerked for Judge Joseph Tauro, worked with the Legal Aid Society, and segued quite naturally from there into working for the NBA.

Jamin will discuss today some of the practical issues involved in being a single-entity league. As a practitioner, he will focus on the day-to-day issues and how they differ in a single-entity league from that which we see in a more traditional model, such as you might think about from the National Football League (hereinafter “NFL”), Major League Baseball (hereinafter “MLB”), the NBA, or the National Hockey League.

I am now delighted to turn over, and stop speaking for a change, the program to Ken Shropshire.

MR. SHROPSHIRE: Good Afternoon. It is good to see some former students here today. I will try not to cover old territory.

I will do a quick overview of league structures, historically and currently. Although I won’t detail the inner workings of the single-entity structure, I will try to introduce some of its attributes and flaws, so that the later speakers can elaborate. What I will try to tie in are some of the business reasons why the single-entity structure is being looked to so much.

Many of you know that originally sports in America, especially the team sports, started off as individual clubs.²⁰ You have stories of George Halas sitting around with the rest of the football team, passing the hat around after games to collect funds to divide amongst the team.²¹ At the heart of that is the thought that we started off with individual and independent clubs that eventually got together and said, “Hey, we should come together with a plan, a schedule,

²⁰ See, e.g., Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternate Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 66 (1995).

²¹ For a brief biography of Halas, see *Real Men: George Halas*, at <http://www.manlyweb.com/realmen/GeorgeHalas.html> (last visited Jan. 31, 2002). While he may not have passed his trademark hat into the crowd to collect money, Halas was the founder, owner, and a player for the Chicago Bears, and was one of the leading forces behind the creation and development of the NFL.

organize, and become a league.” So it was the teams that formed the leagues. Sometimes we lose track of that, but it was the leagues that were created to direct the success of the individual teams.

Many legal scholars, and those of you taking sports law courses, have trouble or point out the trouble of trying to define what kind of legal structure a sports league is.²² Is it a corporation? What is this thing? How do you view this thing and how do you deal with it? That issue is certainly at the heart of the problems that are there in the cases that have tried to figure out if the single-entity defense is valid.²³ What we began to see was the law of private associations being applied to determine how these leagues should operate, how they should run, and how the law should address them.²⁴ If you go back and look at this stuff, you will see an old *Harvard Law Review* article, entitled “Private Associations,” that many people point to as the crux of how to define these leagues legally.²⁵

If you look for when these problems began and when this whole idea of restructuring came to bear on these leagues, it is relatively recent. If you look at the initial sports law hornbooks, such as the Weistart and Lowell book,²⁶ or Lionel Sobel’s book from the 1970s,²⁷ you see there a theoretical conversation about what happens when individual teams and the league start fighting. There was very little guidance from the case law until we got beyond that period.

The key distinction that you see in these discussions though, between private associations and sports leagues is the emergence of the commissioner, as opposed to the leadership within a private

²² For a sampling of the various views of a sports league’s legal status, see Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729 (1987); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991).

²³ For discussion, see generally Brad McChesney, *Professional Sports Leagues and the Single Entity Defense*, 6 SPORTS LAW. J. 125 (1999) (discussing various sports leagues have claimed to be single entities in order to defend against charges of antitrust liability).

²⁴ See Lentze, *supra* note 20, at 76.

²⁵ Note, *Development in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 985 (1963).

²⁶ JOHN C. WEISTART & CYM H. LOWELL C., *THE LAW OF SPORTS* (1979).

²⁷ LIONEL S. SOBEL, *PROFESSIONAL SPORTS AND THE LAW* (1977).

association, and the way that the courts began to treat the commissioner in these settings.²⁸

There were a couple of sidebar events where property law came into play and where there was an argument that whenever the commissioner or league would take action, they were doing some harm or taking property from the team for a short period of time.²⁹ That kind of discussion was the precursor for some of the decisions that we see today, including the *Raiders* decisions.³⁰

It became clear that the heart of how a league operates and how the courts will view a league is based largely on the respective league's constitution and bylaws.³¹ The courts said to the leagues, "Look, the way we want to treat you is how you want to treat yourself. You set forth the rules and guidelines as with any other private association, and then we will know how to deal with you in the way that we should treat you."

We began to see, in *Finley v. Kuhn*,³² that the court is trying to figure out what the commissioner did in negating the sale by Finley. The court said it was not whether Commissioner Kuhn was wise in voiding the trade, but whether he had the authority. That became what the courts continually tried to look at to decide whether or not there was authority present.³³

Just prior to that case, if you think about the economics, the biggest economic influx in sports was television in the 1950s³⁴ and

²⁸ See Lentze, *supra* note 20, at 69-79.

²⁹ See Note, *supra* note 25, at 998.

³⁰ L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356 (9th Cir. 1986); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984).

³¹ See Rosenbaum, *supra* note 22, at 795 (stating that "[t]he implications drawn from early case law suggest that so long as a league rule is incorporated into a collective bargaining agreement, after being subject to meaningful arms length negotiation between the relevant parties, the nonstatutory labor exemption should immunize a league from antitrust liability.").

³² Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527 (7th Cir. 1978).

³³ See Nat'l Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562, 568-69 (9th Cir. 1987).

³⁴ See Brett T. Goodman, *The Sports Broadcasting Act: As Anachronistic as the Dumont Network?*, 5 SETON HALL J. SPORT L. 469, 471-72 (1995). Though the first televised sporting event in America, a college baseball game, occurred in 1939, professional

with it came a need for a greater level of cooperation among the teams in order to be successful in the television market.³⁵ This was what was contemplated at the time: “Let’s negotiate these TV contracts as a group rather than as individual franchises and we will be able to gain more from the networks.” This was certainly the basis of discussion in the *United States v. National Football League*³⁶ case in the early 1950s, and certainly why we see the evolution of the Sports Broadcasting Act of 1961.³⁷

These set the stage for courts trying to figure out, in the late 1960s and early 1970s what a league is, and, more importantly, the big battle of whether or not antitrust law should apply to sports leagues—specifically whether or not this is the type of enterprise that is subject to scrutiny under section 1³⁸ and section 2³⁹.

The biggest focus on this that we have seen in recent years which turned the corner in thinking about this, were the *Raiders* relocation cases, involving Al Davis and the Raiders, in the late 1970s and early 1980s.⁴⁰ This is where the single-entity defense⁴¹ becomes the shield that the leagues look to say to courts, “Wait a minute, they’re one of us. We’re all the same. How can you possibly say that we are violating the antitrust laws when we are just a single entity? That cannot be and we should not allow that to happen.” Similar issues emerged in other cases at that time, in the relocations of the San Diego Clippers⁴² and others,⁴³ and you saw a freezing of league

sports did not gain major exposure from the networks until the 1950s. *Id.*

³⁵ See Lentze, *supra* note 20, at 66.

³⁶ 116 F. Supp. 319 (E.D. Pa. 1953).

³⁷ 15 U.S.C. § 1291 (1961). This act is an exemption from antitrust laws for agreements covering the telecasting of sports contests and the combining of professional football leagues.

³⁸ 15 U.S.C. § 1 (2001). Section 1 of the Sherman Act prohibits agreements or conspiracies among competitors that have an anticompetitive effect on the market.

³⁹ 15 U.S.C. § 2 (2001). Section 2 of the Sherman Act prohibits actions taken to gain or maintain a monopoly.

⁴⁰ L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 791 F.2d 1356 (9th Cir. 1986); L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381 (9th Cir. 1984).

⁴¹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

⁴² *Nat’l Basketball Ass’n v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987).

⁴³ The Baltimore Colts and the Arizona Cardinals were among the NFL teams that relocated in the aftermath of the *Raiders* decisions. See Jack Clary,

actions occur as the Raiders successfully got a judgment against the NFL in that case.⁴⁴

So as this begins to develop, I think it also becomes clear that the single-entity defense may be helpful in some labor settings as well. From the business standpoint against teams, and from the labor standpoint against players, it becomes in the league's best interests to figure out a way to be viewed as a single entity.

As many franchises were going through transformations, a statement that highlights some of the business issues of the time is O'Malley's statement about why he decided to sell the Dodgers to Murdoch and Fox.⁴⁵ Basically, he said that you need a broader financial base than an individual family to carry you through the storm, that you've got to find a way to make the smaller enterprises work within a group, and that sports are becoming entertainment, a different business from that of George Halas's time.

Certainly, we have seen different owners step up and act counter to broader league interests. Apart from Al Davis, you saw Jerry Jones of the Dallas Cowboys take individual actions for the benefit of his team⁴⁶ that were not necessarily in line with what David Harris described as "league-think" in his book *The League*.⁴⁷ Basically, Jones's actions were not in line with what was best overall for the league.

Many people looking at this said, "Well, let's look as if we are going to start a new league, which we have seen enough of in recent years, what is the best way to structure it? How should we do it to avoid the problems that we have seen regarding labor, the problems

The Third 25, THE COFFIN CORNER, Vol. XVI (1994), available at <http://www.footballresearch.com/articles/frpage.cfm?topic=seas-25c> (last visited Jan. 5, 2002).

⁴⁴ See *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1359 (9th Cir. 1986).

⁴⁵ See The Official Website of the Los Angeles Dodgers, *History, Timeline, 1990's*, at http://dodgers.mlb.com/NASApp/mlb/la/history/la_history_timeline_article.jsp?article=11 (last visited Jan. 5, 2002). On March 19, 1998 the FOX Group officially took over the team from the O'Malley family that had owned the team for over fifty years.

⁴⁶ *Nat'l Football League Properties, Inc. v. Dallas Cowboys Football Club, Ltd.*, 922 F. Supp. 849 (S.D.N.Y. 1996).

⁴⁷ DAVID HARRIS, *THE LEAGUE: THE RISE AND DECLINE OF THE NFL* (1986).

we have seen regarding antitrust, and also to move forward more rapidly to take advantage of the entertainment-type synergy, and also make quicker decisions about those opportunities?"

The classic strategy analysis of a sports model for success would take you through a few different elements. Let me highlight some and then close with a couple of thoughts.

The first element, as Martin mentioned, is certainly the financing to get these enterprises funded. Most problematic for the single-entity structure is figuring out how to tell the large-ego set of owners that this league is going to be a little bit different and that as a single entity, one of the owners, like George Steinbrenner⁴⁸ or Jerry Buss,⁴⁹ will not have the opportunity to be out front in the same manner that previous leagues have had individual owners out front.

The next element is the control. If you are the commissioner, the president or head of the league, you do not have to go to twenty-nine or thirty owners and say, "What is it that we should do?" With the single-entity structure, decisions can be made in more of a centralized manner.⁵⁰ At various times and in various leagues, it can be said that some commissioners have had more of that kind of power than others.⁵¹ And certainly, in Major League Baseball, the Bud Selig model is probably as far away as you can get from an individual who is in charge, and more often it is the owners who come together to make league decisions.⁵²

The third element relates to the product on the field that is produced by the traditional model versus this new single-entity

⁴⁸ George Steinbrenner is the majority owner of the New York Yankees baseball team, and one of the most influential and well-known team owners in Major League Baseball. See The Official Website of the New York Yankees, at http://yankees.mlb.com/NASApp/mlb/nyy/team/nyy_frontoffice_dir.jsp?club_context=nyy (last visited Jan. 5, 2002).

⁴⁹ Dr. Jerry Buss is the owner of the Los Angeles Lakers basketball team, and like Steinbrenner in baseball, is a prominent team owner in the National Basketball Association. For a history of the Lakers franchise and a chronicle of their success, see *Lakers History*, at <http://www.nba.com/lakers/history/history.html#18> (last visited Jan. 5, 2002).

⁵⁰ See McChesney, *supra* note 23, at 142-43. The author compares the solidarity of purpose and interest in MLS, with the intraleague squabbles that one sees in other leagues.

⁵¹ See Lentze, *supra* note 20, at 71.

⁵² See *id.* at 80-81.

concept. How much control does the league have over the quality of the gameplay? I mean, when you think about this like any other consumer product, do you have more control if what you put out there is the result of centralization? Think of the XFL and the product that is there, whether you like the league or not, there is uniformity in the way the league and teams look. This element also allows the league to take care of the large-market/small-market problems that we are seeing in baseball and basketball.⁵³ If it is all centralized, it is easier to take care of than trying to put the pressure on the teams themselves.

The next element concerns the marketing problems that may arise. The key marketing element in sports is consumer confidence that this is a valid and fair competition, and that there is no advantage to any individual franchise.⁵⁴ Again, the single-entity model can be confusing, in that you do not have the traditional competitive elements of owner against owner.⁵⁵ And if combined with that you lack a strong commissioner, if you don't have the white-swathed hair of Commissioner Landis⁵⁶ to say everything is okay, then the problem gets even deeper.

The final element concerns the legal issues and the benefits that come from the single-entity structure. It is not clearly defined yet. It is not clear that this entity escapes antitrust scrutiny. As we mentioned, section 2 still lays out there, and section 1 possibly still exists.⁵⁷ And remember, there is a difference between antitrust actions by players as opposed to those by other teams or even upstart leagues.⁵⁸ If other leagues come into play, particularly with regard to section 2, how valid is the single-entity defense going to be in that type of setting?

⁵³ See, e.g., Dan Lewis, *It Happens Every Spring*, REASON ONLINE (2001), at <http://www.reason.com/0105/co.dl.it.shtml> (last visited Jan. 5, 2002).

⁵⁴ See Lentze, *supra* note 20, at 70. Public confidence in baseball dropped dramatically after the "Black Sox Scandal," involving the fixing of the 1919 World Series, leading to the installation of the near-omnipotent Commissioner Landis.

⁵⁵ See McChesney, *supra* note 23, at 142-44.

⁵⁶ For a short biography of Landis, see Kenesaw Mountain Landis (1866-1944), at <http://www.inficad.com/~ksup/landis.html> (last visited Jan. 5, 2002).

⁵⁷ See McChesney, *supra* note 23, at 141-45.

⁵⁸ See *id.* at 127-33. Suits brought by players under antitrust grounds may succeed whereas suits by other teams or other leagues may not pierce the single-entity defense.

Based on the full analysis of this single entity, if you think of the WNBA, MLS, and the XFL, people say that notwithstanding the financing problems, the lack of legal confidence, and certain marketing concerns, that this is a model to try. That is why we have seen sports going forward in that direction.

We have seen some restructuring, particularly with MLS. "Can we really get funds in by giving owners no kind of Steinbrenner-esque face time?" But they have addressed this and been trying to make it work better.

In the end, regarding restructuring, I don't think we are wherever we are going to be, and I do not think that we will see any unstructuring of any of the major sports, but we will see a different structure for the newer emerging sports, particularly as some of these upstart leagues go by the wayside and others come up in their place. Let me stop at that and let others talk about what is next.

MS. O'DONOGHUE: Let me ask everybody to step back for a second and, instead of focusing on the antitrust element of a league's structure, think about some of the general difficulties that a new league or any new business will face. There are always antitrust concerns, but separate and apart from that, I think that a fundamental issue that new leagues have to consider is the competitive environment they are coming into and how to ensure their success in that environment.

Besides dealing with a competitive environment, MLS is coming into an environment where soccer has failed miserably in the past and the League wants to avoid its predecessors' mistakes.⁵⁹ There are also the issues of wanting to avoid the pitfalls that other leagues have faced in the legal arena, including the antitrust pitfalls.⁶⁰

But if we just look at a start-up business generally and look at a league generally and what it needs to do to maximize its revenue, the single-entity structure gives the league the ability to give those who

⁵⁹ See *Fraser v. Major League Soccer, L.L.C.*, 97 F. Supp. 2d 130, 132 (D. Mass. 2000) (discussing the failure of other soccer leagues).

⁶⁰ See generally *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996); *L.A. Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982).

invest in this league—the actual investors in the league, its sponsors, its television partners, or its marketing partners—a degree of certainty that does not necessarily exist in other structures.⁶¹ This certainty has value in it. So I think that new leagues are in a position where they need to capitalize on every piece of value out there, and the single-entity structure allows them to do that.⁶²

If we look at another league, such as the National Football League, the NFL has the ability to take the intellectual property associated with it and all of its clubs and package that for its sponsors and its television partners. But it is able to do that in a different way than an entity like Major League Soccer. It is able to do that because it secured the right to do that from the clubs.⁶³

In a single entity like MLS, the intellectual property rights, for example, reside with the entity, they reside with the league.⁶⁴ The teams do not own anything. The teams are a part of the league. So not only do you give yourself and your business partners the ability to use such assets to their full advantage, but you avoid the pitfalls

⁶¹ Karen Jordan, *Forming A Single Entity: A Recipe For Success For New Professional Sports Leagues*, 3 VAND. J. ENT. L. & PRAC. 235, 245, 247 (2001) (having a centralized system of decision making in the league office shield the team owners from money pressures which can lead to rash decisions and potentially hurt their investment); Heike K. Sullivan, *Fraser v. Major League Soccer: The MLS's Single-Entity Structure Is A "Sham"*, 73 TEMP. L. REV. 865, 866 (2000) (noting that the risk-friendly nature of the MLS system where the league has control appeals to investors because it gives them a greater chance of survival); see also Larry Lebowitz, *Sports Inc.: Leagues are Forming as 'Single Entities' Where Decision and Profits Are Shared By All Owners*, SUN-SENTINEL (Ft. Lauderdale), Apr. 20, 1997, at 1F, available at 1997 WL 3098439 (discussing that owners see the advantage of investing in a single entity as decreasing the risks of independent team ownership where one owner could spend out of control and put the other team out of business).

⁶² All revenues generated by league operations belong directly to MLS. See *Fraser*, 97 F. Supp. 2d at 131. MLS owns and controls all trademarks, copyrights, and other intellectual property rights that relate in any way either to the League or to any of its teams. *Id.* MLS also owns all tickets to MLS games and receives the revenues from ticket sales. *Id.* There are central league regulations regarding ticket policies, including limits on the number of complimentary tickets any team may give away. *Id.*

⁶³ See generally Gary R. Roberts, *The Legality of The Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 VA. J. SPORTS & L. 52 (2001).

⁶⁴ See *Fraser*, 97 F. Supp. 2d at 133.

that can be associated with a maverick owner doing what he sees fit for his particular club.⁶⁵

Now, of course, there are antitrust issues there, but what you are really trying to do is, avoid having an owner make deals on his own that are not beneficial for the entire league and its survival.⁶⁶ That is not just an antitrust problem. That is a problem with being able to deliver your product to the sponsors with whom you want to be associated. The single entity model minimizes these risks, making it a very attractive model in this competitive environment.

I think some of the new media aspects really tie into that as well. The Internet is a whole new marketing device that we have really seen grow in conjunction with some of the new leagues.⁶⁷ It is a place where you have another audience, and where you really need to guarantee to your partners that you are going to be delivering what you have said you will deliver, without having affiliated entities doing their own thing to the detriment of your partnerships. Major League Soccer is an example of a league where there is that kind of certainty and related asset value.

Apart from that, there are unquestionably antitrust issues. I am confident that Jeff Kessler will talk about those.⁶⁸

But just from the management perspective, I think the bottom line is that there is always an antitrust question, even though *Brown v. Pro Football*⁶⁹ did a little bit to clarify where the labor laws stop and the antitrust laws begin.⁷⁰ As long as uncertainty exists, it behooves a league, particularly a new league that is going to face start-up

⁶⁵ See Matthew Futterman, *Owners Can be their Own Worst Enemy*, NEWHOUSE NEWS SERVICE, Aug. 30, 2000 (discussing the owner of the Dallas Cowboys, Jerry Jones, making deals with sponsors that are competitors of the NFL's sponsors).

⁶⁶ *Id.*

⁶⁷ Terry Lefton, *NFL Signs Its Own Big 3*, THESTANDARD.COM, July 11, 2001, available at 2001 WL 6874179 (CBS Sportsline and the NFL entered a five-year deal for the NFL's Internet rights that is the richest web sports rights alliance ever).

⁶⁸ See *infra* text accompanying notes 86-109.

⁶⁹ 518 U.S. 231 (1996).

⁷⁰ In *Brown v. Pro Football*, 518 U.S. 231 (1996), the Supreme Court held that when the NFL bargained to impasse with the NFLPA over a mandatory subject of collective bargaining and then unilaterally implemented the terms of its last good-faith bargaining offer, it was exempt from antitrust scrutiny. *Id.*

problems like limited funds, et cetera, to do what it can do to shore up its labor situation. If shoring up its labor situation means taking steps to prevent itself from being subject to the antitrust sword that players might use to determine their terms and conditions of employment, if they opt not to use the labor laws, then that is something it really needs to take into account in structuring itself. I do not think that this is something that investors would not consider. This is important to them.

Looking back on the history of sports, other leagues have gone through enormous antitrust litigation.⁷¹ Although I think we have seen that just because you are a single entity, that does not mean you are not going to go through some very serious antitrust litigation, but it is an extra measure of taking care of those risks.⁷²

I think the financing point is a very interesting one. How do you as a single entity make yourself attractive enough in a risky area to secure financing? When you are making an effort to appeal to people with a lot of money, and the potentially big egos that go along with that, but you are not willing to offer them that sort of "individual owner" role in things, you are going to have some difficulty.⁷³ Part of the way you deal with that is making it clear that in this new risky venture when you are a single entity you can spread the financial risk around; you spread the risk; you spread the reward.

Some owners are in a position where they've got a big marketplace, with a big-market club, making big-market dollars. Perhaps their counterparts are not so fortunate. This disparity is part of the way the market had developed in soccer in the past, and was something MLS needed to avoid.⁷⁴

⁷¹ See generally *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996); *L.A. Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982).

⁷² MLS is a single entity and has still undergone serious antitrust litigation. See *Fraser*, 97 F. Supp. 2d at 132.

⁷³ MLS teams have had some problems keeping investors. The league took over the D.C. United, the most successful franchise in MLS, due to an inability to find new investors during the two years it was for sale. *Major League Soccer Takes Over Troubled D.C. United*, HOUSTON CHRON., Dec. 15, 2000, Sports, at 11.

⁷⁴ See Richard Alm, *One More Time, With Feeling; Lowered Expectations, High Hopes for MLS*, THE RECORD, Apr. 7, 1996, at S15 (discussing the failure of the North American

If you structure yourself as a single entity, you can offer your investors the avoidance of that situation. You could say, "Listen, we are going to share profits and losses equally on a pro rata basis in accordance with your investment in this league, and that is one of the ways you can avoid becoming one of those clubs that isn't making any money simply because of where you are, because you do not have a good local TV deal, whatever the case may be."

That is certainly not the kind of thing that would happen in Major League Soccer. Obviously, given what we know has happened in Major League Soccer, that does not guarantee you will be an automatic financial success,⁷⁵ but it means that the risks are spread and, hopefully, in time, the rewards will be spread as well. So there is a little bit more certainty there, and I think that, again, certainty is something that can win out over the gratification an individual may derive from actually "owning" a team.

Some people have said that to satisfy the ego or "ownership" element in MLS the investors can purchase the right to manage a team in addition to their investment in the league. But again, it is a very different situation than if they actually owned the club, which they do not. Perhaps the right to manage a team satisfies egos, and perhaps it is just something that people are interested in doing, but it is another way to secure additional financing because, at least in Major League Soccer, there is an additional cost associated with acquiring that right.⁷⁶

The control aspect is very important for some of the reasons I talked about a moment ago. Control refers to controlling your sponsorship, your licensing, your marketing, and making sure that your investors do not have the ability to go out and do otherwise, which in a single entity such as MLS, they will not have the ability to do. If they attempt to do that, part of what a league can do in its documents is to carve out a very clear with or without cause termination right. There are many creative ways of doing things

Soccer League due to financial disparities in the different markets).

⁷⁵ Major League Soccer has lost in excess of \$250 million since the league's inception in 1996. *MLS Takes Control of D.C. United*, SEATTLE TIMES, Dec. 15, 2000.

⁷⁶ See *Fraser*, 97 F. Supp. 2d at 132.

within this structure that give you the rights you might not have, or need in a traditional league structure.

The quality-control issue is also an interesting one. MLS has been, at times in the press, attacked in terms of going out of its way to achieve competitive balance within its clubs and not succeeding.⁷⁷ Nobody is perfect. I think sometimes it works and sometimes it does not, but the bottom line is, there is a mechanism there that does not allow the clubs with the most money to change competitive balance in a way that would undermine a start-up business.

That can be another attractive feature of securing investors. If they come in and they say to themselves, "Well, let me step back, because what if another investor is willing to dig down as deep into his pockets as he can go to win, but I'm not willing or able to dig as deep, won't I lose out?" In MLS, the answer is no, it just will not happen that way.

That does not mean that people do not have input into who they may like on their team, but it does mean that there are budgetary controls and budgetary restrictions at the league level that prevent everything from spiraling out of control and prevent the types of market disparity that can bring a great deal of unhealthiness to the league, particularly a new league, as a whole.

Television agreements are another important area here, just in terms of being able to get your product out into the marketplace. New leagues are in a particularly volatile position in terms of being able to get themselves on television, but the more you have to offer the networks, the better off you will be.⁷⁸ I think that has certainly been the case with MLS, and I imagine that has been the case with the other start-up leagues as well. Again, it is that measure of control that you get with a single entity that you do not necessarily have with some of the other structures.

⁷⁷ MLS has been attacked by the players in the MLS litigation that the lack of competition among teams for players has in effect eliminated the market for their talent. See Jordan, *supra* note 61, at 242.

⁷⁸ See Roberts, *supra* note 63.

Single entities are probably in a really good position to capitalize on streams of revenue that would otherwise be divvied up and be less than what the league itself can get with respect to new arenas and new playing facilities. I think that is probably an area that has yet to be developed, but it is an important part of any single entity. I think the longer these newer leagues are around, the more we will see that.

Just to close out on the antitrust issues, I think that we still have this ongoing issue with whether MLS is a single entity,⁷⁹ although we do have a decision from the District of Massachusetts that says that it is indeed a single entity.⁸⁰ Part of the reason why is that Major League Soccer is structured as a limited liability company (hereinafter “LLC”) which, for all intents and purposes, acts as a corporation.⁸¹

Within the LLC context, you bring in your investors, you have a management committee (which is how LLCs like MLS are run under the Delaware law) and there is really no reason to treat it differently from a corporation,⁸² which as a single corporation will not be subject to section 1 scrutiny because it is a single actor, and you need more than one actor under section 1.⁸³

I think section 1 is something where you can structure yourself to help you to avoid some of the litigation problems of section 1.

⁷⁹ *Fraser* was scheduled to be heard before a three-judge panel in the First Circuit Court of Appeals on October 1, 2001. Joe Rutland, *Sports Notebook*, HOUSTON CHRON., Sports, Aug. 28, 2001, available at 2001 WL 23624602.

⁸⁰ See *Fraser*, 97 F. Supp. 2d at 131.

⁸¹ *Id.* (citing DEL. CODE ANN. tit. 6, §§ 18-101 *et. seq.* (1996)).

⁸² An LLC is a form of statutory business organization that combines some of the advantages of a partnership with some of the advantages of a corporation. See *Fraser*, 97 F. Supp. 2d at 134.

⁸³ Section 1 of the Sherman Act only prohibits collective activity by plural economic actors which unreasonably restrains competition. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-73 (1984) (holding that a parent company and its wholly owned subsidiary have a “complete unity of interest” and therefore cannot violate section 1 of the Sherman Act); see also *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) (holding that if the league is organized and functions as a single entity it cannot be found to be subject to section 1 of the Sherman Act; only section 2 claims apply to the activities of a single entity).

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 433

Section 2 is not such an easy thing to avoid, and section 2 is certainly out there.⁸⁴

But I think that as far as restructuring leagues, which is what initially the panel was talking about here, that is a very different issue, and it is not clear yet how, if at all, the impact of the *Fraser*⁸⁵ case or the structure of any of the new leagues will impact the existing leagues. I think it is a very detailed analysis that certainly we cannot really address on this panel, but it raises some very interesting questions.

MR. KESSLER: Thank you.

The single-entity issue is a wonderful example of how the legal system and lawyers can mess up a business structure in this country. It is also a good example of why panels like this can be very dangerous, because they tend to raise concerns for businessmen that do not make any sense, except for the desire to achieve a particular legal result in a courtroom, as opposed to achieving a particular result in the marketplace.

Basically, as we have seen so far, the single entity has been a failure from a business sense. MLS, for example, which is the leading example of a purported single-entity structure, claims in court that it lost \$250 million during its first five years of existence—that is terrible.⁸⁶ Its revenues last year were less than its first-year revenues—that is abysmal.

Why has this happened? It has happened because fans do not like the claimed single-entity structure. Entrepreneurs must be given the power to hire the players for their individual teams. The absence of control over players and rosters is something that is a detriment, not a positive, because you create an image that there is one giant fantasy soccer game that someone plays in the league office in which players get ripped from their fans by a central authority and reallocated

⁸⁴ Section 2 of the Sherman Act states in relevant part: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony.” 15 U.S.C. § 2 (2001).

⁸⁵ See *Fraser*, 97 F. Supp. 2d 130.

⁸⁶ See *Fraser v. Major League Soccer L.L.C.*, Trial Transcript of 10/11/2000 at 2014:2-5; see also *supra* note 75.

around the country. MLS is having trouble finding new investors because few entrepreneurs want to own such a thing.⁸⁷

So what has the single-entity structure accomplished for MLS? Well, so far, pending appeal, it has enabled the MLS operator-investors to get away with having no competition for players, which is a wonderful, anticompetitive objective to achieve if you are an owner, but not if it also prevents you from growing your revenues. I will talk about the appeal issues in the *Fraser* case in a few minutes.

The bottom line is that there is a good reason why, up until now, all of the successful sports leagues in this country—and around the world, by the way (this is an international result)—have adopted a model of individual ownership of teams. The reason is that the professional team sports business is basically a local business. You get a local personality who runs it. You want an entrepreneur who will develop it. You want to create an association between the team and the local fans and have the sense that the teams are, in fact, competing, because you are selling, in sports, the product of competition, in which each team has a separate interest from the other teams.⁸⁸ That is what works. It is what has worked from the very beginning of baseball, basketball, football, hockey, rugby and soccer around the world, and in almost any sport that you can think of.

Generally, economists will tell you that businesses adopt structures because they are efficient and they are effective. If the so-called single-entity structure had independent economic value, it would have been adopted thirty years ago. It would not have taken until

⁸⁷ Eric Fisher, *Anschutz Takes Over United; Billionaire Operates Three Other MLS Teams*, WASH. TIMES, Feb. 16, 2001, at B1 (noting that control over the D.C. United team gives one owner control of one-third of the teams in MLS); *MLS Eliminates Fusion, Mutiny* (Jan. 8, 2002) (containing the league announcement that both Florida teams are to cease operations, leaving MLS with only three remaining investor-operators—Philip Anschutz with five teams, Lamar Hunt with two teams, and Robert Kraft with one team), at <http://www.mlsnet.com/content/02/msl0108miatb.html> (last visited Jan. 24, 2002).

⁸⁸ Debbie Thorn et al., *The Impact of Sports Marketing Relationships and Antitrust Issues in United States*, J. PUB. POL'Y & MKT., Apr. 1, 2001, at 73, available at 2001 WL 25436089 (arguing that the product associated with professional sports is “the entertainment of competition” and that the business of sports involves competition with the players competing for space on teams, teams competing for players, and leagues competing for team locations).

now for lawyers to think of it for purely legal reasons. So the idea of trying to create a single entity to escape antitrust liability, as far as I am concerned, has been terrible not just for the players involved, but for the business of professional team sports.

The Continental Basketball Association recently collapsed as a minor league, and arguably that was in part because Isiah Thomas convinced them to change their structure to form a single entity.⁸⁹ It existed for many years, when there were individual entrepreneurs operating the individual teams. In one year, they put together a single-entity structure, and the whole thing collapsed.⁹⁰ This does not seem like a coincidence.

Most of the start-up leagues that have tried a single-entity structure have failed. We'll talk about the WNBA separately because I think that is a different case, at least economically, because it is really a structure where the teams in one league, the NBA, own another league and the NBA itself is clearly not a single entity. But the overall point is that the single-entity league, as a business model, has so far proven to be an economic failure.

So why did the MLS owners choose to form a single entity? They did it so that they could claim an exemption from section 1 of the Sherman Act and not have to compete with each other for their players. There is no other reason. In a series of antitrust cases in the 1970s, 1980s and through the early 1990s, essentially the rule was that if you were not labor-exempt by having a union in place and fighting over the meaning of the labor exemption, the restrictions imposed by owners to restrain competition for players were held to be illegal.⁹¹ There was a consistent losing record by the owners on

⁸⁹ See Lester Munson & L. Jon Wertheim, *Demise of the CBA: Music to their Ears; After Selling the Owners on his Plan to Turn the League Around, Isiah Thomas Quickly Led the CBA into Bankruptcy*, SPORTS ILLUSTRATED, Apr. 9, 2001, available at 2001 WL 8024730.

⁹⁰ See *id.*

⁹¹ See, e.g., *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (holding that the Rozelle Rule was an unreasonable restraint of trade because the Rozelle Rule was significantly more restrictive than necessary to serve legitimate business purposes); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (holding that the NFL draft was an unreasonable restraint of trade); *McNeil v. Nat'l Football League*, 1992-2 Trade Cas. (CCH) ¶ 69,982, 68,769 (D. Minn. 1992), available at 1992 WL 315292 (holding that the NFL's

this point.⁹² Absent the labor exemption, whenever you got to the merits of the case, virtually all player restraints were found to be unreasonable restraints of trade.⁹³

So the sports team owners went to their lawyers and said, “Can’t you do anything about this?” Well, one of the things they tried to do was to assert the single-entity defense for the old established leagues, and that argument lost repeatedly.⁹⁴ Even the Seventh Circuit in the *Chicago Bulls* case, which indicated that maybe, in some cases, a single-entity defense could apply, also said “but not for players, not when you are restraining competition between the teams for their employees.”⁹⁵

So the single-entity defense had little value for the old, established leagues, and the existing leagues are not likely to ever restructure themselves to become a single entity. Every one of the older teams has a totally different market value and it is unlikely that they could ever put Humpty Dumpty together again in a new single-entity structure. So the single-entity issue is really an issue for new, fledgling leagues.

Here is where the lawyers come in. They tell the entrepreneurs who are going to form a new league that, if they put all of their teams

Plan B was an unreasonable restraint of trade in violation of antitrust law); *Jackson v. Nat’l Football League*, 802 F. Supp. 226, 228-29 (D. Minn. 1992); *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984), available at 1984 WL 894; *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315 (D. Conn. 1977); *Robertson v. Nat’l Basketball Ass’n*, 389 F. Supp. 867, 890-91, 893 (S.D.N.Y. 1975); *Bowman v. Nat’l Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975); *Kapp v. Nat’l Football League*, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff’d*, 586 F.2d 644 (9th Cir. 1978); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1058 (C.D. Cal. 1971).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* See also Neal R. Stoll & Shepard Goldfein, ‘*Fraser v. Major League Soccer*’—*Sports Leagues as Single Entities?*, N.Y.L.J., May 16, 2000, at 3 (stating that judges have repeatedly failed to look past the individual ownership of teams when deciding whether traditional sports leagues can assert the single-entity defense, *citing* *Sullivan v. Nat’l Football League*, 34 F.3d 1091 (1st Cir. 1994); *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 791 F.2d 1356 (9th Cir. 1986); *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249 (2d Cir. 1982); *McNeil v. Nat’l Football League*, 790 F. Supp. 871 (D. Minn. 1992)).

⁹⁵ See *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 599-600 (7th Cir. 1996).

into one holding company to own the whole thing, they then can claim that they are a single entity, which does not have to compete with each other for players, at least under section 1 of the Sherman Act.⁹⁶

So what happens? Major League Soccer is a good example. No sports entrepreneur really wants to invest in such a league, so an internal struggle develops among the Major League Soccer entrepreneurs. “Do we really have to give up all this control? Can’t we operate our teams separately? Can’t we have separate franchise values? Do we really have to share all of our profits?” And a compromise is reached that keeps shifting, and that is what the record facts in the *Fraser* case show.⁹⁷ The MLS owners never formed a true single entity, because they did not want to give up individual team control. MLS is not a passive corporation in which people own stock and sit home and watch to see if their stock goes up or down and then sell it. MLS is a company, an LLC, in which each of the investor-operators buy the rights, in a special class of stock, to run their individual teams, and they can resell those rights, and keep somewhere between fifty and fifty-five percent of their locally-generated revenues.⁹⁸ (Just like, by the way, the type of revenue sharing that exists in the NFL, the NBA, and Major League Baseball.) The percentages vary, but the concept is the same economic structure. You can resell your ownership interest to run a sports team, and you can therefore develop a separate market value for your franchise.⁹⁹ You do not share your profits and losses.¹⁰⁰ So

⁹⁶ Sherman Antitrust Act, 15 U.S.C. §1 (2001) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal”); *see also* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

⁹⁷ *See Fraser*, 97 F. Supp. 2d at 132-33 (describing the management of Major League Soccer).

⁹⁸ *See id.* *See, e.g., MLS Eliminates Fusion, Mutiny, supra* note 87 (“[T]he League has made significant changes to its operating relationship with its teams. These adjustments will provide enhanced revenue opportunities at the local level by allowing teams to retain a greater share of revenue from ticket sales, local sponsorship and television.”).

⁹⁹ *Fraser*, 97 F. Supp. 2d at 133, 136 (operator-investors can harvest the value of the particular teams they operate by selling their operational rights or by requiring the league to pay them the fair market value of their investment).

¹⁰⁰ *Id.* “Admittedly, unlike differentiated shares of stock, the market value of a team operator’s investment will not simply reflect an aliquot share of the whole enterprise, but

the MLS investor-operator in New York would have an entirely different set of profits and losses than the MLS investor-operator in Chicago, based upon how he operates his team and manages his revenues and expenses.¹⁰¹

Who hires coaches in MLS? The individual MLS operator-investors hire them.¹⁰² The League does not. All of the MLS team employees are separately hired by and paid for by the individual operator-investors, except for the players.¹⁰³ This is no coincidence. The players are the ones who are centrally hired by the League in order to prevent any competition from taking place.¹⁰⁴

So, in the end, I do not think MLS is a true single-entity structure and I don't think it is exempt from section 1 of the Sherman Act. Tandy O'Donoghue does.¹⁰⁵ In the end, the First Circuit will sort all of this out.

But whether or not MLS is a true single entity, the point is that the MLS structure has clearly not been a good thing for the business of MLS. The concept of a single entity has become the exclusive focus of the operator-investors in Major League Soccer. It blinds them to the fact that operating a league in which the individual teams do not hire players is an unattractive business for the fans. The MLS owners sit there and say, "We are going to fight to preserve our structure." Why? So that they can lose another \$250 million? Would you invest in such a single entity? It does not make any sense, but that is where we are.

On the section 2 issue, we also did not get to present a section 2 claim against the MLS single-entity structure because the judge ended up ruling that the MLS single entity not only was immune

will also reflect in certain respects the success of the local operation." *Id.*

¹⁰¹ *Id.* at 133 (noting that, for example, in 1997 individual team operators received 100% of the first \$1.24 million and 30% of the excess over \$1.24 million of local broadcasts and sponsorship revenues (with annual increases), and 50-55% of ticket revenues from home games and stadium revenues).

¹⁰² *Id.* ("It is undisputed that "team operators are responsible for . . . general team administration, including salaries of the team's management and coaching staff.").

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 137-38.

¹⁰⁵ See *supra* text accompanying notes 59-85.

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 439

from section 1 review, but that it was immune from the section 2 case as well. The section 2 trial thus ended up being about an entirely different issue, the conspiracy between MLS and the USSF to exclude a rival soccer league. In this case, the jury came back and found that there was no relevant market proven.¹⁰⁶ So the MLS jury trial tells us nothing about a possible section 2 claim against a single-entity structure. Maybe we will find out more about this on appeal.

As for the WNBA, I will say a couple of words about that. Obviously, the NBA is not a single entity.

MR. DERSHOWITZ: That is not so obvious.

MR. KESSLER: Well, okay. It appears to me that the courts will not find the NBA to be a single entity, at least with respect to its players. We have several decisions that would establish that point at least.¹⁰⁷

The NBA is a traditional non-single-entity structure. It went into the WNBA as a second business. The NBA teams, in effect, own the WNBA, and they claim single entity in that sense.¹⁰⁸ However, the individual NBA teams, as I understand it, also have the right to operate specific WNBA franchises and keep much of the profits from such operations. We will see how it works from an economic standpoint. The New York Knicks, to give an example, are owned ultimately by Cablevision in a structure, which everyone, I believe, recognizes is a separate entity from the other owners in the NBA. The Knicks operate the WNBA's New York Liberty, generating different profits and losses than the other NBA owners make on their WNBA teams. Perhaps this hybrid model will have a better chance of succeeding with fans in the marketplace than the MLS model,

¹⁰⁶ Fraser v. Major League Soccer, Trial Transcript of 12/11/2000, at 6805:2-22.

¹⁰⁷ See Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 890-91, 893 (S.D.N.Y. 1975); Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1058 (C.D. Cal. 1971); see also Robert E. Freitas, *Overview: Looking Ahead at Sports and the Antitrust Law*, Special Sports Issue: Antitrust and the Business Side of Sports, 14-SPG ANTITRUST 15, 16 (2000) (noting that the NBA is not a single entity with respect to market for players' services).

¹⁰⁸ Sarah Talalay, *WNBA Is Achieving Steady, Cautious Growth*, RECORD (Northern N.J.), June 18, 2000, at S04, available at 2000 WL 15819232 (stating that the WNBA was created as a single entity and that all twenty-nine teams in the NBA own equal shares of the WNBA).

because WNBA fans seem to believe that the WNBA teams have more control over how their players are signed and allocated.

In terms of a single-entity defense, my own view is—and we will see what happens in the First Circuit—that the WNBA owners will not be able to hide under this defense. The reason is that the WNBA teams appear to be controlled by a group of separate entities that do not share profits and losses in an economic sense.

Now, if we lose in the First Circuit, and it eventually becomes the law that merely forming an LLC structure governs over economic reality, then we might face a different story. But for now, we have a district court decision in *Fraser* that I think is wrong, and we will find out what happens on appeal. The First Circuit will obviously have something to say about the future of the single-entity defense, and it may get played out in other Circuits as well.

In the labor exemption area, there were competing rules in the different circuits for years before the Supreme Court finally took the issue in *Brown v. Pro Football* and resolved the issue in the courts.¹⁰⁹ Eventually, that might happen with the single-entity issue as well.

MR. EDEL: Jeff, thank you.

I think he has thrown down the gauntlet for you, Jamin.

MR. DERSHOWITZ: I guess he has. I was asked to fill in at the last minute for the XFL General Counsel, so I want to apologize in advance for those of you who were expecting a smash-mouth, in-your-face, sexually charged legal debate. About the only thing the WNBA has in common with the XFL is the amount of time our cameras stay focused on women during game broadcasts.

I was asked to discuss the day-to-day business differences between working for a single-entity structured league like the WNBA and a more traditional league. So I walked down the hall before I came here today and compared notes with the NBA General Counsel.

¹⁰⁹ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (holding that a non-statutory antitrust exemption applies where there is a collective-bargaining relationship between a union and employer).

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 441

With respect to collective bargaining, no one on this panel would argue with the fact that the NBA is a single entity—it speaks with one voice to the Players Association.¹¹⁰ The same is true of the WNBA.¹¹¹

The NBA General Counsel spends a lot of time negotiating and drafting media contracts for TV, radio, and the Internet—leading few to argue that the NBA is not a single entity with respect to negotiating media contracts.¹¹²

The same applies with respect to sponsorship and licensing agreements. The NBA acts with one voice as a single entity when it licenses T-shirts and sells national sponsorships and video games and the like.¹¹³ Again, the same is true of the WNBA.¹¹⁴

The other thing that both the NBA and WNBA spend a lot of time doing is enforcing trademark and other intellectual property rights. Again, very few people on this panel would argue that the NBA is not a single entity when it comes to dealing with its trademark and intellectual property rights.¹¹⁵

Baseball may be the least centralized of all the major sports, but even baseball is trending in the direction of becoming more centralized. It has just recently centralized its Internet businesses, and it is obviously a single entity with respect to its TV negotiations, collective bargaining and licensing.

It is really a historical accident that many of these traditional so-called sports leagues are not considered single entities. When the

¹¹⁰ See *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995) (stating that for the purpose of negotiating with the Players' Association, the NBA teams have bargained as a multi-employer bargaining unit).

¹¹¹ See Stephen Nidetz, *Hunter Gives Stern Silent Treatment*, CHI. TRIB., Nov. 14, 1998.

¹¹² See *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (concluding that when acting in the broadcasting market the NBA is more like a single firm than multiple firms).

¹¹³ See Brandon L. Grusd, *The Antitrust Implications of Professional Sports' League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & L. 1, 11-12 (1999).

¹¹⁴ See Alisa Solomon, *Clutch Purse; Women's Stake in the Sports-Industrial Complex*, VILLAGE VOICE, Apr. 28, 1998.

¹¹⁵ See Louis Klein, *National Basketball Association v. Motorola, Inc.: Future Prospects for Protecting Real-Time Information*, 64 BROOK. L. REV. 585, 597 (1998).

NBA was formed fifty-some years ago,¹¹⁶ when eight guys got in a room and decided to start a league, they very easily could have started a corporation or an LLC, if that format was around back then. Instead, they started a joint venture. I do not think, as Jeff might say, that it was because they needed to show the fans that they were competing. I think that it was just a business decision they made at the time and it bears very little reference to the way the league operates today.

I took the liberty of thumbing through the NBA Operations Manual before I came over here this morning. It is full of rules and regulations telling the teams how they must operate if they want to be a part of the NBA family—a member of the League.

It has a lot of rules and regulations that you might expect to see. For instance, how far out is the three-point line, how big is the basketball, how long is each quarter.¹¹⁷ But it also has a lot of rules you may not expect to see. I think it has about ten pages on what team mascots can and cannot do on the court.¹¹⁸ They are allowed to mock referees, but only during time-outs and only if they get the referee's permission.¹¹⁹ They are not allowed to rappel from the ceiling.¹²⁰ They are not allowed to hang on the rim.¹²¹ They are not allowed to stand on the scorer's table.¹²²

Decibel levels, noise levels, and what kind of music can be played during the game and time-outs, is all outlined in the Manual.¹²³

Championship ring guidelines are also detailed. There has to be a certain number of diamonds in the championship ring when the team

¹¹⁶ See Rosenbaum, *supra* note 22, at 771 n.180; see also Christian M. Mc Burney, Note, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925, 942 n.104 (1985) (establishing that the NBA emerged in 1949).

¹¹⁷ The NBA Operations Manual is an internal league document, and is not available for citation.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Supra* note 117.

wins the championship and a certain level of clarity in the diamonds.¹²⁴

There are even regulations about the number of toilets that a new arena has to include if an NBA team is going to play in it.¹²⁵ So every level of detail is contained within this Operations Manual. It really exhibits just how centralized all of these businesses have become—especially the NBA, the league that I used to work for full-time and still occasionally moonlight for.

It is too easy to say that a traditional sports league is not a single entity. The court cases are certainly starting to trend in the other direction. Jeff mentioned the *Chicago Bulls* case.¹²⁶ That case certainly went pretty far in saying that the NBA was a single entity with respect to a lot of its businesses.¹²⁷ It has taken a long time for the courts to recognize the economic realities of how all of these businesses really operate—but the pendulum has clearly swung.

There is one major difference between what I do and what the NBA General Counsel does. The time that he spends administering the NBA salary cap is the time that I spend negotiating and signing player contracts directly with the League.

Jeff also used the example of the Continental Basketball Association (hereinafter “CBA”). It is a good example of how the single-entity structure is not a magic bullet. MLS is losing money.¹²⁸ The WNBA is losing money.¹²⁹ The ABL was a women’s professional sports league that organized as a single entity, but it had a bad business plan and it went out of business after a couple of

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593 (7th Cir 1996).

¹²⁷ *Id.* at 600 (concluding that the NBA is closer to a single firm than a group of independent firms when acting in the broadcasting market).

¹²⁸ Steve Davis, *Playing On: Concerns Remain, But Survival No Longer Main Issue*, DALLAS MORN. NEWS, Apr. 5, 2001, at 4B, available at 2001 WL 18812247 (explaining that Major League Soccer lost approximately \$250 million over its first five years in business).

¹²⁹ Shannon Rose, *Growing Pains Survival of WNBA Depending on TV 1st, Bigger Fan Base 2nd*, ORLANDO SENT., July 15, 2001, at C1, available at 2001 WL 9197186 (reporting that the “WNBA is still losing money.”).

years.¹³⁰ It paid players too much, and it played during the wrong season.¹³¹ The magic bullet that the ABL may have thought the single-entity structure provided did not work. Maybe when Isiah Thomas formed the single-entity structure of the CBA, he also mistakenly thought it was a magic bullet.¹³² So I agree with Jeff that the single-entity structure is not a magic bullet in any way, shape, or form.

There are other issues—negatives—regarding the single entity structure that are rarely spoken about. One is more personal and one is more global.

I will start on a personal note. This is the time of year when the WNBA negotiates and signs player contracts. In the next two months, I will be negotiating about a hundred veteran contracts and about another hundred rookie contracts. It is not my favorite time of year. It is certainly not my family's favorite time of year. If I am a little grumpy today, it is because I have already had several salary conversations this morning with players and their agents.

The discussions are really quite sobering. These are elite players that have worked very hard to get to the top of their profession. And I have to explain to them that they are not going to get A-Rod money, they are not going to get Shaq money, in fact, they are not even going to get first-year lawyer money.¹³³ They are going to

¹³⁰ See Jayda Evans, *Summer Storm Brewing*, SEATTLE TIMES, May 30, 2000, at D1, available at 2000 WL 5538069 (stating that the ABL filed for bankruptcy on Dec. 12, 1998).

¹³¹ See *id.* (reporting that "player salaries were the death of the ABL.").

¹³² See Lester Munson & L. Jon Wertheim, *Demise of the CBA: Music to their Ears; After Selling the Owners on his Plan to Turn the League Around, Isiah Thomas Quickly Led the CBA into Bankruptcy*, SPORTS ILLUSTRATED, Apr. 9, 2001, available at 2001 WL 8024730 (describing the demise of the CBA after Isiah Thomas bought the league and transformed it into a single entity).

¹³³ See Tim Brown, *Shaq's Max O'Neal Finally Gets His Three-Year, \$88.4-Million Extension, Answering a lot of Questions about the Future of the Lakers*, L.A. TIMES, Oct. 14, 2000, at D1, available at 2000 WL 25907032; Earl Gustkey, *Salary Doesn't Pay in WNBA Pro Basketball: Season Starts Today with Players Unhappy They Receive only a Third of Earning Potential in Europe*, L.A. TIMES, May 29, 2000, at D4, available at 2000 WL 2245437; *Rangers Break the Bank, Sign Alex Rodriguez for Ten Years \$252 Million*, DETROIT FREE PRESS, Dec. 12, 2000, available at http://www.freepress.com/sports/baseball/horn12_20001212.htm (last visited Jan. 5, 2002).

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 445

receive on average something in the range of \$50,000 to \$60,000.¹³⁴ Those figures are a hard pill to swallow and they cause a lot of understandable animosity.

I think the low point for me was when a player thought her agent was not doing a very good job, and I was not budging, so she decided to put her grandmother on the phone. It was a very unpleasant conversation, and the grandmother used words that I had never heard my grandparents use. But it was from the heart. She tried to explain that I did not understand where her granddaughter had come from, and I could not possibly understand how hard she had to work to get to the level she was at. She found it unconscionable that her granddaughter was not being offered six figures. It was a very hard conversation. But that is the personal aspect of my job that I hate and will always hate, and it is, I think, endemic, as Jeff said, to the single-entity structure.

But there is a more systemic issue with the single-entity structure as well. We have a member of the WNBA Players Association in the audience who was on one of the earlier panels here, and I think he might tell you that when we go into collective bargaining, we are going to be sitting across the table—myself, the President of the WNBA, Val Ackerman,¹³⁵ and others—we will be sitting across the table from players whose salaries we negotiated.

In a traditional sports league, in the NBA model, for example, those decisions are diffused among the twenty-nine general managers and the players are not sitting across the table from the people who made those decisions directly. They are sitting across the table from the Commissioner and the Deputy Commissioner and the General Counsel.

The union may be able to really galvanize and focus the players on who the bad guys are when they are sitting directly across the table. So I think when we do have collective bargaining negotiations in the

¹³⁴ Joanna Cagan, *Ballin' Abroad: European Pro Leagues Still a Destination for Women Hoopsters*, VILLAGE VOICE, Apr. 24, 2001, available at 2001 WL 9089405 (stating that \$55,000 is the average salary for a player in the WNBA).

¹³⁵ For a brief biography of Ackerman, see http://www.wnba.com/basics/ackerman_bio.html (last visited Jan. 5, 2002).

next year or so, it will be interesting to see whether that galvanizing effect has an impact and whether it is something that really is not to the benefit of the League—signing players directly from the center.

There has been a lot of discussion about why leagues form as single entities. We put a lot of thought into it. We did not just decide that the single-entity structure is a magic bullet, to use Jeff's phrase.

We formed as a single entity because it more accurately reflected the way that we do business—from the center—and for the reason that Tandy said, to try our best to shrink the target that is on all of our backs. As anybody who has worked for a professional sports league knows, that is the antitrust litigation target. Antitrust litigation has become the weapon of choice. Fortunately, it did not work against Major League Soccer, which has somehow been able to absorb huge litigation costs—costs that I am not sure the WNBA could absorb.¹³⁶ But fortunately we have not had to test that one out quite yet.

The bottom line with respect to a sports league is not whether it is a single-entity structure or whether it has a more traditional structure; it is the business plan. A successful league is about getting butts in the seats, finding a way to make it work, creating local excitement. Everything else flows from that.

To paraphrase the guy with the Arkansas accent who is living up in Chappaqua now: it is the business plan, stupid; it is not the legal structure.¹³⁷

When you are starting a sports league, the lawyers are the least important people in the room. If you are going to compete in the really crowded entertainment marketplace right now, get the lawyers out of the picture, and figure out a way to get people interested in your product.

¹³⁶ Grahame L. Jones, *MLS: Jury Rules in Favor of League in Player Suit*, L.A. TIMES, Dec. 12, 2000, at D3 (stating that Major League Soccer won the antitrust lawsuit brought by the players).

¹³⁷ Referring to former President Bill Clinton, whose unofficial campaign slogan in 1992 was, "It's the economy, stupid."

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 447

MR. EDEL: Jamin, thank you.

I thought what we would do at this point is open up for questions. I would like to take the prerogative of the chair to ask the first one. Perhaps I should address this specifically to Ken and Jamin, which is on Jeff's point: Does the single-entity model reduce entrepreneurial zeal? What we have seen in each example of a single-entity league is that the league is losing money. Some may not survive, some may come out of it at some point, but they are losing money. Is this inherent in the single-entity model, and is that a good reason then to avoid it?

MR. SHROPSHIRE: Well, the entrepreneur is the person at the top of the league. That is the person who may or may not come out with some funds on top.

Roller derby, from our childhood, that was the single entity that worked. Every time you saw the New York Bombers and L.A. T-Birds, they were in the same facility, same people switching teams, all in one city. I do not know who ran the thing, but people recognized it as entertainment and were not looking at it for the same sort of competition that you look for traditionally in sports.

But if you take away the individual owners, there may be some tweaking that will come up that will give somebody a way to have control of a franchise in a way that the fans will recognize. But so far, I do not think anybody has come up with a way. In the traditional model, we are used to seeing teams being led by owners that have their own self-interest in winning games.

MR. DERSHOWITZ: Again, I think it is the business plan. You can accomplish anything if you can get the local buzz. But I do think it is a local business. I think that is an important thing to discuss. It can be a single entity and still be a local business. General Motors understands that they have to take into account the local dealers and let the local dealers make some important decisions about how they manufacture and market their cars. We believe that as well in the WNBA.

Whether we are a single entity or in the case of the NBA, a so-called traditional sports league, we are going to give a lot of power

and a lot of input to the local owners, and we are also going to make sure that the fans understand that the local operators on the WNBA side, the local owners on the NBA side, have significant input with respect to the players and the product on the court. Nobody seriously doubts the competitiveness of WNBA teams, even though the team operators do not own the teams.

As far as turning a profit, again, it is just that there are too many leagues starting out in a crowded entertainment marketplace right now. We are about to start another league, the NBDL, the National Basketball Developmental League, which we are going to start as a single entity as well. But it is just as crowded a marketplace today, and everybody wants to get on the bandwagon, making it very tough.

I do think that the WNBA will turn a profit in the future, whether we are a single entity or not. I think the marketplace is ready for it, and I think the fans are interested and it will take.

QUESTIONER: Mr. Kessler, you spoke very adamantly about the single-entity leagues. It seems that, while perhaps it may not be the optimal structure, it is preferable to not having a league at all. I was wondering if you would speak a moment on whether you think that in the absence of the single-entity option, new leagues would even be launched, given the risks?

MR. KESSLER: Absolutely, because if you accept my premise that they have a greater chance of generating revenues and fan interest if they are not formed as a single entity, then simple economics will tell you that they will be more attractive to investors and will attract fans with a traditional league structure. Plenty of new leagues have been formed over the years using such a structure. That is how you got the American Football League, which eventually merged with the NFL. It was not because it was a single-entity structure. If there is a market and sufficient demand for new leagues, and absent some other anticompetitive activities going on, then you would expect new leagues to form.

My main point is if the single-entity structure were efficient, it would not be driven by legal advice, which clearly it has been. If

2002] RESTRUCTURING PROFESSIONAL SPORTS LEAGUES 449

you look through the evidence in the *Major League Soccer*¹³⁸ case—and this will all be in the First Circuit brief, so read my brief and you will see it—the evidence shows that the decision to form a single entity was driven by antitrust advice, it was not driven by economics or market forces. There was a very specific legal reason why the MLS ownership wanted to do this.

I think the whole issue of entrepreneurship is key. I will use the NBA as an example. Mark Cuban, the owner of the Dallas Mavericks, is a Commissioner's nightmare. However, he is wonderful for Dallas. If you look at what has happened in attendance in Dallas, in the competitiveness of the Dallas team, it has been a brilliant entrepreneurial play in what had been a very moribund NBA marketplace.¹³⁹ Now, Mr. Cuban drives the Commissioner crazy. He is the antithesis of centralized league control. But that is because the NBA is not a single entity. They do not allow for that. The NBA will have different levels of compliance with league rules by different owners, and they are not all going to be Mark Cubans. But the point is that allowing this type of independence is a good thing from a product and fan standpoint; it is not a bad thing. The single-entity structure, by contrast, stifles that entrepreneurial ability.

QUESTIONER: This question is directed to Mr. Kessler. You make the argument that the structure of the MLS is adversely affecting the product. But you do not seem to address the issue that perhaps the product of soccer in the United States may just be too flawed to work. If we look at the past, in the United States no soccer league has ever succeeded—the NASL, any indoor soccer league, anything else.

And also, perhaps for start-up leagues in America, there is not the market for them that people seem to think that there is. In fact, no

¹³⁸ 97 F. Supp. 2d 130 (D. Mass. 2000).

¹³⁹ Steve Frank (reporting), *Profile: Entrepreneur and Dallas Mavericks Owner Mark Cuban*, CNBC: Early Today, Apr. 2, 2001, available at 2001 WL 22705370; Barbara Barker, *Maverick Owner: He's Not Just About Fines; Billionaire Cuban Turns Dallas, NBA Upside Down*, NEWSDAY, Feb. 4, 2001, at C8, available at 2001 WL 9215239 (describing the success Dallas has encountered since Mark Cuban became the team's owner).

start-up league has truly been a stable financial success since the NBA really started fifty years ago. Can you address those concerns?

MR. KESSLER: Sure. They just came out with a survey of fan interest. It was published in the most recent *Sports Business Journal*. Professional soccer as a whole—they do not limit it to any league—is more popular among fans in the United States than, for example, tennis or golf. It is not that far below hockey in terms of its level of fan interest; in fact, it is quite close to hockey. It is also quite close to some of the college sports. There is clearly a market and demand for professional soccer in this country at a respectable level that can more than support it.

In fact, in the first year of its existence, MLS on its revenue side—and this is in the public record—had more than \$60 million in revenue. That is extremely respectable for the first year of operation.

So the idea that there is not sufficient demand to support professional soccer in the United States is just not correct. I think soccer in this country can succeed. I think its single-entity structure is hurting it, not helping it.

QUESTIONER: Let me just ask a follow-up to the first issue before we address the second issue. I happen to be a tremendous soccer fan—European soccer, the top leagues in the world, simply because of fan interest and money over there. I have never attended or watched an MLS game in the United States.

MR. KESSLER: Why not?

MS. O'DONOGHUE: You should.

MR. SHROPSHIRE: Why not?

QUESTIONER: A basic lack of interest.

MR. KESSLER: Why do you lack interest?

QUESTIONER: I do not know who the players are.

MR. KESSLER: Ah, okay.

QUESTIONER: And, in general, the quality of the League is simply not the same as it can be in an England, in an Italy, in a

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 451

Spain, because there is simply so much more money and interest there, just as a basketball league in Italy can never achieve what it can in the United States, simply because of interest and money.

MR. KESSLER: If you look at those leagues that you are interested in, they all obviously are organized along independent ownership where the teams compete. In fact, in soccer, as you know, they have this relegation system, which I actually think is brilliant. For those of you who are not soccer fans worldwide, in the second-tier leagues, the best teams can play their way into the top league, and the worst teams in the top league play themselves into the second league. It creates yet another competitive inducement for teams to improve themselves and creates tremendous interest for fans.

You do not know many MLS players in the United States. That is exactly the problem, and that is because the single-entity structure is incapable of developing individual player personalities in local markets, who fans can identify with on any systematic basis. In fact, the few times that players in MLS have been developed in certain markets, they have ended up getting moved by the single entity to other franchises, over the protests of the investor-operators who were running the teams. This does not create fan interest. This is the problem.

MR. EDEL: Tandy?

MS. O'DONOGHUE: Needless to say, I disagree. The single-entity structure is not the issue here. I think that your answer is the answer that, unfortunately, Major League Soccer has been hearing. It is not, "We don't come to your games because you are a single entity." It is a difficult proposition. Soccer clearly in this country is not what soccer is in the countries where it is *the* game.

England is a perfect example. I have a hard time imagining that if the premier league were to turn into a single entity, people would stop going. I mean, that is what they live for over there.

I also have a hard time with the fact that the single entity has prevented people from learning who Cobi Jones is.¹⁴⁰ People here

¹⁴⁰ For a brief biography of Jones, see <http://www.lagalaxy.com/roster/cobijones.html>

may not know who Cobi Jones is, but I think the reason is because you are following other sports in a crowded marketplace, you are not interested in soccer. That is part of Major League Soccer's problem.

I think the people at MLS probably shudder at the thought of where the league would be were it not a single entity. The single entity has not put the league where it is. What has put the league where it is—and the people at MLS know this, and know that these are the things they need to work on—is difficulty with fan interest, regardless of whether a survey says that it is more popular than men's golf or women's tennis.¹⁴¹

If anyone has a chance to go to Columbus, Ohio, I urge you to stop by Crew Stadium.¹⁴² That is how soccer is intended to be presented to its audience, in a small specific stadium—not at Giants Stadium with 76,000 seats, where you only want to fill 20,000 to have your ultimate soccer game. That is how it is meant to be played.

So there are very specific packaging issues that MLS has faced, it knows it is facing them, and it will continue to face them—including educating people about soccer and making the stars known.

The local operators, in addition to the teams that MLS operates, go out of their way to educate their markets about their important players. So there are other struggles there that have nothing to do with the single entity. In fact, I think the single entity is a critical part of the reason MLS is still here today, despite the litigation that has surrounded it.

MR. DERSHOWITZ: There are so many ways to have local incentives. Jeff wants player salaries to go through the roof; that is his only goal—an admirable quest. But you can create fan excitement and you can give local investors all the incentive in the world to win by using many different types of mechanisms. It does

(last visited Jan. 5, 2002).

¹⁴¹ Soccer is the most popular sport in the world today. Walton Morais, *Brazilian Soccer Sensation*, BUS. TIMES, Dec. 31, 1999, at 33, available at 1999 WL 27555043.

¹⁴² Crew Stadium is the only soccer-specific stadium in the United States. It holds 22,500 fans very close to the field to keep them in the action. See Soccer's New Work Site, at <http://www.columbus.org/showcase/crewstadium> (last visited Jan. 5, 2002) for more information on Crew Stadium.

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 453

not have to be the traditional joint venture or partnership model. You could simply have local incentives, which we have in the WNBA, where a lot of local revenue gets retained. You can have bonus structures for winning. There are all kinds of things you can do.

You do not have to dismiss the single-entity structure, as Jeff does, just because player salaries do not get “A-Rod’ed” through the roof every time you turn around.

MR. KESSLER: Actually, the only way player salaries go up substantially is if revenues can support it, no matter what model we create. I can have an entirely competitive marketplace, and if there are no revenues, then there are not high player salaries, because you have to have revenues. The reason why teams bid for players in the competitive marketplace is because they believe the player is going to enhance their ability to make more money. Otherwise, you would not bid.

MR. DERSHOWITZ: What about the Mark Cubans?

MR. KESSLER: That is a good example.

MR. DERSHOWITZ: Mark Cuban is doing this because he’s got play money and he wants to win. It has nothing to do with revenues.

MR. KESSLER: I do not agree with that at all. Look at the attendance at his team. Mark Cuban has made much more money for his team this year through his pursuit of players and other entrepreneurial activities.

MR. DERSHOWITZ: No. He has lost much more money than the previous owner. The reality is he spent money to try to get the buzz going, and he has done a heck of a job and we love it. You say he is the Commissioner’s thorn. Mark Cuban is doing great things. I mean, do we like it when he jumps on the court? No.

MR. KESSLER: Well, then we agree.

MR. DERSHOWITZ: Yes. But it is not about revenues with him, it’s toy money, it’s play money.

MR. KESSLER: I think it is about making his team successful. He likes to win, but that is all part of it.

MR. DERSHOWITZ: Yes. Nothing to do with revenue.

MR. EDEL: Why don't we go to the next question, now that we seem to have found some common ground here?

QUESTIONER: Going back to that issue, though, since the American Basketball Association was losing millions and had to merge with the NBA, the American Football League was losing millions and had to merge with the NFL—the World Hockey Association, the United States Football League (hereinafter "USFL"), the World Football League, all were traditionally structured leagues; they all went out of business. Isn't it more likely to assume that the reason any sports league coming into this marketplace fails is because of the competitive nature of the market, not the single-entity structure? And also, don't you think that your lawsuit, which would have made the investors liable for triple damages, scared away any potential investors in the League for the last four years?

MR. KESSLER: I doubt it. The lawsuit could have been settled at any time for a fair system for the players. But the MLS owners are not interested in that. Rather, they are only interested in defending the single-entity structure of the League, so that is what we are going to have to fight about.

But the point is, you are quite right, that sports is a competitive business. No one is saying, and I am certainly not saying, that if MLS did not have a single entity, it would be guaranteed success. However, on balance, the single entity is a negative in their ability to succeed, and I think it is a contributor to their lack of success. But you are quite right; MLS owners would still have to compete and be successful, with or without it. The league still needs good owners; it still has to have a sound business plan. I also agree that a business plan and leadership are critical at the individual team level in terms of making the sport successful. So no one is saying this would guarantee success.

Now, there are different things going on here, too. For those leagues that you mentioned, there were different things going on in

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 455

each case. The American Football League was successful, and that was a completely different case from some of the other leagues you mentioned. The USFL was unsuccessful, but it won a monopolization case against the NFL, but only won a dollar, so there was really a strange set of circumstances there.¹⁴³ There are a lot of different reasons why different leagues failed.

On the whole, what seems to have worked best, if you look at what has proven itself, have been leagues like the NFL and the NBA, where you have individually owned and operated teams who compete for players; but yes, you also have a certain amount of joint-venture activity.

I would not say that all league centralization is bad. It is subject to antitrust review. But, having joint marketing and promotion, and doing the things the leagues do in licensing and business development, have generally been good things. These efforts are subject to antitrust review, but they can still be reasonable agreements to advance the joint-venture business. So a complete separation in terms of team operations may not be economically desirable either. In fact, I do not think it would be.

QUESTIONER: Has anyone considered doing it from the other direction, starting perhaps as a single entity and then ceding more and more rights to individual operators so they almost grow into becoming owners, give the league some traction for a few years and then start moving toward a more traditional format? Has anyone thought of that, or are there any downfalls there that I am not thinking of?

MR. DERSHOWITZ: We think about it every day. We are in an experimental mode. We are looking for anything that works. I think it was probably the right decision to initially organize the WNBA as a single entity. Five years from now, it could be, we will shake it up. I have no idea.

¹⁴³ *United States Football League v. Nat'l Football League*, 842 F.2d 1335 (2d Cir. 1988).

QUESTIONER: I mean, would it be an instant switch, or are you considering, like I said, slowly ceding more power to the individual operators?

MR. DERSHOWITZ: We are also considering more centralization. This is a business where we are open to any kind of suggestions to make this thing work. I do not think anybody has thought about blowing up the model completely, but if we can think of a way to make this thing profitable—improve the P&L's—we would do it in an instant.

QUESTIONER: In the effort to keep salaries down, given the fact that this is sort of a global enterprise—with the exception of the WNBA, because women's opportunities are so small—do you think that you may be blowing the opportunity to take it to the next level, in that if you look at where a lot of the NHL talent is coming from right now, it is coming from abroad because they pay more and it is a higher value for the players. Or if you look at the NBA, increasingly, the NBA rosters are filled out by international players; they are still predominantly Americans, but there is some very strong international talent.

You look at soccer, though, and the game is far stronger abroad. Why in the world would somebody who is playing with one of the premier leagues down in Brazil or in Germany come to play in the United States when their salary may shrink in fact,¹⁴⁴ in terms of endorsements and all that? Without that buzz, do you think that you may not be attracting the talent which does then pull the fans like that, and say, "Well, hey, you know what? I'm going to go watch the German game today."

MS. O'DONOGHUE: Well, I think that is certainly an issue when you really have hard-core soccer fans who are very interested in the European and the South American games. But part of MLS's focus has always been to develop American players, and it is doing so. There are some really young players that it has worked with

¹⁴⁴ See Sullivan, *supra* note 61, at 902 (MLS has a difficult time keeping players because they do not pay as much as European soccer teams even if the European soccer team is in a second- or third-division league).

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 457

extensively, and it also has a specific program, Project Forty, which develops young players.¹⁴⁵

You are right, though. You recognize a key issue. There are limited funds and you cannot go out and afford every star player. Even if you only want a limited number of those high-caliber European players or South American players, you cannot afford all of them. In fact, probably the costliest of the costliest you cannot afford at all. So you have to make those business judgments about where you are going to spend your money.

QUESTIONER: I have a follow-up. Even if you take the developmental nature of American soccer, why do you end up with the dynamics where you have millions of American kids playing soccer,¹⁴⁶ but at some point in time when they reach a level of talent at a little bit older age, a bunch of them switch over to other more lucrative sports? So you may have fantastic athletes who at the high school level all of a sudden start to play basketball or football.

And also, if you look at the American stars that have developed, they have not developed through the American competition. They are predominantly stars who have developed in the international competition as well as the United States such as Cobi Jones,¹⁴⁷ and Alexi Lalas.¹⁴⁸

MS. O'DONOGHUE: Well, if you look at Cobi and Alexi, those are two players who predate MLS, so they certainly started to develop before MLS was around, and they are definitely a product of being part of the national team.

¹⁴⁵ Project Forty is a developmental program funded by MLS to develop players selected by teams through the MLS draft, or if signed after the draft, through a lottery system. See Kevin Coleman, *Trade Winds Blow Through MLS, Too: Single-Entity Structure Doesn't Hinder Movement*, DENVER POST, July 2, 2001, available at 2001 WL 6756205.

¹⁴⁶ According to the Soccer Industry Council of America, the number of youths (under nineteen years old) registered to play is 3.6 million, a figure that has grown at a rate of eight-to-ten percent annually between 1990 and 2000. See Haya El Nasser, *Commotion Kicking Up Over Space for Soccer*, USA TODAY, June 16, 1999, at 17A, available at 1999 WL 6845590.

¹⁴⁷ See *supra* note 140.

¹⁴⁸ For a brief biography of Lalas, see <http://www.lagalaxy.com/roster/alexilalas.html> (last visited Jan. 5, 2002).

But if you are talking about the kids right now that are twelve, thirteen, fourteen, fifteen, I think that is where MLS's real opportunity is. By demonstrating to them that, "We now have a place for you to play, so we are encouraging you stick with soccer; sure, play your other sports, but now you have a place to come to, instead of abandoning the sport or thinking 'Okay, I am going to do my best, but then I will go play overseas,'" MLS is making every effort to hold on to the talented American players.

By the same token, there are those players who it is simply not in a position to get at all, the younger stars on the national team who bypass MLS altogether and simply go straight to Europe. It is a matter of getting the League more on par with the European competition. That is coming. It is going to take a little while.

But I think certainly the youth concentration and focusing on making an effort to tell those players, "Develop, we have an interest in you, we have a place for you," is going to be turning around in a couple of years. You know, Bobby Convey, he is a great example. If you take an interest in a younger kid who is obviously very talented and make it clear that he will have a place to play, you have a good shot of not losing him.

MR. KESSLER: Virtually every MLS player you could mention who anybody would have heard of in the United States as a famous U.S. player has been developed by the national team—where there is, by the way, a sense of individual player identity, an organization which develops and promotes players and people get interested in them. You cannot name an MLS player who has developed or become known just for being an MLS player. They are all from somewhere else. That is the problem.

QUESTIONER: Josh Wolff.¹⁴⁹

MS. O'DONOGHUE: Thank you.

QUESTIONER: Josh Wolff made his splash at the Olympics. He is totally American.

¹⁴⁹ For a brief biography of Wolff, see http://www.mlsnet.com/bios/josh_wolff.html (last visited Jan. 5, 2002).

2002] *RESTRUCTURING PROFESSIONAL SPORTS LEAGUES* 459

MR. KESSLER: Where did he make a splash?

QUESTIONER: At the Olympics.

MR. KESSLER: Yes. And how did he become known? In the Olympics, right?

QUESTIONER: But how did he develop?

MS. O'DONOGHUE: How did he develop? In MLS.

MR. KESSLER: I am not saying you cannot develop your soccer skills in the MLS single-entity structure. There is a difference between becoming a skilled player and becoming a marketable player that will attract fans in this country on any kind of base broad enough that many people will know who Josh Wolff is. In this room, it is probably only a minority who ever heard of Josh Wolff, as would be the case throughout the country.

But the point is you have got to have a structure where players are promoted. One of the brilliant things that David Stern recognized a long time ago is that the players are the game. When the players became the focus of the NBA's marketing and the teams' individual promotions the NBA took off as an enterprise. That is what, for better or worse, American fans identify with—people, human beings and individuality.

It will be interesting to see what happens with women's soccer, because in women's soccer, you have a group of people who are relatively well known from the national team and from the World Cup, and they are going to be put into a single-entity League again. We will see what happens. It will be very interesting to see whether the league structure enhances their appeal or diminishes their appeal. I am interested to see that.

MR. EDEL: And on that note, I want to thank you all for your participation. I know I speak on behalf of everybody here when I say that we all found it to be very stimulating.