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THE LEGAL CONCEPT OF PROFESSIONAL SPORTS LEAGUES: THE COMMISSIONER AND AN ALTERNATIVE APPROACH FROM A CORPORATE PERSPECTIVE

GREGOR LENTZE*

I. INTRODUCTION

Sport is "diversion, amusement, recreation, a pleasant pastime, having an athletic character."¹ However, professional sport in the United States means significantly more than that and, in 1995, sport is commercialized entertainment and big business in addition to competition. The perpetual enthusiasm of sports fans provides considerable profits for professional sports participants. For professional athletes, average salaries have reached a remarkable level.² The leagues have tremendous television contracts³ and the broadcasting companies use professional sports as their most important medium to sell commercial time.⁴ Finally, the operation of a sports enterprise is a profitable investment for the owners.⁵

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1. NEW WEBSTER DICTIONARY OF THE ENGLISH LANGUAGE 942 (1981).

2. In 1994, the average salary in the NBA was \$1.38 million, in Baseball \$1.2 million, in the NFL \$737,000 and in the NHL \$525,000. *See, e.g., Steve Zipay, A Bitter Pill: All Four Major Leagues Choking on Owners' Cure-All*, NEWSDAY, Oct. 5, 1994, at A78.

3. The NBA's four-year contracts with NBC and TNT/TBS are worth \$1.1 billion. *See, e.g., Richard Sandomir, N.B.A. and Turner in 4-Year Pact*, N.Y. TIMES, Sept. 22, 1993, at B18. The NFL gets from Fox for the National Football Conference rights \$1.58 billion and the NHL made a five-year contract with Fox for \$155 million annually. *See, e.g., Richard Sandomir, Fox Adds Some Pucks to its Expensive Collection of Footballs*, N.Y. TIMES, Sept. 14, 1994, at B14. Major League Baseball had a contract with CBS for four seasons (1990-1993) for \$1.08 billion and now has established a joint venture with ABC and NBC until 1999. *See, e.g., Richard Sandomir, Baseball Breaks With its Television Past*, N.Y. TIMES, May 9, 1993, at 1, 7.

4. *See, e.g., Joe Logan, Banking on Super Bowl's Commercial Appeal*, PHILADELPHIA INQUIRER, Jan. 24, 1995, at E1 (the price for a 30-second commercial during the 1995 NFL Super Bowl was one million dollars).

5. The average franchise value in 1994 was \$107 million. In the last 85 years, the price of a professional sports team, has, on average, increased approximately 15% annually. In transactions between 1990 and 1994, the median price appreciation was 11.7%, which was 65% better than the price performance of the stock market as measured by the Standard & Poors 500

Here, the focus should lay on the owners' operation. For them, the major sources of income are gate receipts, local broadcasting, national broadcasting, and concessions, of which broadcasting has been the most important.⁶ Early in the development of professional athletics, sport promoters realized that athletic competitors must become business partners to maximize profits.⁷ From a strong economic point of view, "[f]orming [a sports] association . . . enhances efficiency because it increases the marketability of the generic product that previously existed and marketing a product becomes more successful than without the integration."⁸

An important aspect of the economics of sports is that trends in the sources of revenue and cost play an important role in determining the organizational structure of a league.⁹ In fact, the organizational structure of a league is influenced by the relative importance of league management and centralized decision-making regarding certain significant sources of revenue.¹⁰ Therefore, professional sports evolved from modest recreational beginnings into sophisticated business operations,¹¹ promoting extensive league management rather than individual team management. Thus, the four major team sports—football, baseball, hockey and basketball—are organized in self-governance associations, the "professional sports leagues." This Article will discuss the legal concept of these professional sports leagues.

over the same period. See Michael Ozanian & Brooke Grabarek, *Throughout History the Prices Paid for Teams Have Almost Never Gone Down*, FIN. WORLD, May 10, 1994, at 61 (annual report of professional franchises). For a comprehensive explanation of the efficiency effects of investment in professional teams for the owners, see Roger G. Noll, *The Economics of Sports Leagues*, in LAW OF PROFESSIONAL AND AMATEUR SPORTS 17 (Gary A. Ueberstine ed., 1991).

6. Noll, *supra* note 5, § 17.02, at 17-20.

7. Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771, 772 (1972). This construction is primarily an issue in the antitrust context, because the principle "competition on the field, cooperation off the field" leads to the question of to what extent a professional sport league can be regarded as a "single entity" under § 1 of the Sherman Act.

8. This is the conclusion of the "Chicago School." Robert H. Heidt, *Don't Talk of Fairness: The Chicago School's Approach Toward Disciplining Professional Athletes*, 61 IND. L.J. 53, 55-56.

9. See Noll, *supra* note 5, § 17.01, at 17-20.

10. *Id.* For particular economic decisions regarding certain revenue sources, it is desirable to act on behalf of the league collectively, e.g. the league contracts for national broadcasting rather than individual team contracts, and collective bargain agreements with the player associations rather than individual club contracts.

11. See Comment, *supra* note 7, at 771 (footnote omitted).

It might be expected that these professional sports leagues are organized in a corporate governance structure as are the majority of business associations in the United States. However, despite this radical transformation in sophisticated business operations, the simple organizational structures which characterized the early development of various sports have been retained.¹²

Most likely, the main reason for the reluctance to alter the original governance structures is the remarkable success of professional sports in the present form. Certainly, this success is significantly influenced by public policy and the judicial and legislative treatment of the leagues. Moreover, sport entrepreneurs have succeeded in obtaining special status for professional sports leagues in some decisive aspects.¹³ Particular examples of this success include the Sports Broadcasting Act,¹⁴ the tax treatment of team transactions,¹⁵ and the special status of the leagues.¹⁶ "Yet, industries built upon special institutional arrangements are always precarious, for what the political process gives, it can take away."¹⁷

The discussion in this Article does not measure the legal concept of the professional leagues solely in its economic context, provided by public policy. Rather, there is a question as to what extent the present governance structure actually provides a desirable concept for all participants. Part II will show the present governance structure of the professional sports leagues. Part III will focus on the office of the Commissioner and his authority and function in the concept of the leagues.

12. *Id.*

13. Noll, *supra* note 5, § 17.04, at 17-31-32.

14. 15 U.S.C.S. § 1291, 1294 (1994) (exempts the professional sports leagues from anti-trust laws for agreements covering sport contents).

15. A major factor affecting the economic returns to sports investments is the accounting system that is used to determine a team's tax liability. The possible amortization of player contracts provides an especially effectful tax shelter for the owner when purchasing a team. See Steven Braun & Michael Pusey, *Taxation of Professional Sports Teams*, 7 TAX ADVISER 196-206 (1976).

16. Baseball is fully exempted from antitrust laws. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972). However, in a recent case the court ruled that the exemption affects merely the reserve system and is not applicable for franchise ownership or location of franchises. *Piazza v. Major League Baseball*, 831 F.Supp. 420 (E.D. Pa. 1993). See, e.g., Latour R. Lafferty, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball's Antitrust Exemption: A Review of Piazza v. Major League Baseball*, 21 FLA. ST. U. L. REV. 1271 (1994). The other leagues may rely on the labor exemption from the antitrust laws. See, e.g., Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339 (1989).

17. Noll, *supra* note 5, § 17.04, at 17-32. Congress has recently threatened to withdraw baseball's antitrust exemption. Bills were introduced in 1993 in both the House of Representatives, H.R. 108, 103d Cong., 1st Sess. (1993) and the Senate, S. 500, 103d Cong., 1st Sess. (1993). Neither of these bills was successful.

Part IV will show the objectives of league organization and Part V discusses to what extent the Commissioner's office is appropriate to the several parties. Finally, Part VI will consider conceivable alternatives to the current organizational structure from a corporate perspective.

II. ORGANIZATIONAL FORM OF THE PROFESSIONAL SPORTS LEAGUES

A. *The National Football League (NFL)*

The NFL is an unincorporated association, not organized or operated for profit.¹⁸ However, the NFL carries out several business transactions through its independent NFL Properties, Inc., which is operated for profit.

Membership and the rights thereof are limited and restricted.¹⁹ Any person, association, partnership, corporation, or other entity is eligible for membership as long as not operated for profit. Each entity or each person holding any interest in the applicant must be approved by the affirmative vote of no less than three-fourths of the members. A three-fourths majority is also required to transfer a membership to another entity. Each member holds a franchise from the league to operate a professional football club in a designated city.²⁰

There are two sources of authority in the NFL: the Executive Committee and the Commissioner. The Executive Committee includes one representative from each member club, usually the owner of the club.²¹ It has the power given by the Constitution²² and acts by affirmative vote of no less than three-fourths. The Commissioner is also present at each meeting of the Executive Committee.

The Commissioner is elected by the owners and possesses disciplinary power, dispute resolution authority, and decision-making authority, including the power to appoint other officers and committees.²³ Basically, the Commissioner has executive power unless the collective bar-

18. National Football League Constitution and Bylaws Art. II, § 2.2 [hereinafter NFL CONST.].

19. See NFL CONST. art. III., § 3.1-3.9.

20. The franchise renders territorial rights to the club. Relocation of the franchise is possible with an affirmative vote of three-fourths of the owners. The present attempt of the L.A. Rams' owner to move her team to St. Louis was rejected by the owners. Thomas George, *N.F.L. Owners Reject Rams' Bid to Move to St. Louis*, N.Y. TIMES, Mar. 16, 1995, at B15.

21. See NFL CONST. art. VI., § 6.1-6.9.

22. See NFL CONST. art. VI., § 6.5 (includes the power to impose fines or additional penalties upon any members after action of the Commissioner).

23. See *infra* part III.

gaining agreement with the Players Association renders specific powers to other authorities.

B. The National Basketball Association (NBA), the National Hockey League (NHL) and Major League Baseball (MLB)

The NBA and the NHL are, roughly speaking, organized in the same manner as the NFL. They are unincorporated, non-profit associations²⁴ with limited membership and a franchise system.²⁵ However, unlike the NFL, there is no membership restriction for corporations. The leagues have an elected Commissioner with similar power and the owners are organized in a common council, called the "Board of Governors."²⁶

Baseball is structured somewhat differently. The two leagues, the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs, are unincorporated non-profit associations with limited membership and a franchise system.²⁷ Basically, these two leagues are independent from each other with their own executive power.²⁸ The Major League Baseball Agreement contains the governing rules for the business of baseball. The agreement renders the power to the Commissioner²⁹ and sets up an Executive Council,³⁰ made up of the Commissioner, the two league presidents, and six other owners. The Executive Council shall prepare and submit to the leagues the rules of the game for consideration and adoption.

III. THE LEAGUE COMMISSIONER

All professional sports leagues described above have one important thing in common—the position of a Commissioner.³¹ The existence of this position plays a decisive role in the structure of the leagues and may

24. National Basketball Association Constitution and By-Laws § 2 [hereinafter NBA CONST.]; National Hockey League Constitution and By-Laws § 2.2 [hereinafter NHL CONST.].

25. NBA CONST. § 7, 9; NHL CONST. § 3, 4.

26. NBA CONST. § 18; NHL CONST. § 5.

27. Constitution and Rules of The National League of Professional Baseball Clubs § 2.2 [hereinafter NBL CONST.]; Constitution of The American League of Professional Baseball Clubs § 2.5 [hereinafter ABL CONST.].

28. NBL CONST. §§ 5.1, 7.1 (president under supervision of executive committee); ABL CONST. §§ 5.1, 6.1 (president under supervision of board of directors).

29. Major League Baseball Agreement art. I [hereinafter MLA].

30. MLA art. II. (the Commissioner shall serve as chairman and has the right to vote upon all matters).

31. The title "President" was changed to "Commissioner" in the NFL in 1941. THE NFL'S OFFICIAL ENCYCLOPEDIA HISTORY OF PROFESSIONAL FOOTBALL 33 (1977). In the NHL, the title was changed in 1993. Joe Lapointe, *NHL Goes to the Hoop for First Commissioner*, N.Y. TIMES, Dec. 12, 1992, at 1, 33.

explain the respective organization of the leagues. However, what does it mean—league commissioner?

A. *Creation and Development of the Commissioner's Office*

To understand the function and existence of the Commissioner in the structure of professional sports leagues, it is helpful and necessary to look at the history of the Commissioner's office. The office of the Commissioner was created in baseball on January 12, 1921 in the new Major League Baseball Agreement. The creation was a response to several events which had happened in the years before.

In 1903, the National and American Leagues established professional baseball in form of the Major League.³² The League was governed by the so-called "National Commission," which consisted of the two league presidents and a third member chosen by them to serve as chairman.³³ However, because of the personal interests of the members, the Commission remained largely ineffective and was frequently criticized in subsequent years. The final impulse for the creation of a single Commissioner was given by the "Chicago Black Sox" scandal in 1920.³⁴ The public confidence in the game decreased significantly. In particular, the National Commission received serious criticism for not investigating the scandal with as much intensity as the situation warranted.³⁵ Finally, in order to restore public faith in the honesty and integrity of the game and protect their own interests, the owners replaced the National Commission with the position of a single Commissioner.

The new single Commissioner was to be disinterested and independent from baseball. The first candidate for Commissioner was Judge Landis, who demanded control over "whatever and whoever" had anything to do with baseball.³⁶ The owners complied with this demand and, thus, the new Major League Baseball Agreement gave this position broad and

32. See Major League Baseball News Release, *The Commissionership — An Historical Perspective* 22 [hereinafter *The Commissionership*] (1903 was the year of the first World Series in baseball).

33. See HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 9 (1971).

34. The scandal affected the 1919 World Series: the heavy favorite, the Chicago White Sox, lost against the Cincinnati Reds. Rumors immediately circulated that the Series was fixed and, finally, after a court investigation, White Sox players confessed that they had accepted gamblers money to "throw" the series. *Id.* at 308-309.

35. The reluctance of the Commission to investigate is not surprising at all, given that the chairman of the Commission at the time was August Herrmann, the president of the Cincinnati Reds, the winner of the affected World Series. See *The Commissionership*, *supra* note 32, at 5.

36. SEYMOUR, *supra* note 33, at 322.

comprehensive power. In their effort to clean up the sport and to restore integrity to the game, the owners established a single omnipotent position that has the power to "take away or materially affect significant property interests" of all persons involved in baseball.³⁷

The terms and the authority of the Commissioner's position have not changed significantly during the last seventy years. In 1944, after the death of Judge Landis, the owners restricted the authority of the Commissioner and changed the Major League Agreement in two important ways.³⁸ In 1964, however, the owners withdrew these changes and granted even broader power to the Commissioner.³⁹ The Major League Agreement still gives the Commissioner the power his office attained about seventy years ago.

The Commissioner posts in the other leagues were created for many of the same reasons as the baseball commissionership,⁴⁰ raising the question about the desirability and workability of the commissionership in modern professional sports. It must be examined whether this authority is merely a relic from the past that should be reconstructed, or if it provides a workable concept for a professional sports league in 1995.

B. Scope of Commissioner's Authority - Differences from the Corporate Chief Executive Officer

The Commissioner is the chief executive officer (CEO) of the league.⁴¹ Like the CEO in a corporation, the Commissioner is elected by the owners and is an employee of the league.⁴² The essential question is to what extent the Commissioner resembles the CEO of any other

37. Jeffrey A. Durney, Comment, *Fair or Foul?, The Commissioner and Major League Baseball's Disciplinary Process*, 41 EMORY L.J. 581, 582 (1992).

38. First: clubs would be free to challenge actions in court. Second: conduct which did not violate a specific league rule could not be found by the Commissioner to be detrimental to the best interests of baseball. See *The Commissioner's Position*, *supra* note 32, at 6.

39. First, the policy of prohibiting court challenges was resurrected. Second, under the new agreement the commissioner is allowed to take action against any act believed to be "not in the best interests of baseball." This is in fact a broader formulation than the previous "... detrimental to the best interests of baseball..." formulation. Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1417 n.52 (1990).

40. The first Commissioner for the NFL was elected in 1921, R. TREAT, *THE ENCYCLOPEDIA OF FOOTBALL* 655 (1975); in the NBA in 1946, *THE OFFICIAL NBA BASKETBALL ENCYCLOPEDIA* 13 (1989); and in the NHL in 1924 (until 1993 the title was president). STAN FISCHLER & SHIRLEY WALTON FISCHLER, *THE HOCKEY ENCYCLOPEDIA* 3 (1983).

41. MLA art. I, § 2(a); NFL CONST. art. VIII, § 8.4 (B)(b); NBA CONST. § 24; NHL CONST. § 6.3(a).

42. MLA art. I, § 7; NFL CONST. art. VIII, § 8.1 (b); NBA CONST. § 24(a); NHL CONST. § 6.1.

usual corporation. In contrast to corporate CEOs, league Commissioners has been described in phrases such as "czar"⁴³ or "absolute despot with power of the proverbial pater familias."⁴⁴ Therefore, the question arises as to what kind of power is inherent in the office of the Commissioner that leads to such commentaries.

1. Scope of Authority and Control

In a typical business corporation, all corporate powers shall be exercised by or under the authority of the board of directors.⁴⁵ Although it is generally recognized that the board of directors is not expected to operate the business itself,⁴⁶ this basic principle of corporate governance has a decisive impact, since all power of the executives must be delegated to them through the By-Laws⁴⁷ and is merely derivative. By contrast, the league constitutions give the commissioner's office its original power and no further delegation of power is necessary.⁴⁸ Thus, the source of power for the Commissioner is different.

This distinction in the source of power has an important consequence for the governing structure of the league. In a corporation, the CEO is subject to the direct control of the board.⁴⁹ By contrast, the Commissioner does not act under the direct supervision and control of the owners.⁵⁰ In fact, the Commissioner may carry out the business of the professional sports league without direct control of the owners. Largely, many of the decisions involve the Commissioner's sole discretion. The impact is remarkable: the Commissioner acts as an employee of the league, but is not under the control and supervision of its own employer. Therefore, the employed Commissioner represents an almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners.

43. See Durney, *supra* note 37, at 583.

44. *Milwaukee American Association v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931).

45. See REVISED MODEL BUSINESS CORPORATE ACT § 8.01 (1994) [hereinafter RMBCA]. In this chapter, the RMBCA and the related "Model By-Laws - A Long Form, By-Laws of Business Enterprises" [hereinafter Model By-Laws], reprinted in *SELECTED CORPORATION AND PARTNERSHIP STATUTES, RULES AND FORMS* 497-509 (Lewis D. Solomon et al. eds., 1994), should be the applicable standard for the usual business corporation.

46. MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION* § 11.1, at 143 (1976).

47. See Model By-Laws art. IV, § 5.

48. See MLA art. I, § 2; NFL CONST. art. VIII, § 8; NBA CONST. § 24; NHL CONST. § 6.

49. See Model By-Laws art. IV, § 5; RMBCA § 8.01, official comment (there is even a responsibility of the directors to exercise oversight over the officers).

50. The NBA constitution merely renders the general supervision to the Board of Governors. NBA CONST. § 18(a). However, the Commissioner does not in fact act under control of the board.

That leads to the question of what kind of authority the league constitution renders to the commissioner's office. Basically, the Commissioner possesses decision-making, dispute resolution and disciplinary power of which the latter one is the more significant one.

a. Disciplinary Power of the "Best Interests" Clause

The Commissioner represents the internal disciplinary system of the league. The Commissioner's disciplinary power is conferred through the "best interest" clauses of the respective league regulations.⁵¹ At his sole discretion, the Commissioner has broad power to investigate any conduct or activity deemed "not in the best interest"⁵² of the sport. The Commissioner may also impose sanctions upon finding any owner, player, or other persons involved in the sport guilty of such conduct. In fact, the Commissioner is vested with investigative, prosecutorial, and adjudicative powers. Thus, the clause is a powerful tool which "can be used to justify nearly any action taken by the Commissioner."⁵³

b. Dispute Resolution Authority

The league regulations vest the Commissioner's office with the authority to arbitrate disputes between members of the associations⁵⁴ and the Commissioner has full, complete, and final jurisdiction of any dispute.⁵⁵ The Commissioner is the arbitrator for all disputes except those

51. MLA art. I, § 2(a); NFL CONST. art. VII, § 8.13; NBA CONST. § 24(j); NHL By-Laws § 17.3(a).

52. The NFL Constitution refers to conduct "detrimental to the welfare of the League." NFL CONST. § 8.13.

53. Durney, *supra* note 37, at 607. The various Commissioners have invoked the "best interest" clause several times in the past. The first action taken by a Commissioner was Judge Landis' life suspension for the players involved in the Black Sox scandal. This action showed the strength of his authority, since the players were suspended even though they had been acquitted by the court. Likewise, several players have been suspended for on-the-field and off-the-field conduct. Furthermore, the Commissioners in the various leagues have invoked the "best interest" clause to severely sanction owners' conduct. *See, e.g.,* George F. Will, *A One-Man Error Machine*, NEWSWEEK, Aug. 6, 1990, at 58 (Fred Saigh, the owner of the St. Louis Cardinals, was forced to sell his interest in his team after he was convicted of tax evasion.); *Atlanta National League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977) (Atlanta Braves owner Ted Turner was suspended for one year from the business of baseball.); *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989) (Pete Rose, manager of the Cincinnati Reds and baseball's all time hit leader, was banished in August of 1989 by Commissioner Giamatti for alleged gambling activities.)

54. MLA art. VII, § 1; NFL CONST. art. VIII, § 8.3; NBA CONST. § 24(c); NHL CONST. § 6.3(b).

55. MLA art. VII, § 2; NFL CONST. art. VIII, § 8.3; NBA CONST. § 24(c); NHL CONST. § 6.3(b) (only the NHL leaves a general possibility for the parties to choose other arbitrators).

excluded by the collective bargaining agreements. For example, respective agreements between the owners and the Players Associations have established salary arbitration and grievance arbitration for disputes involving the interpretation of the collective bargaining agreement provisions.⁵⁶

c. Decision-Making Authority

Under common law principles of corporate law, the CEO carries out the ordinary business, but has no authority for extraordinary business affairs.⁵⁷ The respective league regulations address the basic authority of the Commissioner in a different fashion.⁵⁸ Yet, leagues ordinarily furnish the Commissioner with some significant authorities beyond the ordinary business.

The Commissioner may disapprove any contract entered into by a franchise with a player or with television networks, and no sale or trade by a club is binding without approval of the Commissioner.⁵⁹ In other words, the Commissioner has the power to invade directly into the affairs of the association members, the teams themselves. He has great influence on the owners' decision of approval of admission or transfer of membership, since the Commissioner conducts the investigation and submits the application with a recommendation to the owners.⁶⁰ Moreover, the Commissioner interprets and establishes policy and procedure with respect to the league provisions as the centralized control in the administration of the league.⁶¹

56. See Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association, Jan. 1, 1990, art. VI(F), XI [hereinafter Basic Agreement]. Akin agreements exist as well for the other leagues.

57. *Lee v. Jenkins Brothers*, 268 F.2d 357 (2d Cir. 1959), *cert. denied* 361 U.S. 913 (1959).

58. MLA and NBA merely name him as CEO without further explanation, so the usual standard might be applicable. The NFL CONST. § 8.10 ("no binding effect for 'substantial commitment' by the league") excludes the extraordinary business expressly; by contrast, NHL CONST. § 6.3(a) gives authority for "general supervision and direction of all the business and affairs of the league"

59. NFL CONST. art. X, § 10.1, art. XV, § 15.4, art. XVI, § 16.8; NBA CONST. § 24(f). In Baseball the right to approve player contracts is within the authority of the league presidents. Basic Agreement art. IV.

60. See, e.g., NFL CONST. art. III, §§ 3.3(A)(C), 3.5(B); NBA CONST. § 9A(b) (Commissioner appoints an investigation committee).

61. MLA art. I, § 2(e); NFL CONST. art. VIII, § 8.5; NBA CONST. § 24(e). In addition, the NFL Commissioner has the power to appoint other officers, committees, and departments under his exclusive control. See NFL CONST. art. VII, § 7.1 (a), art. VIII, §§ 8.7, 8.8.

2. Limitations

The Commissioner's power to arbitrate disputes is limited by the fact that he both formulates rules and procedure and acts as an arbitrator thereof. Consequently, courts have expressed concern over the dual functions of arbitrator and administrator.⁶² Moreover, when the Commissioner has exceeded the bounds of his authority, courts have not hesitated to interfere with his activities.⁶³ Finally, the Commissioner has no authority to arbitrate disputes excluded by the collective bargain agreements.

In the disciplinary area, courts have difficulty defining the boundaries of the Commissioner's power, since the scope of his power under the "best interest" clause remains difficult to determine. The broad and undetermined term "best interests" tends to give almost unlimited power and provides only a vague standard.⁶⁴ However, the courts have expansively applied the function of the clause in favor of the Commissioner by giving him alone the power to interpret this vague standard.⁶⁵ The sole restraints by the regulations are related to the extent of monetary punishment,⁶⁶ but not to the invocation of the power itself.

3. Conclusion

Even though the Commissioner is the chief executive officer and employee of the league, his scope of authority goes far beyond the authority under the usual corporate governance concept and the respective league regulations give a Commissioner significantly more power. In particular,

62. See JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* 440-446 (1979) (discussion of the Commissioner's dual role). See, e.g., *National Football League Player Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974) (the Commissioner may not arbitrate the merits of his own conduct and review his own actions).

63. The Commissioner has no authority to settle self-created disputes. *Professional Sports, Ltd. v. Virginia Squires Basketball Club, Ltd. Partnership*, 373 F. Supp. 946, 952 (W.D. Tex. 1974) (Commissioner may not arbitrate where no dispute between the parties exists). See, e.g., *Atlanta National League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977).

64. See *Durney*, *supra* note 37, at 607-608. This standard is an inappropriate base because it is "closely analogous to clauses deemed too vague to be legally enforceable." *Id.* at 607.

65. See, e.g., *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978). See, e.g., *Atlanta National League Baseball Club*, 432 F.Supp. at 1222; *Milwaukee American Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931). When one Commissioner asked what the best interest of baseball clause meant, his attorney answered, "it means anything you want it to mean, Mr. Commissioner." Joe Illuzzi, *UPI*, Aug. 5, 1985, available in LEXIS, Nexis Library, UPI File.

66. MLA art. I, § 3(e); NFL CONST. art. VIII, § 8.13; NBA CONST. § 35(e); NHL By-Laws § 17.3.

the Commissioner does not act under control of his employer, the league. Rather, the league owners, as the Commissioner's factual employer, are themselves subject to the disciplinary power of the Commissioner. Thus, there is some question about why the multi-billion dollar team owners are willing to subject themselves to the broad power of an omnipotent Commissioner instead of appointing a CEO, furnished with the power of the Revised Model Business Corporate Act (RMBCA) model, and acting under their control.

C. Problem of Judicial Interference and Basic Due Process of Internal Proceedings of a Private Association

1. Interest of an Association to Avoid Judicial Interference

a private association has an interest in avoiding judicial review of their activities, since judicial proceedings invoke litigation costs of time and money and "divert attention and resources from the game being played on the field."⁶⁷ Judicial review and control means decreased autonomy of the association. This loss of autonomy by judicial interference results in a higher risk and uncertainty for the monetary investments. Thus, it is in the team owner's interest that their investments are governed by an internal authority that provides more certainty than outside judicial forces.

2. Judicial Review of Private Associations in General

a. Courts Reluctance to Review

In general, courts have been reluctant to take jurisdiction over the affairs of private associations and to review their internal actions.⁶⁸ The judicial restraint finds its source in the generalized freedom of association implicit in the First Amendment and the concept of liberty found in the Due Process Clauses of the Fifth and Fourteenth Amendment.⁶⁹ Another argument for providing associations with immunity from judicial review is based on the fact that the relation between the league and its members is contractual in nature.⁷⁰ Furthermore, the restraint of ju-

67. Michael J. Willisich, Comment, *Protecting the "Owners" of Baseball: A Governance Structure to Maintain the Integrity of the Game and Guard the Principals' Money Investment*, 88 NW. U. L. REV. 1619, 1625 n.43 (1994).

68. Note, *Developments in the Law: Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 990 (1963). See, e.g., *Finley*, 569 F.2d at 542.

69. Note, *supra* note 68, at 1055. See, e.g., *Durney*, *supra* note 37, at 596.

70. See *Durney*, *supra* note 37, at 596 (the courts hesitate to relieve the parties from the contractual terms they accepted upon joining the association. "The constitution, by-laws, and rules of the association are part of the contract accepted by a member." *Id.* at 597).

dicial interference finds support in policy and efficiency reasons. As confirmed by the courts, judicial review of every sanction imposed by the Commissioner would produce an unworkable system for the leagues.⁷¹

b. Requirement of Effective Internal Methods of Control

The right to self-governance for a private association is not unlimited and under certain circumstances a private association may be subject to judicial scrutiny. The enforcement of rules and procedures of an association must not be arbitrary or against public policy.⁷² However, courts will not interfere if "effective nonjudicial methods of control are available."⁷³ Therefore, a professional sports league must provide an effective method of control that cannot be regarded as arbitrary or against public policy. Yet, there is some question about what type of proceedings are regarded as sufficient to provide an "effective internal method of control" and which standard the internal league proceedings have to meet in order to provide the necessary control.

The Fourteenth Amendment of the United States Constitution guarantees procedural and substantive due process of law for state actions. However, since private conduct is not governed by the Constitution,⁷⁴ this standard is not directly applicable to the professional sports leagues as private actors.

Yet, courts have demanded that an association provide basic due process of law when an interest of substance is affected.⁷⁵ Because membership in a professional association is an interest of substance,⁷⁶ the professional sports leagues have to provide basic due process in their internal proceedings. To meet the standard of basic due process, an association has to follow its own bylaws and procedures and the proceedings cannot be tainted by bias, prejudice, or lack of good faith.⁷⁷

71. *Atlanta Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1223 (N.D. Ga. 1977).

72. *See, e.g., Higgins v. American Society of Clinical Pathologists*, 238 A.2d 665, 671 (N.J. 1968). *See Durney, supra* note 37, at 596.

73. *See Note, supra* note 68, at 993.

74. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). *See, e.g., Finley*, 569 F.2d at 544 n.62 (strict adherence to judicial standards of due process would be arduous and might seriously impair the proceedings of voluntary associations).

75. *Finley*, 569 F.2d at 544. *See, e.g., Durney, supra* note 37, at 601.

76. *See, e.g., Virgin v. American College of Surgeons*, 192 N.E.2d 414, 422 (Ill. App. Ct. 1963).

77. *Id.* at 423. *See, e.g., Finley*, 569 F.2d at 544 n.65 (the tribunal has to be impartial and fair); *Willisch, supra* note 67, at 1626.

Furthermore, there has to be a "meaningful notice and hearing" as procedural safeguards.⁷⁸

c. Waiver of Recourse

The owners have manifested their desire to shelter league activities from judicial review by enacting the "waiver of recourse" clause in the respective regulations.⁷⁹ In general, provisions to waive all review of an arbitrator's decision in private agreements have been upheld by the federal courts as not violating due process.⁸⁰

However, a waiver of recourse clause does not preclude judicial review of proceedings violating basic due process. In fact, the clause "adds little if anything to the common law rule of nonreviewability of private association actions and can be upheld as coinciding with the common law standard disallowing court interference.⁸¹ Accordingly, the clause is invalid if the proceedings fail to provide basic due process of law.⁸²

d. Conclusion

Even though a private association is free to set up its own rules of procedure, it is subject to judicial scrutiny unless it provides its members basic due process. To ensure such due process and to avoid judicial control, professional sports leagues are supposed to set up fair and impartial internal proceedings. If the league does not provide due process, the courts might interfere despite existing waiver of recourse clauses.

3. Commissioner's Function in Providing Basic Due Process

Thus, to afford basic due process, a league must provide impartial and fair proceedings as an effective internal method of control. In general, "the effectiveness of such internal appeals will be limited by the extent to which the interests of the reviewing body coincide with those of the group taking the action."⁸³ Therefore, basic due process requires the reviewing body of league activities and decisions to be independent from

78. See, e.g., *Riko Enter., Inc. v. Seattle Supersonics Corp.*, 357 F.Supp. 521, 526 (S.D.N.Y. 1973) (provision of the NBA Constitution invalidated because of the absence of such a procedural safeguard).

79. MLA art. VII, § 2 provides: "... to be finally and unappealable bound by such actions and severally waive such right of recourse to the courts as would otherwise have existed in their favor." Similar regulations can be found in NFL CONST. art. VIII, § 8.3; NBA CONST. § 24(k); NHL CONST. § 6.3(b).

80. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

81. *Finley*, 569 F.2d at 543.

82. *Id.* at 544.

83. Note, *supra* note 68, at 993.

the owners as the acting group.⁸⁴ As a result, owner-led disciplinary proceedings would result in court findings that due process had not been met.

To avoid judicial interference, there must be a disinterested reviewing body with the power and independence to sanction players and owners alike. The Commissioner must have no financial interest, direct or indirect, in any professional sport.⁸⁵ By that, the Commissioner is supposed to be this disinterested reviewing body within the leagues. With the power to discipline owners as well as players, the Commissioner shall provide an internal method of control that obviates the need for judicial interference into league's affairs.⁸⁶

D. Conclusion

The Commissioner has significantly more authority than the usual chief executive officer in a business corporation. In particular, the team owners, as a "quasi" board of directors, are subject to his disciplinary power under the respective "interest" clauses. However, due process of law concerns provide an argument for the traditional model of a strong and independent Commissioner. The likely rationale for the Commissioner's broad authority is that, as a disinterested party, he shall provide due process in internal proceedings to avoid judicial interference with league affairs.

IV. OBJECTIVES OF THE LEAGUE ORGANIZATION

The respective organizational structure of the league has to further primarily two objectives. First, the league needs an internal, impartial and fair authority to resolve disputes and to enforce the disciplinary process. This is necessary to maintain the integrity of the game and to pro-

84. In fact, "if the owners double as disciplinarians, they would effectively function as the prosecutor, judge, and jury when sanctioning themselves and their employees." Willisch, *supra* note 67, at 1627.

85. NFL CONST. art. VIII, § 8.2; NBA CONST. § 24(b); NHL CONST. § 8.1. The MLA does not address the independence of the Commissioner explicitly.

86. See, e.g., Willisch, *supra* note 67, at 1624-25; Durney, *supra* note 37, at 603. By contrast, the NCAA has been successful in due process challenges, even though they do not have an explicit disinterested authority within the organization to protect the athletes interests. See, e.g., NCAA v. Tarkanian, 488 U.S. 179 (1988). However, the NCAA, which is run by about 1000 member colleges and universities, finds itself in a significantly different context than the professional sports leagues. The professional leagues and teams employ professional athletes with a strong business purpose, whereas the NCAA merely organizes the collegiate sport of students who do not get paid.

vide basic due process in order to avoid judicial interference with league affairs.

The impartial authority has a strong protective function within the league. Since professional sports leagues are regarded as monopolistic business associations,⁸⁷ the team owners as the association members may exercise monopoly power. Thus, a main rationale of an internal reviewing body in the league shall be to shelter other participants from the owners' monopoly power. The protection of the non-owner parties by an impartial authority becomes more important with regard to the fact that professional sports is moving towards corporate ownership.⁸⁸ With traditional business interests getting into the games, the need for protection of the parties increases.

Moreover, the importance of such an independent, impartial authority within the league can be recognized in labor disputes between owners and players. As an unbiased and independent authority, the Commissioner may play a decisive role in strikes or lockouts. He might invoke the best interest clause and avert a work shutdown by demanding that owners stop a lockout or by ordering players to play.⁸⁹ The fact that Major League Baseball has not had an independent Commissioner since September 1992⁹⁰ might be one reason for the longest strike in professional sport history.⁹¹

87. See, e.g., Stephen F. Ross, *Break up the Sports Monopolies*, in *THE BUSINESS OF PROFESSIONAL SPORTS* 152-174 (Paul D. Staudohar & James A. Morgan eds., 1991).

88. See, e.g., Michael Ozanian & Brooke Grabarek, *The \$11 Billion Pastime; Why Sports Franchise Values are Soaring Even as Team Profits Fall*, *FIN. WORLD*, May 10, 1994, at 50-55 (At least 40 public companies have ownership interests in 22 franchises. In particular, there is a trend of media companies acquiring sport franchises, e.g. Walt Disney, Turner Broadcasting, ITT, Tribune Company, Blockbuster Video). Only the NFL prohibits corporate ownership. See NFL CONST. art. III, § 3.2.

89. The Commissioners of baseball played an important role in the lockout in 1976 and the strike in 1985. See Willisch, *supra* note 67, at 1638-39 nn.129, 130, & 132. Commissioner Fay Vincent was called a "pivotal player" in the resolution of the 1990 spring training lockout. See Marty Noble, *Fay's Autonomy Divides Owners*, *NEWSDAY*, June 11, 1992, at 139.

90. The elected Commissioner Fay Vincent resigned under the owner's pressure on September 7th, 1992. Two days later, Bud Selig, the owner of the Milwaukee Brewers, was named interim Commissioner until a new labor agreement is reached with the players. George Vescey, *A League of Their Owners Strikes Out the Manager*, *N.Y. TIMES*, Sept. 13, 1992, sec. 4, at 2.

91. See Frank Dolson, *Ending Baseball's Strike the Easy Way, Name a Strong Leader as Commissioner*, *PHILADELPHIA INQUIRER*, Mar. 12, 1995, at C2 (citing view of former National League president Bill White). The players strike in baseball was ended after 234 days after the NLRB had sought an injunction against the owner's unilateral decision to change the collective bargaining agreement. See Murray Chass, *234 Days Later: The Players Are Asked to Report to Camps by End of Week*, *N.Y. TIMES*, Apr. 3, 1995, at A1.

Secondly, a league needs an efficient decision-making process. As a common undertaking of several team owners, the league must have a centralized authority to control the administration and to represent a unanimous opinion of the several owners in public. In order to be efficient for the owners, this centralized authority must exclusively protect their interests.

The following section will discuss which model for a professional sports league can best provide both effective decision-making and an impartial authority within the league.

V. THE TRADITIONAL COMMISSIONER MODEL

A. *Commissioner's Conflict of Interest*

An obvious problem with the league's governing structure arises out of the Commissioners "dual role as guardian of the game and business champion."⁹² On the one hand, the Commissioner has the power to supervise, sanction, and even suspend team owners under the power of the "best interests" clause. On the other hand, the Commissioner is an employee of the league and, thus, employed and elected by the owners who determine the Commissioner's term and compensation. Ironically, the Commissioner, as an employee, has the disciplinary power over his own employer.

Even though a relationship to one party will not generally be viewed as evidence of prejudice and does not necessarily disqualify the Commissioner as impartial and fair authority,⁹³ there exists at least a strong conflict of interest for the Commissioner.⁹⁴ To maintain the integrity of the game and to protect all parties equally, the Commissioner must make decisions contrary to the owner's interests. However, the Commissioner has a personal interest in not offending a bloc of owners in order to protect his own job security and to avoid dismissal by the offended owners. The Commissioner has to ensure the owner's goodwill regarding his concern about re-election or job termination.⁹⁵

92. Willisch, *supra* note 67, at 1622.

93. See Weistart, *supra* note 62, at 444. See, e.g. Pachman, *supra* note 39, at 1428.

94. Likewise, the "outside director" in a business corporation is subject to the same conflict of interest. In order to separate management and control, the "outside director" is supposed to control and supervise the executives. However, the "outside directors" are chosen usually by the CEO. Thus, the "outside director" tends to act in the interests of the CEO in order to secure his own position. See, e.g., Victor M. Earle, *Corporate Governance and the Outside Director - A Modest Proposal*, 36 WASH. & LEE L. REV. 787 (1979).

95. The Major League Agreement, NFL Constitution, and NHL Constitution do not address premature termination of the Commissioner. The NBA merely addresses termination

As a result of this conflict, it is very likely that the Commissioner will tend to avoid a dispute with the owners and make decisions in the owners' favor. The Commissioner's incentive to control and sanction the owners is significantly reduced and a conflict of the game's and the owner's interests is likely to be resolved "in favor of the owners pocket-books."⁹⁶ Accordingly, the enforcement of control and due process in the internal proceedings of the professional sport leagues depends heavily and solely on the person of the Commissioner itself and to what extent the Commissioner is willing to use the power of the office. Yet, because of the conflicting interests, there is some serious doubt as to whether the present system itself in fact can provide basic due process in the form of an impartial and unbiased authority.⁹⁷ For the non-owner participants,⁹⁸ the present organizational form seems to be inappropriate to provide a fair and unbiased authority as required by basic due process.

B. *The Owners' Perspective*

The Commissioner's position represents a comfortable instrument for the owners which, from the owners point of view, fulfills two important functions. First, the Commissioner shall provide basic due process

and enhances the hurdle for termination. *See* NBA CONST. § 24(a) (requires a vote of three-fourths). Termination of the baseball Commissioner was at issue in 1992 in the dispute between the baseball owners and Commissioner Fay Vincent. Vincent himself claimed that certain language in the MLA bars firing the Commissioner. *See* Robert L. Bard & Lewis Kurlantzick, *Can the Baseball Commissioner Be Fired?*, 208 N.Y.L.J. 1 (1992) (nothing in the MLA directly supports the position of Vincent that a termination is absolutely barred by the MLA. Moreover, an interpretation of an absolute prohibition of termination would be unenforceable under employment principles which deny an injunction. Therefore, in absence of a regulation, the Commissioner might be released by a majority vote and could merely sue for monetary damages). However, the owners did not try to remove Vincent, but voted to ask Vincent to resign. After a 18-9-1 vote of non-confidence, Vincent resigned. *See* Ross Newhan, *Embattled Vincent Resigns as Baseball Commissioner*, L.A. TIMES, Sept. 8, 1992, at A9. Accordingly, the Commissioner's conflict of interest is not reduced by the league regulations by giving him extraordinary job security.

96. Willisich, *supra* note 67, at 1622.

97. *See* Durney, *supra* note 37, at 607 (denies fairness and impartiality of the present disciplinary system under the Commissioner). *See* Note, *Pinch-Hitting for Baseball's Present System - Impartial Arbitration as a Method of Dispute Resolution*, 14 U.C. DAVIS L. REV. 691 (1981) (dispute resolution process under the Commissioner is unfair).

98. According to a former baseball player, the Commissioner's job in baseball consists of "protecting the financial interests of the business groups which make profits from baseball." *See* Jim Bouton, *Ball Four Plus Ball Five* 408 (1981). Marvin Miller, former Executive Director of the Major League Baseball Players Association, finds the Commissioner closely allied with the owners. *See* MARVIN MILLER, A WHOLE DIFFERENT BALLGAME: THE SPORT AND BUSINESS OF BASEBALL 383, 406 (1991). *See, e.g.,* Weistart, *supra* note 62, at 442-443.

to obviate judicial interference.⁹⁹ Secondly, since the Commissioner conducts the ordinary business of the league, decision making by the Commissioner significantly reduces the direct accountability of the owners. The Commissioner's authority embodies unpopular as well as popular decisions and the Commissioner, not the owners, is blamed for unpopular decisions. It seems that the "Commissioner is hired to make difficult managerial decisions and the current structure allows the owners to abandon the commissioner once the problematic decision is made."¹⁰⁰

For the owners this structure is merely a comfortable instrument as long as the Commissioner is acting primarily in their interests. This might be very likely given the Commissioner's apparent conflict of interest.

Nevertheless, league regulations leave a broad authority for the Commissioner and enable him to act against the owners' interests and opinions. If the Commissioner is willing to do so, he may be a very uncomfortable authority for the owners. Even though the Commissioner is elected by the owners, there is a permanent risk that the Commissioner does not care about job security and, in order to protect the interests of the sport, will act in contrast to the owners' interests. After the conflict with Commissioner Vincent in 1992, the baseball team owners appointed a restructuring committee to examine and rewrite the power of the Commissioner.¹⁰¹ Apparently, the baseball owners are no longer willing to take the risk of an uninterested Commissioner who is not primarily protecting their interests.

99. See *supra* part III.C.3.

100. Willisch, *supra* note 67, at 1623 (footnote omitted). In the words of former baseball Commissioner Ueberroth, "the owners hire you to make the tough decisions and then abandon you after you make them." Rob Rains, *Who Will Rule?*, USA TODAY BASEBALL WKLY., Sept. 9-15, 1992, at 36.

101. See Murray Chass, *Commissioner's Powers Are Diluted by Owners*, N.Y. TIMES, Feb. 12, 1994, at 29, 32. In particular, the owners want to remove his best-interests powers in labor matters and in matters that are covered by club votes. League matters include league expansion, sale or relocation of clubs, interleague play, and league alignment. Under the revised powers, the Commissioner could not intervene in collective bargaining matters. Termination of the Commissioner is not mentioned in the report. See Major League Baseball News Release, *Restructuring Report Enhances Commissioner's Authority 1* (1994). In a Congressional Hearing before the Senate Antitrust Subcommittee, chairman Sen. Howard Metzenbaum commented: "You don't have to be a genius, . . . a lawyer, . . . a Supreme Court Justice to understand that, under this new agreement, you have denigrated the position of the Commissioner." See Jerome Holtzman, *Metzenbaum Takes a Senatorial Swing at Baseball Owners*, CHI. TRIB., Mar. 22, 1994, § 4, at 3.

C. Conclusion

On the one hand, the Commissioner should be the centralized, efficient decision-maker for the owners. To be efficient for them, the Commissioner must protect their interests. An impartial and disinterested Commissioner would result in inefficiency for the owners. On the other hand, he is supposed to act as impartial authority in the dispute resolution and disciplinary context. That requires a completely different acting by the Commissioner. However, a single Commissioner can only either be efficient for the owners or impartial to all parties. Because of this unavoidable conflict of interests, the traditional model of a single Commissioner cannot further both objectives of league organization at the same time and does not provide a sufficient alternative.¹⁰²

VI. ALTERNATIVE APPROACH FROM A CORPORATE PERSPECTIVE

A. The Pure Corporate Model

1. The Model

Corporate law principles provide an appropriate framework to organize a professional sports league. The owners would act as the board of directors with the exclusive power to manage the league's affairs. They would establish league policy and appoint a CEO to execute their decisions by carrying out the ordinary, daily business. The CEO would act under direct control and general supervision of the owners and serve at the pleasure of the board.¹⁰³ Since the CEO has to protect exclusively the owners' interests, there would be no conflict of interest with a CEO, accountable only to the owners. Acting under the owner's control, the CEO would be the centralized authority to represent the owners' policy and interests in public. Moreover, it would allow owners, acting as a board, to formulate policy decisions without fear of second-guessing by the CEO because under the corporate structure, the board's decision is definitive.¹⁰⁴ League decisions would be more predictable, certain and efficient. Additionally, the accountability of the owners would be increased. Since the CEO acts obviously and without any doubt on their

102. With the same conclusion: Durney, *supra* note 37, at 605; Willisch, *supra* note 67, at 1649; Note, *supra* note 97, at 709; Comment, *supra* note 7, at 798.

103. Jerry Reinsdorf, principal owner of the Chicago White Sox, said he would like to have a CEO reporting to the owners as a board of directors. Newhan, *supra* note 95, at A9.

104. Willisch, *supra* note 67, at 1637. The owners would also be protected from a courts second-guessing by the business judgement rule, which states a rebuttable presumption that a director acts in good faith and as a reasonable person. See *Gries Sports Enter., Inc. v. Cleveland Browns Football Co., Inc.*, 496 N.E.2d 959 (Ohio 1986).

behalf, the owners could be made responsible for unpopular decisions. Therefore, under the corporate model, the efficiency of the decision-making process would be enhanced significantly.

2. Criticism

The pure corporate model does not provide an appropriate concept for three reasons. First, a professional sports league is acting in significantly different circumstances than any other business corporation. For the owners this is not just a usual investment, but an investment into the "national pastime" of society.¹⁰⁵ This crucial involvement of the public in their investment requires an extraordinary concept of balancing the interests of the owners in their investment and of the public in the integrity of the game. The pure corporate model does not provide such a balancing system of control because the control of the owners is exclusive.

Second, the CEO would not be an unbiased, independent and impartial authority within the league to provide the basic due process.

Finally, when the owners act as a board of directors of the league, they are subject to a duty of loyalty.¹⁰⁶ However, the team owners have a potentially conflicting personal interest in the profitability of their individual franchises. They would be inclined to base their voting decisions on what they believe to be most beneficial to their own teams rather than voting for what they believe to be in the best interests of the league.¹⁰⁷ Thus, it is almost impossible for the owners to put their personal interest second and to meet the duty of loyalty.

Therefore, even though the corporate model enhances the efficiency of the decision-making process, it does not provide an internal, impartial authority. Therefore, the corporate model in its pure form is not an appropriate concept for a professional sports league.

105. See, e.g., *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 364 (1953) (baseball named as a "major asset" to the nation); *Flood v. Kuhn*, 407 U.S. 258, 266 (1972) (baseball named as "everybody's business").

106. The duty of loyalty requires a director to place the corporation's interests above his own interests in case of conflicting interests. See, e.g., *Bayer v. Beran*, 49 N.Y.S.2d 2 (Sup. Ct. 1944).

107. See, e.g., *Willisch*, *supra* note 67, at 1643-45 (for instance, increased revenue sharing between the clubs might not be in the individual interest of the rich clubs, even though it increases the competitive balance of the clubs and is economically in the interest of the league. It is unlikely that the owners of the rich clubs vote for revenue sharing).

B. *The Hybrid Model - a Modified CEO and a Modified Commissioner*¹⁰⁸

The hybrid model is a division in governance responsibilities and is built around a CEO who manages the business affairs of the league, and a Commissioner who protects the integrity of the game. This concept tries to avoid the disadvantages of the pure corporate model. It extends the power of the CEO to address the duty of loyalty problem¹⁰⁹ and establishes a modified Commissioner to provide an impartial authority in order to balance the different interests.

1. Modification of the CEO's Power

Under the hybrid model, the CEO would be entrusted with the power to make any decision in the "best economic interests of the league." This authority would allow the CEO to override board decisions that he determines are not in the best economic interests of the league. In fact, the CEO would determine whether an owner breached his duty of loyalty and acted in his own interests rather than in the interests of the league. To restrain the CEO from abusing his power, a decision could be overridden by the owners with a three-fourths vote. In order to enable the CEO to resist political pressures by the owners, the owners could terminate the CEO only by a two-third vote. The CEO would preside at board meetings and vote only when necessary to break a deadlock.

2. Modification of the Commissioner's Power

The Commissioner would be elected and employed by the owners and would retain jurisdiction over the dispute resolution and disciplinary process under the best interests clause. The position is modified in that the Commissioner would lose the power for the decision-making process which is granted to the CEO. To strengthen the position, the Commissioner could only be terminated by a unanimous vote of the owners.

3. Criticism

First, the modification of the CEO's power is not sufficient to avoid duty of loyalty violations by the owners. Indeed, the CEO may invoke the "best economic interests" clause to obstruct measures determined to

108. The hybrid model is a proposal by Willisch to reconstruct Major League Baseball. Willisch, *supra* note 67, at 1640-49.

109. *See id.*

be not in the best economic interests of the game. However, the CEO would not have enough standing against the owners to enforce this clause. A powerful enforcement of the clause would mean that, on the one hand, the CEO is executing the owners' decisions under their control, and on the other hand, the CEO is overriding their majority decisions. It is not hard to imagine that a CEO, overriding a board's decision, may face termination, since he is employed at will of the owners.¹¹⁰ Therefore, a CEO takes job security into consideration when deciding to invoke the clause. Thus, there is still the conflict of an employee controlling actions by his own employer.¹¹¹

Second, the modification of the Commissioner's power is not sufficient to provide an impartial and effective internal authority, as now the Commissioner would be elected by the owners without any involvement of other participants. The hybrid model addresses the conflict by requiring a unanimous vote for the termination of the Commissioner. Indeed, there would be a high threshold to discharge him by a board decision. However, this requirement does not avoid the Commissioner's conflict. The Commissioner still has an interest to act primarily in favor of the owners based on his personal interest to be reelected by the owners after his term has expired. Moreover, even a majority decision by the owners to terminate his term might put enough political pressure on him forcing him to resign voluntarily.¹¹²

Therefore, the hybrid model does not establish an impartial and fair authority for the dispute and disciplinary process. Thus, it does not further the second objective of league organization and is not a sufficient alternative.

C. The Panel Model - a CEO and Reconstruction of the Dispute Resolution and Disciplinary Process

The panel model is based upon the division of governance responsibility as well and proposes two major changes in the present league organization. First, it establishes the position of a CEO. Second, to balance the interests of the parties and to address the specific circumstances of the professional sports league, it reconstructs the dispute and

110. The proposed requirement of a two-third vote under the hybrid model merely reduces this conflict, but does not avoid it.

111. *See supra* part V.A. Here the conflict is even stronger, because the CEO is acting under direct control of the owners.

112. Compare the resignation of the baseball Commissioner Fay Vincent. The owners did not try to terminate him, but made a vote of no confidence and thereby put political pressure on him to resign. *See supra* note 95.

disciplinary process and abolishes the office of the Commissioner in the traditional way.

1. The CEO

Under the panel model, the position of the CEO is similar to the CEO under the pure corporate model.¹¹³ Thus, the owners act as the board of directors with the exclusive decision-making authority and their decisions are executed by an appointed CEO, acting under their control. Yet, in order to do justice to the specific circumstances of a professional sports league,¹¹⁴ the CEO should be given a stronger position. The CEO could be terminated only by a two-third vote of the owners and would be the designated chairman of the board, where he votes when necessary to break a deadlock.¹¹⁵

2. Reconstruction of the Dispute Resolution and Disciplinary Process

a. Federal Agency

Since the issues and disputes in the several sports leagues are similar, one alternative might be to establish a federal agency for professional sports.¹¹⁶ A federal agency could provide uniform national regulations applicable to all sports and acquire great expertise, since its sole function would be to regulate and supervise professional sports.¹¹⁷ Such a federal agency has been set up by Congress in the past for self-regulatory organizations in other areas.¹¹⁸ However, as private associations, leagues have the basic right to police and formulate themselves, which sets a

113. See *supra* part VI.A. His power is measured under the standard of a usual business corporation's CEO.

114. A professional sports league as a private association is not owned by the team owners like other corporations are owned by shareholders. The league has a characteristic of a joint venture of independent business men. A CEO of the league does not deal merely with usual owners of "his" corporation, but deals with more than twenty independent business people, all operating their own teams and joined in a common league.

115. This is an element of the CEO's modification under the hybrid model. See *supra* part VI.B.2.

116. See Comment, *supra* note 7, at 795-798 (outlines a structure for a federal agency dealing merely with discipline matters).

117. *Id.* at 795.

118. For example, the Securities Exchange Commission was implemented pursuant to the Securities Exchange Act of 1934. 15 U.S.C. § 77 (1988). The Commission has the power to regulate the exchanges and the entities registered as a self regulatory organization. See David A. Skeel, *Some Corporate And Securities Law Perspectives On Student Athletes and the NCAA*, MICH. L. REV. (forthcoming 1995, on file with author) (discussion to subject the activities of the NCAA and its member universities to external oversight in form of securities-styled regulation in form of the SEC).

high standard for outside interference.¹¹⁹ As far as possible, a private association should be able to act without external interference. On the other hand, the approach to establish a federal agency for the professional sports leagues draws support from the fact that "sports have thus far failed to establish a disciplinary system which adequately protects the interests of both the public and the players."¹²⁰

Yet, under practical considerations the realization of a federal agency for sports seems questionable. The owners have a strong interest in exercising their right not to be governed by outside forces.¹²¹ Because of the owner's disinterest and reluctance to subject their business to an outside authority, the concept of a federal agency is highly unlikely. Likewise, an initiative by Congress appears unlikely with regard to the long lasting unwillingness of Congress to intervene in the sports business (e.g., failing to withdraw the baseball antitrust exemption). Besides, the creation of a federal agency entails significant administrative expenses, which makes such a step harder to enforce politically.¹²² Based on these practical obstacles, it is unlikely that a federal agency will be established as a disciplinary authority.

b. *The Panel*

Under the panel model, the parties are subject to the dispute resolution and disciplinary authority of an Internal Arbitration and Disciplinary Panel (IADP). The establishment of the panel is based upon involvement of both the owners and the players, since, as shown above, the election of the disciplinary authority by the owners alone causes an unavoidable conflict of interest for the Commissioner.

The IADP would be a tripartite panel. The concept of a tripartite panel is consistent with the Federal Arbitration Act¹²³ and is used in several other organizations as well.¹²⁴ In particular, baseball's collective bargaining agreement established such a procedure for its arbitration on salaries and grievances involving matters not presented to the Commissioner.¹²⁵

119. See, e.g., Durney, *supra* note 37, at 624.

120. Comment, *supra* note 7, at 796 (footnote omitted).

121. See *supra* note 67 and accompanying text.

122. See, e.g., Skeel, *supra* note 116, at 64; Comment, *supra* note 7, at 796.

123. See 9 U.S.C. § 5 (Supp. I 1995).

124. See, e.g., the General Agreement on Trade and Tariffs (GATT), art. XXII (arbitration panel established with the same election procedure).

125. See Basic Agreement, *supra* note 56, art. XI, A(9). Therefore, establishing the IADP could extend the procedure and methods already used.

Under the panel model, each party shall appoint one member to the panel, and a third member is chosen by the first two members as the designated panel chairman.¹²⁶ This concept ensures an balanced involvement of both the players and the owners and, thus, provides impartiality of the chairman. The chairman would not be subject to a conflict of interest like the present Commissioner.

Usually, a tripartite panel issues panel decisions, decided by all three members of the panel. However, the panel model proposes a different approach. The owners and the players should agree to let the Chairman decide the issues alone, treating him as an umpire and the other two arbitrators as advocates and agents of the designating party.¹²⁷ Consequently, the model suggests that both the owners appoint the CEO and the players the Executive Director of the Players Association. The partiality of the executives would not bar them from being members of the IADP.¹²⁸ The appointed executives would act as agents and representatives of their parties in the panel. The involvement of these two chief executives would avoid inefficiency arising if too many persons were given authority. As the decision-maker, these two personalities bring the greatest knowledge of the parties' respective positions into the panel. The executives could bring their position fast and informally to the Chairman who could discuss and evaluate the facts of a dispute with the executives before issuing a decision.

To strengthen the position, the Chairman would be elected for a term of five years and terminated by a three-fourths majority of both the owners and the players. Thus, there would still be a strong, single person with the authority to act promptly and without delay. The Chairman's power to decide alone enhances the accountability of the panel, since the decisions are identified as coming from a single person. On the other hand, although a single person is deciding, both parties are represented equally on the panel. This might avoid potential conflicts because higher acceptance of an internal authority reduces the likelihood of a challenge of an authority in court.

126. In the event the parties cannot agree on a fixed period of time, they shall request that the American Arbitration Association furnish them with a list of arbitrators. Upon receipt of said list, the parties shall alternate in striking names from the list until one remains. For example, baseball's Basic Agreement uses this approach. *See id.*

127. *See, e.g.,* *Petrol Corp. v. Groupment D'Achat Des Carburants*, 84 F. Supp. 446 (S.D.N.Y. 1949) (this construction was held by the court as consistent with the law).

128. *See, e.g.,* *M. De Matteo Const. Co. v. Maine Turnpike Authority*, 184 F. Supp. 907, 913 (Me. 1960) (a party of an arbitration panel employed by one party or acting as an agent of one party does not itself disqualify him from acting as independent arbitrator or umpire if the parties so agree).

The newly created panel would provide basic due process and, therefore, avoid judicial interference under the Federal Arbitration Act.¹²⁹ Although arbitration agreements do not deprive the National Labor Relations Board (NLRB) of jurisdiction, the NLRB has stated that it will decline jurisdiction where the arbitration proceedings are fair and regular.¹³⁰

Accordingly, under the panel model, the traditional role of the Commissioner would be abolished. In fact, he would act as the chairman of the panel, elected by both parties, responsible for the dispute and disciplinary process and without decision-making power.

3. Allocation of Power between the CEO and the Chairman of the Disciplinary and Arbitration Panel

With the division of power, some questions arise about the allocation of power between the CEO and the chairman of the panel. Since the owners are the money investors, they have a legitimate interest in controlling league matters. Their executive organ would be the CEO with the exclusive decision-making power. The CEO's authority would include control over the season, rules, and marketing, and the CEO would promulgate administrative rules and regulations. Further, he would make the strategic league decisions and act as the official spokesperson of the game with the long range interests of the game in mind.

The chairman of the panel would function reactively with authority for dispute resolution and disciplinary actions. The arbitration authority would include salary arbitration, grievance arbitration, and arbitration of all disputes between any parties about the interpretation of any league or collective bargaining agreement.

Further, the Chairman would ensure the integrity of the game through his disciplinary power. The disciplinary power, given by the "best interests" clause, would be applicable to any action of any party not in the best interests of the game. All parties would be subject to the disciplinary power of the Chairman. To maintain the integrity of the game, the executive decisions of the board and the CEO would also be reviewable. In fact, if management decisions affect the integrity of the game, the Chairman must have the power to override the decisions and

129. See 9 U.S.C. § 10 (1992) (provides the reasons a court may reverse the decision of an arbitrator; e.g., fraud, corruption, partiality, bias or prejudice).

130. The NLRB will not hesitate to interfere where they determine unfair practices. See, e.g., Murray Chass, *Labor Board to Seek Injunction Against Baseball Club Owners*, N.Y. TIMES, Mar. 27, 1995, at A1 (in the baseball strike in 1994-95 the NLRB sought a preliminary injunction against the owners based upon unfair labor practices).

demand new consideration of the issue. Consequently, management decisions would not be protected from review by the wide scope of the business judgment rule. This is an important distinction between the organization of the professional sports league under the panel model and a usual business corporation. This is necessary because of the public interest in the game and the owners' problem of acting in compliance with the duty of loyalty.¹³¹ Otherwise, the Chairman would not be an effective method of internal control. Thus, the Panel, acting through its impartial Chairman, would possess strong authority in order to protect the integrity of the game. This authority ensures a balance between the interests of the owners, the players and the game.

An example of this model might be the player's strike in baseball. The dispute between the parties was able to escalate because of the lack of an impartial authority within the league.¹³² Under the panel model, the Chairman would be the disinterested and impartial referee, authorized to control the bargaining process between players and owners. This control would give the Chairman the authority to set the day, place, and agenda of the bargaining sessions and to force both parties to bargain seriously and effectively from the beginning.¹³³ The Chairman could act efficiently by communicating with the executives of both sides quickly and informally in form of the panel structure.

Even though this approach might not ensure successful action by the Chairman in this "morality play"¹³⁴ in which even the President's intervention could not settle the dispute, it might have avoided the escalation of the dispute and the cancellation of the World Series for the first time in ninety-two years. In particular, the Chairman could force the parties under the "best interests"¹³⁵ clause to play the game and, thus, intervene effectively in the collective bargaining process as a neutral authority. The decision of the Chairman should receive a high acceptance by both parties since they would have elected him to act as an impartial authority.

131. See *supra* part VI.A.1.

132. See, e.g., Dolson, *supra* note 91, at C2 (citing view of former National League president Bill White).

133. One problem during the strike was the long breaks between the bargaining sessions. It seems the parties had difficulty agreeing about the day and place of bargaining.

134. Fay Vincent (Commissioner of baseball between 1989 and 1992), *What Baseball Needs*, N.Y. TIMES, Apr. 4, 1995, at A25.

135. In fact, there is less doubt that the baseball strike was not in the best interests of the game.

Moreover, the owners could act more efficiently in the bargaining process through their CEO. As centralized spokesperson of the owners, the CEO could represent a unanimous opinion of the owners in the bargaining process, which could avoid any confusion about the owners' position in a labor dispute.

VII. CONCLUSION

The necessity for an alternative approach does not seem to be urgent with regard to the present economic success of the professional sports leagues under their Commissioners.¹³⁶ However, this Article does not measure the present legal concept solely under its economic success. As a matter of fact, the professional sports leagues increasingly find themselves in court. The efficiency of the several leagues and the security of player incomes are threatened by long and painful labor disputes between the parties. This is not only a result of the league's economic system and a disputed division of revenues. The present problematic situation in professional major league sports is, *inter alia*, also a consequence of an insufficient organizational league structure¹³⁷ with which neither the owners nor the players can be satisfied. For the owners, the present governance structure is not efficient enough, which is why they intend to reconstruct the power of the Commissioner. For the players, the system seems structured significantly in favor of the owners. Therefore, the traditional single person commissioner cannot provide a sufficient alternative for the expectations of both parties. The Commissioner under the present governance structure is subject to an unavoidable conflict of interest, which makes it impossible for him to act in favor of both parties. Thus, the position of the Commissioner in the traditional form needs to be reversed.

The panel model might be a considerable alternative to the present system. The panel model suggest dividing the governance responsibilities and sets up two positions. First, a CEO would be the efficient decision-maker for the owners and official spokesperson of the game. Secondly, an internal and impartial panel is given the authority for the arbitration and disciplinary process. The model further suggests allowing the impartial chairman of the panel to independently decide and

136. The NFL under Commissioner Paul Tagliabue and the NBA under Commissioner David Stern have enormous economical success under their strong and powerful leadership. The NHL elected Gary Bettman as its first Commissioner, modeled after David Stern. See Lapointe, *supra* note 31, at 34.

137. See, e.g., Vincent, *supra* note 134, at A25 (the old Commissioner Fay Vincent claims that baseball needs new ideas and new methods under new leaders).

to appoint the chief executives of both the players and the owners to the panel as agents of their parties. This governance structure would support the integrity of the game, do justice to the different interests of the participants and provide fairness to all sides. In sports, fairness is not only required by the parties on the field, but also by the parties off-the-field. The leagues should carefully consider their organizational structure and remind the words of acting Commissioner Bud Selig: "We are where we are now, because we repressed these problems like Scarlett O'Hara: 'We'll think about tomorrow.'"¹³⁸

138. Dave Van Dyck & Brian Hanley, *Little Guys at Root of the Shutdowns In Baseball*, CHI. SUN TIMES, Oct. 14, 1994, at 128 (citing Commissioner Bud Selig).