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Sports

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IV. SPORTS

A. Antitrust

1. *Baseball Remains Exempt From Antitrust Laws*

In the spirit of America's national pastime, it might be appropriate to say that in a recent Texas district court decision, the defendant struck out. For over sixty years, a void in the federal antitrust laws has existed. Baseball, the game that lives in the hearts and minds of millions of Americans, has been exempt from the set of laws[1] designed to prevent the monopolization of interstate commerce. However, in *Henderson Broadcasting Corp. v. Houston Sports Ass'n*,[2] the baseball exemption to antitrust laws was not extended to encompass radio sports broadcasting.

Defendants Houston Sports Association ("HSA"), owner of the Houston Astros baseball team, and Lake Huron Broadcasting Corporation, owner of KENR-AM radio ("KENR"), filed a motion to dismiss plaintiff Henderson Broadcasting Corporation's complaint.[3] The plaintiff, also known as KYST-AM ("KYST"), brought an action against defendants for injunctive relief and $2.5 million claiming violations of sections 1 and 2 of the Sherman Act and the Texas antitrust laws, as well as breach of contract, inducing the repudiation of a contract and interference with business relationships.[4] Relying on the baseball exemption, HSA and KENR sought to terminate the litigation by making a motion to dismiss for failure to state a claim under Federal Civil Procedure Rule 12(b)(6).[5]

The complaint sought to reestablish KYST's legal rights to broadcast Astro baseball games. HSA allegedly entered into contracts with both KYST and KENR, two competitors in the Houston-Galveston radio broadcasting market. HSA was then said to have breached its contract with KYST as part of a conspiracy with KENR so that HSA could monopolize the advertising revenue and listening audiences in the area.

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1. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). Plaintiff baseball team was one of eight members of the Federal League of Professional Baseball Clubs. Defendants, National and American Leagues of Professional Baseball Clubs, were accused of conspiring to destroy plaintiff's league by inducing Federal League teams, except plaintiff, to leave the Federal League and join defendant's leagues.

2. 541 F. Supp. 263 (S.D. Tex. 1982).

3. *Id.* at 264.

4. *Id.*

5. *Id.*

Without rights to broadcast the Astro games, KYST would lose a significant number of listeners resulting in a loss of advertisers and advertising revenue.[6]

KYST's allegation that radio comprised a significant portion of HSA's business, some of which was interstate commerce, placed this activity in the realm of federal antitrust laws.[7] In bringing their motion to dismiss, KENR and HSA had the difficult burden of proving that the acts KYST complained of were exempt or immune from these laws.[8] KENR and HSA did not overcome the presumption against exemption. In ruling against defendants, the court articulated three lines of analysis to demonstrate that radio broadcasting was not to follow on the coattails of the baseball exemption: 1) The Supreme Court "has implied that broadcasting is not central enough to baseball to be encompassed in the baseball exemption"; 2) Congress has not seen fit to accord the exemption to radio broadcasting, and 3) Lower federal courts have not exempted other baseball-related commercial activity which, like broadcasting, do not involve the actual business of the game.[9]

Henderson was a case of first impression. The Texas district court had no precedent which directly confronted the issue of whether or not radio broadcasting was to be included within the baseball exemption. Consequently, although the issue in the case involved broadcasting and not the baseball industry, the underlying theme of the opinion was that the entire baseball exemption exists on such precarious grounds today[10] that extending it would "distort the specific baseball exemption."[11]

The Supreme Court created the baseball exemption in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*[12] for two reasons. First, the business of baseball was not considered to be interstate commerce.[13] The most visible interstate aspect of the game when *Federal Baseball* was decided in 1922 was the

6. *Id.* at 264 n.2.

7. *Id.* at 263-64. In Radovich v. Nat'l Football League, the Court stated that a proper allegation that a substantial amount of profit is derived from radio and television is "sufficient to meet the commerce requirements of the Act." 352 U.S. 445, 453 (1975).

8. 541 F. Supp. at 265.

9. *Id.* The business of the game refers to such matters as a reserve clause in a player's contract, player's rights in a trade agreement and league rules.

10. The court used such words as "aberration" and "anachronism" to accompany the idea of baseball's exemption. *Id.* at 269, 272.

11. *Henderson*, 541 F. Supp. at 271 (S.D. Tex. 1982).

12. 259 U.S. 200 (1922).

13. In *Federal Baseball*, Justice Holmes said that "[t]he business is giving exhibitions of baseball, which are purely state affairs." 259 U.S. at 208.

travel involved when two teams got together to play in a certain city. This interstate aspect, however, was considered incidental and not substantial enough to challenge the local character of the business.[14] Secondly, the sport of baseball could not be considered trade or commerce since the game involves expending personal effort, an attribute not considered to be commerce.[15]

Over the three decades following the *Federal Baseball* decision, radio and television broadcasting greatly expanded, enabling more sports fans than ever before to sit at home and enjoy the game without having to fight the traffic at the ballparts, or risk getting hit over the head with a bag of peanuts thrown by a sluggish vendor. However, expanded media coverage of baseball games did not prompt the Supreme Court in *Toolson v. New York, Inc.*[16] to life the exemption. The impact of broadcasting was not at issue in *Toolson*[17] although the dissent noted the increased revenues generated from radio and television.[18] It was clear that the Court was waiting for Congress to legislate on the baseball exemption and was not going to overrule *Federal Baseball* even if its original premise, exempting baseball, no longer seemed valid.[19]

The last Supreme Court case to date that dealt with the baseball exemption[20] again refused to end the anomalous exemption, although it did criticize and finally contradict *Federal Baseball* by proclaiming that baseball was a business engaged in interstate commerce.[21] *Henderson* concluded that the *Kuhn* Court might have overruled *Federal Baseball* if it had believed that broadcasting was more central to the game.[22] Therefore, in denying the motion to dismiss, the *Henderson* court pointed to language in *Kuhn* that implies that broadcasting

14. *Id.* at 209.

15. "[P]ersonal effort, not related to production, is not a subject of commerce." *Id.*

16. 346 U.S. 356 (1953), *reh'g denied*, 346 U.S. 917 (1953).

17. *Toolson* involved the reserve clauses in baseball players' contracts and league-wide agreements which were both said to have deprived players of services and the opportunity for advancement. *Id.* at 362-64.

18. *Id.* at n.1.

19. *Toolson*, in a half-page decision made clear that "[w]e think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.* at 357.

20. In Flood v. Kuhn, antitrust laws were allegedly violated when a St. Louis Cardinals center fielder was traded without his consultation and was prevented from negotiating his own trade. 407 U.S. 258 (1972).

21. The Court stated that since professional baseball "is a business . . . engaged in interstate commerce," it is an "exception and an anamoly . . . an aberration." 407 U.S. at 282.

22. The Court in *Kuhn* stated, "[t]he advent of radio and television with their conse-

should not be encompassed in the baseball exemption if, alternatively, radio and television coverage would not warrant ending the baseball exemption.

According to *Henderson*, an "important decision"[23] by the Second Circuit Court of Appeals lended support for not exempting HSA and KENR. In *Gardella v. Chandler*,[24] the *Federal Baseball* decision was distinguished on the grounds that modern radio and television accounts of games may make baseball exhibitions interstate commerce. The circuit court took the bold step of remanding the case back to the district court which had previously dismissed the case for lack of jurisdiction.[25] Judge Hand wanted the district court to determine whether the modern media "together with any other interstate activities marked the business as a whole," thus subjecting it to antitrust laws.[26] *Gardella* merely lends more support to KYST's opposition to dismissal. The relationship between broadcasting and the baseball exemption was left up in the air in *Gardella* due to a quick settlement after the circuit court's ruling.

After analyzing the line of Supreme Court cases dealing with the exemption, the *Henderson* court was frank in stating that "[t]he fact that interstate broadcasting on the one hand has subjected other professional sports to the antitrust laws, but on the other hand has not affected the baseball exemption, is perplexing."[27] Today, baseball is the only professional sport which is granted immunity from the federal antitrust laws.[28] The *Henderson* court rationalized this by repeating that "broadcasting is not central enough to the 'unique characteristics and needs' of baseball which the exemption was created to protect."[29] However, the court determined that the more reasonable interpretation is that the baseball exemption is an "aberration" and the court "should leave the aberration as it finds it, on the narrow ground of *stare*

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quent increased coverage and additional revenues has not occasioned an overruling of *Federal Baseball* and *Toolson*." 407 U.S. at 281.

23. 541 F. Supp. at 267.

24. In *Gardella* a New York Giants player was barred from baseball for several years after he violated terms of the reserve clause contained in his contract when he played professional baseball in Mexico. 172 F.2d 402 (2d Cir. 1949).

25. The original grounds for baseball immunity seemed jurisdictionally based on an absence of interstate commerce.

26. 172 F.2d at 408.

27. 541 F. Supp. at 268.

28. *See* Haywood v. Nat'l Basketball Ass'n., 401 U.S. 1204 (1971) (basketball); Radovich v. Nat'l Football League, 352 U.S. 445, *reh'g denied*, 353 U.S. 931 (1957) (football); U.S. v. Int'l Boxing Club, 348 U.S. 236 (1955) (boxing).

29. 541 F. Supp. at 268-69.

decisis."[30]

While precedent was hard to come by, the *Henderson* court found it equally difficult to find guidance from Congressional action, since Congress has not legislated on the issue of exempting radio broadcasting from the antitrust laws.[31] Whenever Congress has come close to addressing the issue, it has not extended the baseball exemption to radio.[32] The only legislation which has exempted any aspect of professional sports dealt with the merger of professional football leagues and pooled telecasting of games in the top four sports markets.[33] Based on an overview of Congressional action, or lack thereof, the *Henderson* court found no support for HSA and KENR's position.

The defendants' position also fell short when viewed against other lower federal court decisions which touched upon the subject of the baseball exemption in relation to the business which markets the game. In recent baseball antitrust cases, when issues involved "contracts between baseball teams or players on the one hand and non-exempt business enterprises on the other, no court has granted a dismissal on the grounds that baseball is implicated."[34] *Henderson* discussed a case involving a stadium concession contract which tied the owner of the Oakland A's to the concessionaire for 20 years,[35] and another case alleging that a chewing gum company violated antitrust laws in the sale of baseball cards.[36] The baseball exemption was not raised as a defense in either case. The *Henderson* court reasoned that if the baseball exemption was not raised in these other cases which litigated revenue-producing areas of baseball, such as a broadcasting contract, then no

30. *Id.* at 269.

31. *Id.*

32. A 1952 House Subcommittee Report was weary of any broad exemption which would have adverse effects on the antitrust laws. House Comm. on the Study on Monopoly Power, Organized Baseball, H.R. Rep. No. 2002, 82d Cong., 2d Sess. 230 (1952). A 1965 Senate Subcommittee was willing to go as far as exempting the "essential sports practices" of baseball, football, basketball and hockey, but was unwilling to exempt the "business practices" of these sports. Professional Sports Act of 1965, S. Rep. No. 462, 89th Cong., 1st Sess. 1 (1965).

33. *See* 15 U.S.C. §§ 1291-94 (1982). The exemption accorded television was for the purpose of assuring weaker teams a percentage of television rvenue; revenue that without the exemption would most likely go to the stronger teams. In this way the League structure could be maintained. 541 F. Supp. at 269-70.

34. 541 F. Supp. at 269-70. The court also pointed out that in such cases jurisdictional challenges were not even raised.

35. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

36. Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982).

justification existed for the exemption to be brought up in the case at hand.

The *Henderson* court was placed in a precarious position of deciding an issue not directly addressed by any previous legal sources. The implications derived from federal court decisions and congressional law-making left no doubt that the baseball exemption was meant to encompass only those aspects of the game itself and not those related to the business end.[37] HSA and KENR contended that radio broadcasting was "so much a part of baseball that it, as well as baseball, was exempt from the antitrust laws."[38] Assuming this were true, their motion was still improper according to the reasoning in *Henderson*. To a large extent, other professional sports have not been exempted from antitrust laws because broadcasting was so bound up with the success or failure of the sport itself.[39] For example, the Supreme Court has found the volume of interstate business in football to be greater than the volume in baseball.[40] It is this volume of interstate transmissions which makes football profitable.[41] Yet, during baseball season, fans are able to see and hear nationally transmitted games throughout the season whether they are on Monday nights, Saturday mornings, the playoffs or the World Series. Seemingly this activity by broadcasters should have lifted baseball's exemption back in the early innings, but it has not. Therefore, in order for *Federal Baseball*'s rationale to hold any meaning today, interstate broadcasting must not be deemed so much a part of the game as "to color the whole" of baseball, otherwise it would thrust the game within the scope of antitrust laws.[42] In other words, the Astros were placed in a no-win situation. If broadcasting is so central to the game, as to "color the whole," then this activity would justify eliminating baseball's exemption. On the other hand, if broadcasting is not important enough to baseball so as to place it within the realm of antitrust laws, then it is certainly not bound up enough with

37. At first glance, it may seem incorrect to exempt the game of baseball and not one of its primary sources of revenue. However, one must keep in mind that antitrust laws exist to promote competition. The original purpose of exempting baseball and the exemption accorded television under 15 U.S.C. § 1291 are not and have never been based on the same premise as HSA and KENR proposed to the Texas district court.

38. 541 F. Supp. at 268.

39. It is difficult to see why broadcasting today is so much more important in other sports than it is in baseball. Although neither the courts or Congress has acted, this does not mean that the baseball exemption remains valid.

40. *Radovich* 352 U.S. at 451-52.

41. *Id.* at 449.

42. *Gardella*, *supra* note 25. In *Gardella*, Judge Hand seriously questioned baseball's exemption in light of modern radio and television. *Id.*

the game so as to justify including broadcasting within baseball's exemption.

Because radio broadcasting was not exempt from antitrust laws before *Henderson*,[43] the decision will not send as many repercussions through the sports industry as those sent up one's arm when hitting a foul ball off the end of a baseball bat. Judging from the type of motion they made, it appears that HSA and KENR sought to terminate the litigation with a long-shot proposition which the court dismissed with the weight of indirect authority. Although the court set forth the rule that radio broadcasting would not be exempt from antitrust laws, the decision's real impact merely drives another nail into the coffin of the baseball exemption. As the district court concluded: "[t]he baseball exemption today is an anachronism. Defendants have not presented a reason to extend it."[44] HSA and KENR's motion "fanned" on three pitches: Supreme Court interpretations, Congressional inaction and lower federal court decisions. As far as the baseball exemption is concerned, the *Henderson* court signals that the "anachronism" may be facing the bottom of the ninth inning.

Remy Kessler

2. *Cross-Ownership Ban*

The North American Soccer League successfully opposed the National Football League's attempt to require team owners to divest themselves of holdings in professional baseball, basketball, hockey, and soccer. In *North American Soccer League v. NFL*,[1] the court held the proposed amendment to the NFL's constitution[2] to be a violation of the rule of reason as extrapolated from section one of the Sherman Antitrust Act.[3]

"Professional sports leagues present a unique form of economic organization, whose members must compete fiercely in some respects and cooperate in others."[4] The structure is economically justified be-

43. *See* Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1982).

44. 541 F. Supp. at 272.

1. 670 F.2d 1249 (2d Cir. 1982), *aff'g in part, rev'g in part*, 505 F. Supp. 659 (S.D.N.Y. 1980), *cert. denied*, — U.S. —, 103 S. Ct. 499, 74 L. Ed. 2d 639 (1982).

2. The proposed cross-ownership ban is reproduced in 505 F. Supp. at 661-62.

3. 15 U.S.C. § 1 (1976).

4. Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 Harv. L. Rev. 418, 419 (1967). "The legal problems [arising from] that 'bedeviling hybrid' . . . cut across every aspect of the sports business . . . ." Riley, "In the

cause it makes possible a product, major league sports.[5]

The NASL came into existence in 1968. It grew erratically until 1974, but achieved dramatic increases in growth from 1975 through 1978.[6] The NFL, a giant of the industry, has opposed cross-ownership since the 1950's.[7] NFL resolutions in 1967, 1972, 1974, 1976, and 1977 urged NFL team owners to divest themselves of holdings in other professional sports teams.[8] Nonetheless, cross-ownership persisted. In particular, Lamar Hunt, owner of the Kansas City Chiefs and the Dallas Tornados, and the Robbie family, owners of the Miami Dolphins and the Fort Lauderdale Strikers, continued to expand their holdings,[9] much to the chagrin of their fellow NFL team owners.[10]

In 1978, the NFL sought to put teeth into its policy with a flat prohibition on cross-ownership, supported by economic sanctions and extending the prohibition to the relatives of NFL team owners.[11] The ban would have required Hunt and the Robbie family to divest themselves of NASL holdings.[12] At the hearing for a preliminary injunction,[13] the NASL claimed that it was already injured in the loss of prospective investors,[14] and that the threat to the NASL's stability jeopardized broadcasting negotiations.[15]

The NFL contended that the purpose of the ban was to preserve commercial confidentiality and public confidence, and to prevent "creeping merger[s]" through joint ownership.[16] The narrow issue was

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Front Court for the NBA," Nat'l L. J., January 2, 1984, a 28, col. 2 (quoting NBA Comm'r-elect, David Stern).

5. Note, *supra* note 4 at 420.

6. Moynihan, North American Soccer League v. National Football League: Applying "Rule of Reason" Analysis under the Sherman Act to Private Bans on Cross-Ownership, 15 New Eng. L. Rev. 697, 703 (1980).

7. 505 F. Supp. at 669.

8. *Id.*

9. *Id.* at 669-670.

10. In particular, Leonard Tose of the Philadelphia Eagles and Max Winter of the Minnesota Vikings. 670 F.2d at 1254.

11. Moynihan, *supra* note 6, at 706.

12. L. Sobel, Professional Sports and the Law, § 5.5 at 67 (Supp. 1981). Lamar Hunt has been characterized as "unquestionably the most powerful force in the founding, survival, and expected growth of professional soccer in the United States." Moynihan, *supra* note 6, at 734.

13. 465 F. Supp. 665 (S.D.N.Y. 1979).

14. Specifically, Carroll Rosenbloom of the Los Angeles Rams and Ranken Smith of the Atlanta Falcons. Moynihan, *supra* note 6, at 712 n. 91.

15. *Id.* at 707.

16. L. Sobel, *supra* note 12, § 5.5 at 67 (Supp. 1981). Moynihan stated that the ban would be procompetitive only if cross-ownership would inhibit season expansion and direct competition between teams of different leagues. Moynihan, *supra* note 6 at 732-34. Moynihan discounted any procompetitive effect because franchise owners are likely to seek econo-

whether it was reasonable to exclude twenty-eight NFL team owners and their families from the market for sports ownership investment capital.[17]

The trial court made no definite finding as to the breadth of the market, but characterized the individual investor in professional sports as the "sportsman,"[18] an individual with a lot of risk capital and a love of sport and the limelight.[19] Such individuals come "from various walks of life, . . . frequently without prior experience in the field."[20] The NFL forbids corporate ownership unless the corporation's primary business purpose is to run a football team,[21] but corporate ownership is relatively common elsewhere in the industry.[22]

The trial court granted a preliminary injunction against the ban because the NASL had demonstrated a substantial risk of immediate irreparable harm and the existence of sufficiently serious merits to make them a fair ground for litigation.[23] The trial court discounted the NFL's claims that it would be injured because of its eleven year delay in acting to enforce the policy.[24]

Nonetheless, "in the light of discovery and a full trial record,"[25] the court determined that the NFL acted as a single entity in the investment capital market.[26] Therefore, it was not subject to the Sherman

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mies of scale in the fuller use of stadia. *Id.* Moynihan criticizes the ban as underinclusive in not prohibiting interests in other businesses and overinclusive in banning cross-ownership rather than imposing a more limited form of oversight. *Id.* at 737-38.

17. Moynihan stated that, absent "supply substitution, the NFL market power would be obviously substantial." Moynihan, *supra* note 6 at 725.

18. The trial court might also have identified the "sportswoman," *e.g.*, Susan Tose Fletcher, a lawyer recently designated Leonard Tose's heir apparent, and Georgia Frontiere, a former vaudeville singer and chorus girl who inherited the Los Angeles Rams in 1979. *See* Janofsky, *Boss's Daughter Takes Firm Command of Eagles*, N.Y. Times, May 16, 1983, at C11, col. 1.

19. 505 F. Supp. at 665. Such "sportsmen" include Leonard Tose, chairman of an interstate trucking company who acquired control of the Philadelphia Eagles; Peter Pocklington, an Albertan businessman who acquired the Edmonton Oilers through a "casual exchange with a friend"; Edward Bennett Williams, attorney for owners of the Washignton Redskins, who acquired control of the team; and Lamar Hunt, who, largely on inherited wealth, acquired the Dallas franchise and the Kansas City NFL franchise. *Id.*

20. *Id.* Ironically, Lamar Hunt, the firebrand of the NASL (*see* n. 13, *supra*), founded the AFL without prior experience. Sobel, *supra* note 12 § 6.1(a) at 382.

21. 505 F. Supp. at 667-68.

22. *Id.* at 665-66. There were eight corporate owners in the NASL, three in the NBA, eight in the NHL, and ten in major league baseball. *Id.*

23. 465 F. Supp. at 668.

24. *Id.* at 677.

25. 505 F. Supp. at 671.

26. *Id.* at 677.

Act.[27]

The Second Circuit rejected the "single entity" reasoning of the trial court. "To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint . . . that would benefit their league [regardless of] its anticompetitive effects."[28] Further, the court characterized the amendment as a "strong action' against Hunt and the Robbies.[29] In light of the protests of individual team owners who instigated the ban, the objective was not to protect the NFL, but individual teams.[30]

The cross-ownership ban was not a violation *per se* because a weak league might be justified in barring an abuse by uncommitted owners.[31] The question, then, was whether the ban promoted more than inhibited competition.

The trial court had not defined the limits of the sports investment capital market,[32] but the ban was intended to foreclose the growth of the NASL by forbidding it access to "a significant segment of the market supply . . . ."[33] That market was not limited to current owners, but the record disclosed a separate market and a need for active, experienced owners. Current owners were, therefore, a significant portion of the market.[34]

The history of nonenforcement of the policy belied the NFL's claim that the ban was necessary to preserve the undivided loyalty of franchise owners.[35] The court suggested the less restrictive alternative of barring cross-owners from negotiations for the sale of broadcasting rights.[36] The court conceded that there was some merit to the NFL's contention that cross-ownership could lead to collusion and a greater restraint on trade than the ban, but saw no substantial threat in this possibility.[37] In short, the NFL had not demonstrated a legitimate purpose for the ban.

The Sherman Antitrust Act provides that, "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be

27. 15 U.S.C. § 1 (1976).
28. 670 F.2d at 1257, citing, Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).
29. *Id.* at 1254.
30. *Id.* at 1257.
31. *Id.* at 1258-59.
32. *Id.* at 1256.
33. *Id.* at 1259.
34. *Id.* at 1260.
35. *Id.* at 1261.
36. *Id.*
37. *Id.*

illegal."[38] Taken literally, the statute would bar all contracts, because every agreement, in some sense, restrains trade.[39] The rule of reason analysis determines whether an agreement merely regulates and thereby promotes trade, or inhibits it.[40] The analysis requires an investigation of the particular business and the purpose and effect of the restraint.[41]

Professional sports leagues compete for players,[42] for stadia,[43] for cities,[44] and for owners.[45] In the market for territories, sports leagues have been deemed single entities. In *San Francisco Seals, Ltd. v. NHL*,[46] the Seals sought to invalidate the NHL's territory regulations. The court looked to the extent of the relevant market[47] and stated that the teams were not competitors in an economic sense and that the territorial regulation "ma[de] possible a segment of commercial activity which could hardly exist without it."[48]

The competition for players, however, is clearly among the teams in a given league. In *Smith v. Pro Football, Inc.*,[49] the court invalidated the NFL draft, as it existed in 1968, for purposefully limiting competition among teams for college graduates.[50] Even so, one judge on that court argued that the teams were not in economic competition[51] and that the draft brought about benefits which inured even to the players.[52]

Missing, however, from *Seals* and *Smith* was the potential for an anticompetitive impact on another league. The NFL may have acted

38. 15 U.S.C. § 1 (1976).

39. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

40. *Id.*

41. United States v. Topco Assocs., Inc., 405 U.S. 596, 606-07 (1972).

42. Sobel, *supra* note 12 § 5.2 (1977).

43. *Id.*, § 5.3.

44. *Id.*, § 5.4.

45. *Id.*, § 5.5, 66-68 (Supp. 1981).

46. 379 F. Supp. 966 (C.D. Cal. 1974).

47. *Id.* at 968-69, citing, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); and Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

48. 379 F. Supp. at 969-70. Ironically, the Seals wanted to move to Vancouver, where there was no NHL team. The NHL's prohibition, therefore, was arguably unreasonable. Had there been a team already in Vancouver, the NHL's prohibition on the Seals' move would clearly have been reasonable. In that situation, however, given the potential for interteam competition, the court might have invalidated the NHL's prohibition. Sobel, *supra* note 12 § 8.2(b) at 502-03.

49. 593 F.2d 1173 (D.C. Cir. 1978).

50. *Id.* at 1185-86.

51. *Id.* at 1195 (MacKinnon, Circuit Judge, concurring in part, dissenting in part).

52. *Id.* at 1201.

as a single entity,[53] but a group cannot escape antitrust liability by adopting a membership plan.[54] It must still pass muster under the rule of reason.

It is beyond the scope of this note to measure the impact the ban would have had on the NASL,[55] and neither the trial court nor the Second Circuit defined the market for sports investment capital.[56] Mr. Justice Rehnquist believed that the Second Circuit "engaged in excessive speculation . . ." and that the Court ought to have remanded the case to the trial court, whose job the rule of reason analysis is.[57] Beyond that, however, the rule of reason analysis "often requires difficult factual inquiries and subjective policy judgments which are more appropriate . . ." for Congress than the courts.[58]

The NFL may yet attempt to reinstate its traditional policy in a less draconian form.[59] Indeed, it has already objected to Edward DeBartolo, Sr. and Jr., owning franchises in the NFL and the USFL on the ground of conflict of interest.[60] The NFL would more likely prefer, however, the finality of an Act of Congress.

The NFL has succeeded in lobbying efforts in the past. It secured authorization for the AFL/NFL merger and the sale of broadcasting package contracts[61] in a scant seventy-two days of lobbying.[62] Commissioner Pete Rozelle has urged Congress to view the NFL as a single entity, but the focus of its more recent lobbying has been the Raiders' move from Oakland to Los Angeles.[63]

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53. Justice Rehnquist viewed the cross-ownership ban as analogous to a reasonably restrictive noncompetition covenant. — U.S. at —, 103 S. Ct. at 501-02, citing, United States v. Addyston, 85 F. 271, 282 (6th Cir. 1898). A noncompetition covenant among joint venturers is valid under antitrust law if the restraint is ancillary to the main purpose of a legitimate contract and necessary to protect the covenantee's legitimate property interests. *Id. See* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

54. Associated Press v. United States, 326 U.S. 1, 19 (1944).

55. *See*, however, Moynihan, *supra* note 6 and Harv. L. Rev., *supra* note 4.

56. *See supra* notes 33-35.

57. — U.S. at —, 103 S. Ct. at 499-500, citing, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); and Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 302 (2d Cir. 1979). The court of appeal is bound by the district court's findings of fact and "cannot weight complex antitrust evidence *de novo*." *Lektro-Vend*, at 262.

58. Linseman v. World Hockey Assn., 439 F. Supp. 1315, 1320 (1977). *See also* United States v. Topco at 609 and 611-12 (Brennan, J., concurring).

59. The courts in NASL, 670 F.2d at 1261, and Smith v. Pro Football, 593 F.2d at 1188, allowed for less restrictive alternatives.

60. "DeBartolo Family is Standing Firm," N.Y. Times, June 29, 1983, at P8, col. 1.

61. 15 U.S.C. § 1291 (1976). *See* Sobel, §§ 6.1(a) through 6.1(c) (1977).

62. L. Sobel, § 10.2(b)(1) at 585.

63. *See* "N.A.S.L. Opposes Bill It Says Favors N.F.L.," N.Y. Times, March 2, 1982, at

The application of antitrust laws to professional sports remains unsettled. Professional baseball retains a peculiar exemption from antitrust law, a vestige of an ancient interpretation of commerce.[64] The Supreme Court adheres to it because Congress has not acted to remove it.[65]

The last attempt of either House to enact comprehensive sports antitrust legislation was in 1965.[66] Congress' authorization for the AFL/NFL merger and the sale of package broadcasting rights[67] was expressly limited to those two areas.[68] The Ninety-Eighth Congress has produced four bills relating to sports antitrust law. One would simply remove baseball's antitrust exemption,[69] while the other three narrowly address the relocation of teams, a clear response to the Raiders' move to Los Angeles.[70] Two of these bills expressly state that the act will not "exempt from the antitrust laws any predatory practice . . ." against other leagues.[71]

The cross-ownership ban, as it was drawn in 1978, is probably a dead letter. Still, Congress's piecemeal approach to sports antitrust law leaves it "confused, unsettled and unpredictable after over 30 years of almost easeless litigation."[72]

William Leamon Cummings

3. *NFL's Home Game Black-Out Exemption*

Agreements by a professional football league to pool and sell the television rights of its member teams enjoy a statutory exemption from

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B8, col. 6; "Rozelle Seeking Change," N.Y. times, august 17, 1982, at D23, col. 1; "David v. Goliath?," N.Y. times, August 27, 1982, at A10, col. 1; Sinnot, "Case For and Against N.F.L. Antitrust Exemption: Needed to Protect Cities," N.Y. Times, March 6, 1983, § 5 at 2, col. 1; and Hecht, "Case For and Against N.F.L. Antitrust Exemption: It Threatens Free Enterprise," *id.*, col. 3. *See also* Los Angeles Memorial Coliseum Comm'n v. NFL, 634 F.2d 1197 (9th Cir. 1980), *rev'g*, 468 F. Supp. 154 (C.D. Cal. 1979).

64. Flood v. Kuhn, 407 U.S. 258, 284 (1972). *See id.* at 281-82 for a summary of legislative efforts to deal with baseball's antitrust exemption. *See also* Radovich v. NFL, 352 U.S. 445, 456 (1957) (Harlan, J., dissenting) (urging extension of baseball's antitrust exemption to professional football under *stare decisis*).

65. *Flood*, *supra* note 64.

66. L. Sobel, § 1.2(c)(5) (1977).

67. *See supra* note 61.

68. 15 U.S.C. § 1294 (1976).

69. H.R. 3094, 98th Cong., 1st Session (1983).

70. H.R. 2041, S. 1078, S. 1036, 98th Cong., 1st Session (1983).

71. S. 1036 § 3(c), H.R. 2041 § 3(c).

72. "Rozelle Seeking Change," N.Y. Times, August 17, 1982, a D23, col. 1 (quoting NFL Comm'r Rozelle).

the application of the antitrust laws.[1] This exemption does not apply to any agreement that attempts to prohibit the televising of games within a particular area of the country.[2] However, the league may restrict, by agreement, the televising of a game within the home territory of a club which is playing at home.[3]

In *WTWV, Inc. v. National Football League*, the court was asked to define the word "televising" in this context.[4] If televising means originating signal, then a blackout of a local game would be permitted only when the television transmitter was located within the home territory. If, on the other hand, televising refers to the area a signal is received, a blackout would be permitted even though a television transmitter is located outside of the home territory. In this respect, a blackout would be concomitant with the physical boundaries of a team's home territory irregardless of where the signal originates. The court held that signal penetration rather than station location was the focus of the controlling exemption.[5]

The NFL By-laws are consistent with the antitrust exemption provided in section 1292; they prohibit telecasts of home games within a club's territory except by agreement between participating teams. The NFL's Constitution and By-laws define "home territory" as "the surrounding territory to the extent of 75 miles in every direction" from the city limits of the club's franchise city.[6]

WTWV, Inc. owns and operates television station WTVX located near Miami, Florida. WTVX was viewed within a relatively small area before it began broadcasting from a more powerful transmitter located 96 miles north of Miami. This transmitter's signal penetrated 40 miles into the Miami Dolphins' home territory. After WTVX switched to the

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1. 15 U.S.C. § 1291 (1976) provides in part:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs.

2. 15 U.S.C. § 1292 (1976) provides:

Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

3. *Id.*

4. 678 F.2d 142 (11th Cir. 1982).

5. *Id.* at 146.

6. *Id.* at 143.

more powerful transmitter, the Dolphins refused authorization for WTVX to broadcast its unsold-out home games.

WTWV brought suit against the NFL and Miami Dolphins for damages and injunctive relief alleging violation of section 1 of the Sherman Act. Because its station and transmitter was located well outside the Dolphins' home territory, WTWV claimed that the blackout was not within the antitrust exemption. The lower court, however, agreed with the NFL that the blackout was proper noting that signal penetration rather than station location determines which television stations are televising within a club's home territory.[7]

The court of appeals, in affirming this statutory construction, based its decision on the purpose of section 1292. "The broadcast exemption from the antitrust laws was intended to preserve the existence of the NFL by shielding its members from a decline in attendance due to televising games in the area from which spectators are drawn."[8] This purpose necessarily "requires that the antitrust exemption focus on where the potential ticket buyers would receive the signal, not where it came from."

Further, the court rebutted WTWV's contention that the district court erred in not following established principles of statutory construction.[9] In support of its contention, WTWV cited Supreme Court cases which noted that antitrust exemptions should be narrowly construed.[10] A narrow construction in this case would require station location rather than signal penetration to trigger the exemption in section 1292.

However, the court was not persuaded. Although an antitrust exemption should be narrowly construed, precedent does not mandate it be given the narrowest possible interpretation.[11] Therefore, the principles of statutory construction do not require televising to be defined by station location rather than signal penetration.

WTWV also contended that facts contemporaneous with the statute's enactment supported the station location interpretation. In college football, Congress specifically utilized a station location rule in

7. WTWV, Inc. v. National Football League, No. 80-8306-Civ-JCP (S.D. Fla. July 21, 1981).

8. 678 F.2d at 145-46.

9. *Id.* at 144-45.

10. Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1, 11-12 (1976).

11. *Abbott*, 425 U.S. at 1, 11-12 (Supreme Court adopted a broader reading of statutory exemption than court of appeals).

giving blackout protection.[12] This, WTWV claimed, evidenced congressional intent to require the station location interpretation in similar statutes. The court rejected WTWV's claim, reasoning that "[j]ust as Congress may have intended the same interpretation but used different language, so too may Congress have used different language to indicate a different interpretation."[13]

The court's decision and reasoning are sound. Technological advances in the transmission of television signals would completely obliterate the home territory shield Congress provided if the court accepted the station location interpretation. WTWV is itself an example of this. Its station was 96 miles outside of Miami. Yet, it penetrated 40 miles into the Dolphins' home territory. Allowing WTWV or any other station outside the 75 mile limit to transmit into a club's home territory would subvert the exemption and render it meaningless. Therefore, the court was correct in finding that signal penetration rather than station location determines the boundaries of the antitrust exemption.

The court, however, did not define signal penetration. It did find that WTVX's signal penetrated 40 miles into the Dolphins' home territory because of its new, more powerful transmitter.[14] This suggests that the standard for determining signal penetration is based on the projected distance of a signal's transmission.

Technological advances have not only been made in the transmission of television signals. Consumers now have the option of purchasing television "dish" receptors which greatly enhance television reception. The court here was only faced with determining the NFL's blackout rights with regard to the transmission and not the reception of signals. This leaves open the question of whether the NFL can refuse authorization of the telecast, because of the viewers' ability to receive television signals.

The court implicitly suggested that it would uphold the NFL's right to refuse authorization of a telecast because of viewers' ability to receive television signals in the home territory. The court has labeled the NFL's refusal to authorize telecasting of games a "fundamental property right."[15] With respect to section 1292, the court stated that the statute was "merely (a) a confirmation of the NFL's television rights and not an antitrust exemption."[16] Given this expansive viewpoint, the

12. 15 U.S.C. § 1293 (1976).
13. 678 F.2d at 145.
14. *Id.* at 143.
15. *Id.* at 145.
16. *Id.*

court would allow the NFL to limit or refuse to authorize the telecasting of games based not only on the power of television stations' transmitters, but also on the ability of the viewing public to receive television signals. Thus, the court's reasoning implicitly suggests a broad definition of signal penetration as well as a broad definition of the NFL's right to refuse authorization of a telecast.

Paul Griener

4. *NFL's Membership Admissions Procedure*

Professional football is not as fortunate as professional baseball with regard to antitrust laws; professional football does not enjoy total exemption from antitrust laws.[1] In *Mid-South Grizzlies v. National Football League*, the court considered whether the NFL's membership admission procedures violated section 1 or section 2 of the Sherman Act.[2] The court held that the NFL's refusal to accept, or to even consider, a qualified application for membership in the league did not violate either section of the antitrust laws.[3]

The dispute originated in late 1975 when the Mid-South Grizzlies applied to the NFL in the hope of obtaining a franchise for the Memphis, Tennessee area.[4] Representatives of the Grizzlies discussed their application in December of 1975 with the NFL Expansion Committee. Investigation and planning for additional NFL teams was the responsibility of this committee.[5] The committee explained to the Grizzlies that further expansion of the NFL was, at that time, unwise. Also, the Committee stated that they would advise the full NFL membership to consider no further expansion.

The Grizzlies attempted to persuade the NFL two more times. One time the entire NFL membership was present. The NFL responded a few months later by passing a resolution which reaffirmed the committee's recommendation of no further expansion. The resolu-

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1. Professional baseball is totally exempt from antitrust laws. Flood v. Kuhn, 407 U.S. 258 (1972).

2. 550 F. Supp. 558, 560 (E.D. Pa. 1982).

3. *Id.* at 571-72.

4. The plaintiff, the Mid-South Grizzlies, was a joint business venture which included the Mid-South Grizzlies, a Tennessee limited partnership, Consolidated Industries, Inc., a California corporation, and John Edward Bosacco, an individual.

5. The NFL Expansion Committee at the time of plaintiffs' application, consisted of the following members: Daniel M. Rooney, President of the Pittsburgh Steelers, Gerald H. Phipps of the Denver Broncos, Louis Spadia of the San Francisco '49ers, and Texas Schramm of the Dallas Cowboys.

tion stated that due to the major problems confronting the NFL at that time[6] a commitment to expansion would not be prudent.[7] However, the resolution reassured the Grizzlies that they would receive serious consideration in the future when definite expansion plans were formulated.[8] The NFL, because it had already decided against expansion anywhere, never fully considered the merits of the Grizzlies' application.

Exhausting their possibilities of obtaining a franchise through the NFL's application procedures, in December of 1979 the Grizzlies filed this suit. The Grizzlies charged that the NFL's actions established an unlawful group boycott and an unreasonable restraint of trade in violation of section 1 of the Sherman Act.[9] Also, the Grizzlies asserted that the procedures practiced by the NFL amounted to monopolization in violation of section 2 of the Sherman Act.[10]

In holding that the NFL did not violate section 1 of the Sherman Act, the court applied the Rule of Reason test.[11] The Rule of Reason test requires the court to determine "whether the restraint imposed merely regulates and thereby promotes competition or is one that may suppress or destroy competition."[12] The critical factor in proving an antitrust violation under this test is showing an anticompetitive intent or effect.[13]

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6. The NFL had numerous problems: no collective bargaining agreement with the Players Association had been in effect for two seasons, a district court had held several player restrictions to be unlawful, another district court enjoined application of the "Rozelle rule" by the NFL, third district court was considering a case attacking the NFL college draft, the NFL Players Association threatened to challenge the procedures the NFL used to man the new Tampa Bar and Seattle teams.

7. The NFL passed on March 17, 1976 the following resolution:

> RESOLVED, after thorough review of the major problems presently confronting the NFL, that the member clubs do not believe they can formally commit to specific expansion arrangements at this time. The clubs do, however, reaffirm their desire to bring total League membership to thirty teams as soon as possible after resolution of current problems and assimilation of the new Tampa Bay and Seattle teams. At that time, Memphis and Birmingham, which have most actively sought admission in recent months, will be among the cities receiving strongest consideration for NFL franchises.

8. *Id.*

9. 15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal."

10. 15 U.S.C. § 2 reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony."

11. *Mid-South Grizzlies*, 550 F. Supp. at 566-67.

12. *Id.* at 567.

13. *Id.*

The court first considered the effect of the NFL's action in denying the Grizzlies a franchise.[14] In so doing, the court noted that the Grizzlies wanted to join with those unwilling to accept them, not to compete with the NFL. Since the Grizzlies did not seek to become competitors with the NFL, but sought to become partners, they could not have been injured by any anticompetitive effect or behavior of the NFL.

The court considered professional sports a unique type of business.[15] Professional teams in a league must not compete too well with each other in a business sense. If all the teams competed as hard as they could in business matters, then the financially stronger teams would drive the weaker teams out-of-business. If this happened, not only would the weaker teams fail, but eventually the whole league would fail. Without a league no team could operate.

The court surmised that if the Grizzlies were to prevail in this legal action, the receipt of a franchise would have a more anti-competitive effect than the failure to obtain one.[16] If all acceptable applicants for franchises were given one, then motivation to form a rival league would be substantially hampered.

After deciding that the NFL's action did not have an anticompetitive effect, the court then considered whether the NFL possessed an anti-competitive intent. The court concluded the NFL acted fairly and objectively in rejecting the Grizzlies' application at least three times over a four-month period.[17]

The court found the failure of the NFL to consider the Grizzlies' application on its merits irrelevant.[18] The NFL had substantial business reasons to justify its decision. The assimilation of two new teams took three players from each existing team. Also, several lawsuits created uncertainty as to the future of several NFL rules and policies. Given these factors, the court reasoned that the decision not to expand was a sound business judgment and not made with an anti-competitive intent.[19]

After finding no section 1 violation, the court considered whether the NFL's behavior constituted an unlawful act of monopolization proscribed by section 2 of the Sherman Act. Since the Grizzlies sought to join the NFL, they were not rivals or potential rivals of the NFL in the

14. *Id.*
15. *Id.* at 566.
16. *Id.* at 568.
17. *Id.* at 568-69.
18. *Id.* at 568.
19. *Id.* at 569.

business sense. Also, the NFL's actions did nothing to prevent the formation of a rival league or the bringing of a team to Memphis, Tennessee. Therefore, the court concluded, as a matter of law, that no section 2 violation had been shown.[20]

The court's decision in this case is sound. Here, the plaintiffs tried to use the antitrust laws to *join* an alleged monopoly. The purpose of antitrust laws is to promote competition. A finding for the plaintiff in this case would be a misuse and subversion of the Sherman Act since it would be contra to the purpose of the antitrust laws. Therefore, the court's decision faithfully follows the statutory scheme it was asked to interpret.

Although the court in refusing to find a violation of the Sherman Act faithfully followed the purpose of the antitrust laws, the case is not without significance. The case implicitly sets forth limitations on professional sports leagues' franchise admission procedures. The court did not stop after deciding that an anti-competitive effect did not exist. It went further and scrutinized the business concerns faced by the NFL in rejecting the Grizzlies' application. This suggests that if a league's rationale for refusing to consider or accept an application is unjustified, then the court could find evidence of an anti-competitive intent. Therefore, the court, by considering the soundness of the league's business judgment, has set limitations on franchise admission procedures.

Paul Greiner

B. Constitutional Law

1. *Boxer's Right to Fight for Championship Title*

The United States District Court of New Jersey in *Duva v. World Boxing Association*,[1] has held that a boxer has protectible property interests in the ranking given to him by the World Boxing Association (WBA) and in the opportunities accruing to him from that ranking. Furthermore, the court held that action taken by a boxing association with regulatory authority constituted "state action" to which the Due Process Clause of the Fourteenth Amendment would apply.[2] Thus, in

20. *Id.* at 571-72.

1. 548 F. Supp. 710 (D.N.J. 1982). The defendant, the World Boxing Association (WBA), is an incorporated association of international boxing officials who promote and regulate professional boxing throughout the world. Under Article IV of the Association's constitution, all WBA officers must be "members in any official capacity of a National, State, Provincial, or Municipal Boxing Authority." *Id.* at 713.

2. *Id.* at 716-18.

arbitrarily depriving a boxer of his interests without giving him a proper hearing to contest such an action, the association deprives a boxer of his property without due process of law.

On February 2, 1982, Davey Moore defeated the WBA defending Junior Middleweight Champion, Tadashi Mihara, and became recognized as the new champion in that division. According to the WBA's World Championships Regulation section 6, Moore was required to defend his title "against the leading available contender in his weight class, in accordance with the current rating list of the association, within a period of ninety (90) days after the acquisition of this title."[3] However, prior to the Moore-Mihara fight, Moore had signed a contract that was promoted and negotiated by Bob Arum Enterprises (Arum), in which Moore agreed to fight Charlie Weir on April 24, 1982 in defense of his title, should Moore defeat Mihara. The Moore-Weir fight was to take place in a new stadium in Johannesburg, South Africa and was expected to draw 80,000 fans. The contract had been approved by WBA President Rodrigo Sanchez. The WBA had ranked Weir the Number Four Contender in the Junior Middleweight Division.

When the Moore-Weir fight plans were publicized, the Number One Contender, Ayub Kalule, filed a protest claiming that under Regulation section 6, Moore was required to fight him, not Weir. Later, Kalule withdrew his protest when he signed a contract with Arum which gave Kalule the right to fight the winner of the Moore-Weir fight in June 1982.[4]

The Number Two Contender, Carlos Herrera, was apparently unavailable to fight Moore. The Number Three Contender, Plaintiff Tony Ayala, Jr. and his managers, Plaintiffs Tony Ayala, Sr. and Louis Duva informed the WBA, after Moore had defeated Mihara, that Ayala Jr. was available to fight Moore.[5] However, after finding out about the Moore-Weir contract, Ayala filed suit to enjoin the WBA from sanctioning the Moore-Weir fight, claiming that the fight violated Regulation section 6.[6]

After Ayala filed suit, the WBA took steps to suspend Regulation section 6. Regulation section 19 permitted the WBA to suspend other WBA rules if such suspension was approved by a two-thirds vote of the WBA Championships Committee, by the President, and by a majority

3. *Id.* at 714.
4. *Id.* at 715.
5. *Id.* at 714.
6. *Id.* at 715.

vote of the WBA Executive Committee.[7] On March 27, 1982, the two committees ratified President Sanchez's decision to suspend Regulation section 6 and sanction the Moore-Weir fight. Ayala's attorney addressed the Executive Committee for fifteen minutes prior to the vote, but Ayala was given no other chance to represent himself before the WBA. No reason was given by the committees or by Sanchez for the decisions.[8]

In court, Ayala contended that as the Number Three Contender, he had the right under Regulation section 6 to fight Moore for the championship before Weir. Ayala claimed that by sanctioning the Moore-Weir fight, the WBA had deprived him of a property interest without due process of law. The WBA responded by asserting that Regulation section 19 gave it the right to suspend Regulation section 6. In addition, the WBA referred to the fact that Regulation section 6 specifically required the division champion to defend his title against "the leading available contender."[9] Therefore, the WBA argued that Regulation section 6, by its wording, only gave a protectible property interest to the Number One Contender, Kalule. Furthermore, since Kalule had waived his right to fight Moore, Moore could fight whomever he wished. Arum, as intervenor in the suit, claimed that even if Ayala had a protectible property interest, the suspension of Regulation section 6 was a justifiable accommodation of the public's wishes.[10]

The court ruled that in order for Ayala to successfully assert a claim that he was deprived of property without due process of law, he must show that the WBA's actions were, in fact, government actions, that Ayala's interest was a property interest protectible under the Fourteenth Amendment, and that the WBA deprived him of this property without due process.[11]

In determining whether the WBA's action constituted government action, the court stated that the Due Process Clause applies only to state action.[12] The court acknowledged that the WBA was a private organization and citing the Third Circuit decision of *Magill v. Avonworth Baseball Conference*,[13] stated that there were three types of instances where ostensibly private action was, in fact, performed by the

7. *Id.* at 714.
8. *Id.* at 716.
9. *Id.* at 712.
10. *Id.* at 712-13.
11. *Id.* at 716.
12. *Id.* (citing Shelley v. Kramer, 334 U.S. 1 (1948)).
13. 548 F. Supp. at 716 (citing Magill v. Avonworth Baseball Conference, 516 F.2d 1328, 1331 (3d Cir. 1975)).

state: state enforcement of a private agreement, significant state involvement with a private party, and private performance of a government function. The court noted that the regulation of boxing had long been a government function in New Jersey and elsewhere in the United States.[14] Furthermore, the court noted that all WBA officers and committee chairmen were required to be officials of some government boxing authority and that the several government bodies represented in the WBA had delegated much of their regulatory power to the WBA.[15] For this reason, the court felt that the WBA's action constituted state action under the second and third *Magill* tests.[16]

In determining whether Ayala had a protectible property interest, the court said that such interests "are created and their dimensions are defined by existing rules or understandings . . . that secure certain benefits and that support claims of entitlement to those benefits."[17] The court said that Ayala's WBA Number Three ranking and WBA Regulation section 6 created property interests because they were rules guaranteeing Ayala the chance to fight for the Championship before a lower-ranked boxer could.[18]

The court rejected the WBA's argument that the words "leading available contender" in Regulation section 6 only gave a protectible property interest to the Number One Contender, Kalule, and that Kalule's waiver of this interest destroyed all obligations on the part of Moore and the WBA. It held that this interpretation was inconsistent with the WBA's declared purpose of protecting the interests of all boxers, since under such an interpretation, promoters could severely damage the expectations of deserving top-ranked boxers merely by buying off the Number One contender and thereby securing his agreement that the Champion fight anyone whom the promoters wished him to fight.[19] The court decided that the term "leading available contender" must protect the property interests of all of the next available ranked boxers once the leading contender became unavailable to fight for the title.[20]

Finally, the court found that the WBA's denial of Ayala's property interest had taken place without procedural and substantive due process of law.[21] Although Ayala's attorney was allowed to speak briefly

14. 548 F. Supp. at 717.
15. *Id.*
16. *Id.* at 716-17.
17. *Id.* at 718, *e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
18. 548 F. Supp. at 718-19.
19. *Id.* at 719.
20. *Id.* at 720.
21. *Id.* at 720-23.

before the Executive Committee, Ayala had been given no chance to object to the WBA's decision to allow a lower-ranked boxer to fight for the championship. Nor was he given a reason for the WBA's decision to suspend Regulation section 6. This was a deprivation of procedural due process since under *Kent v. United States*,[22] procedural due process requires, at a minimum, an opportunity for the injured party to be heard before losing his property and a statement by the decision-maker of the reasons for the unfavorable outcome.

According to the court, an association provides substantive due process when it exercises its regulatory authority "in a non-arbitrary manner consistent with the purpose of its regulations."[23] The WBA's use of Regulation section 19 to suspend Regulation section 6 was apparently a sacrifice of Ayala's property rights for the sake of the WBA's and Arum's financial gain. The court felt that this was an impermissible reason to deprive Ayala of his property interests and therefore an arbitrary exercise of authority.[24] The court also stated that the WBA's action was inconsistent with the stated purpose of the WBA Regulations of protecting the interests of its contending fighters.[25] For these reasons, the court ruled that the WBA had deprived Ayala of property without due process of law.[26] On the basis of this decision, the court entered a permanent injunction directing the WBA to revoke its sanction of the Moore-Weir fight.[27]

This case is of little significance in the area of due process. Unquestionably, if the WBA deprived Ayala of a protectible property interest, its failure to give Ayala a genuine opportunity to protest its action and its refusal to give a reason for its action deprived Ayala of procedural due process.[28]

At trial, the WBA and Arum argued that the WBA's actions were justified because there was a stronger public interest in Moore's fighting Weir than in his fighting Ayala.[29] But denial of an individual's interest because of public opinion was held to be an arbitrary deprivation of his interest and therefore a violation of substantive due process of law in

22. 383 U.S. 541, 553 (1966).

23. 548 F. Supp. at 721, 723.

24. *Id.* at 721-23.

25. *Id.* at 721, 723.

26. *Id.* at 720-23.

27. *Id.* at 723-25. The court felt that it could not enjoin the Moore-Weir fight altogether and stated that its action against the WBA was sufficient to protect Ayala's championship interests.

28. 383 U.S. at 553.

29. 548 F. Supp. at 722.

Winsett v. McGinnes.[30] The WBA did not bother to argue that it had given Ayala due process. Its failure to do so was apparently predicated on its belief that its action was not "state action" and that Ayala had no property interest under Regulation section 6.[31]

It is in the issues of "state action" and "property interests" that this case is of great importance. In deciding that a voluntary athletic organization which regulates the conduct of athletes in a particular sport could constitute "state action", the *Duva* court has created a split between itself and other federal courts around the country over this issue. The *Duva* court compared the WBA to the National Collegiate Athletic Association (NCAA) and noted that virtually every court which has ruled on the matter has ruled that NCAA activities constitute state action.[32]

Not all courts have extended the NCAA cases to situations involving other athletic organizations. In *DeFrantz v. USOC*,[33] a number of athletes sought an injunction prohibiting the United States Olympic Committee (USOC) from carrying out its resolution not to send an American team to participate in the 1980 Summer Olympic Games in Moscow. In support of its position that the USOC's action was state action, the plaintiffs noted that the USOC was a federally chartered organization,[34] and they argued that its resolution occurred as a result of intense pressure put upon it by the federal government.[35]

The *DeFrantz* court disagreed with the plaintiff's contention that government pressure put upon the USOC constituted government action. Citing *Burton v. Wilmington Parking Authority*[36] and *Jackson v. Metropolitan Edison Company*,[37] it held that the government would have either had to insinuate itself into a position of interdependence

30. 617 F.2d 996, 1007 (3d Cir. 1980) (en banc), *cert. denied sub nom.* Anderson v. Winsett, 449 U.S. 1093 (1981).

31. 548 F. Supp. at 720.

32. Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1254-55 (9th Cir. 1974), Howard Univ. v. NCAA, 510 F.2d 213, 217-20 (D.C. Cir. 1972), Parish v. NCAA, 506 F.2d 1028, 1031-32 (5th Cir. 1975).

33. 492 F. Supp. 1181 (D.D.C. 1980).

34. *Id.* at 1187.

35. *Id.* at 1193. President Carter had threatened to take legal action under the International Emergency Economic Powers Act (50 U.S.C. § 1701-06) to enforce his decision to boycott the Games. The Act would have given him the power to prohibit the sending of an American team to the Games by issuing appropriate regulations violations of which would be punishable by civil and criminal penalties (§ 1704-05). Carter had also discussed the possibility of removing the USOC's tax-exempt status if it refused to comply with his decision.

36. 365 U.S. 715, 725 (1961).

37. 419 U.S. 345, 351 (1974).

with the USOC or to have created a sufficiently close nexus between itself and the USOC so that the USOC's action could be created as the action of the government itself.[38] Referring to the exclusive jurisdiction granted to the USOC over matters related to participation in the Games,[39] the *DeFrantz* court held that the plaintiffs failed to demonstrate a sufficiently close relationship between the USOC and the federal government. The Court stated that the government might have the power to prevent the athletes from participating in the Olympics, but not to force the USOC to vote in a certain way.[40]

Although government influence seems to have played as great a role in the USOC's action in *DeFrantz* as it did in the WBA's action in *Duva*, state action was found in *Duva* and not in *DeFrantz*. This indicates that there is a conflict between the lines of thought stemming from the two cases.

At least one other circuit has held *DeFrantz* to be controlling on this issue. *Lafler v. Athletic Board of Control*[41] involved a situation similar to *Duva*. The plaintiff alleged that the Michigan Athletic Board of Control denied her a constitutional right to fight in amateur boxing competition. The federal district court in the Sixth Circuit found that the Michigan Athletic Board of Control had acquiesced in the United States of America Amateur Boxing Federation's (USA/ABF) enforcement of its own rules and that this did not constitute state action under *DeFrantz*.[42] The fact that such acquiescence *was* held to constitute state action in *Duva* is another fact which underlies the tension between *Duva* and *DeFrantz*.

Both the *Duva* and *DeFrantz* analyses of the "state action" issues are flawed. The *Duva* court relied heavily on New Jersey law in ruling that the WBA's regulation of boxing constituted private performance of a government function since the regulation of boxing had long been an exclusive state activity.[43] But this exclusivity does not exist in most jurisdictions. Most jurisdictions explicitly refuse to regulate boxing matches sponsored by a United States amateur boxing association; such

38. 492 F. Supp. at 1193.

39. *Id.* at 1194, 36 U.S.C. § 374(3).

40. 492 F. Supp. at 1194.

41. 536 F. Supp. 104 (E.D. Mich. 1982).

42. *Id.* at 105-06.

43. *See* N.J. Stat. Ann. § 5:2-5 (West. Supp. 1982). "The commissioner shall have and exercise sole . . . supervision over all boxing . . . performances"; *see also*, Laurel Sports Activities Inc. v. Unemployment Compensation Comm'n, 135 N.J.L. 234, 51 A.2d 233 (1947), *aff'd* 136 N.J.L. 637, 57 A.2d 387 (1948).

regulatory authority rests entirely with the association.[44] So the *Duva* court's statement that a private organization's regulation of boxing constitutes private performance of a state function can only be applied correctly to cases involving *professional* boxing since the regulation of professional boxing traditionally *has* been an exclusive state activity.[45] It cannot be applied correctly to cases involving *amateur* boxing since the states by statute generally have given exclusive regulatory authority over amateur boxing to private organizations.[46]

For a similar reason, the *DeFrantz* court was correct in stating that the USOC was not a private party performing a public function in light of the fact that the USOC had been given exclusive jurisdiction over all matters relating to participation in the Games.[47] However, if the *Duva* definition of state action was too broad, the *DeFrantz* definition was too narrow. The *DeFrantz* court failed to consider the possibility that the USOC action might have arisen as a result of significant government involvement with the USOC even if the USOC could not properly be considered to be a private performer of an exclusive government function. Significant state involvement with a private party constitutes state action under *Burton*.[48] Furthermore, the *Duva* court, following a long line of authority,[49] correctly noted that NCAA activity constitutes state action because the numerous public institutions that comprise its membership constitutes such significant involvement.[50] The *Duva* court also noted that the WBA was composed entirely of public officials,[51] and its finding of significant state involvement with the WBA was based on the application of the cases involving the NCAA to its analysis.[52]

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44. Michigan is one of these states. *See* Mich. Stat. Ann. § 18.425(804) (Callaghan 1972). The *Lafler* court, which was ruling on a Michigan case, should have based its decision on the fact that Michigan authorities were statutorily prohibited from regulating a USA/ABF match and not on the misstatement that they had merely acquiesced to the USA/ABF's actions. *See also*, West Cal. Bus. & Prof. Code § 18651 (1964), N.Y. Unconsolidated Law § 8931 (McKinney 1974), Nev. Rev. Stat. § 467.170 (1979).

45. *Cf.* 4 Am. Jur. 2d Amusements & Exhibitions § 27 (1962) ("Statutes have been passed in many states making prizefighting a crime and where those statutes are still in effect, it is a crime except insofar as it has been legalized as by . . . permitting contests between amateurs or by permitting prizefighting when licensed by a state or other governmental regulatory body").

46. *Id.*

47. 36 U.S.C. § 374(3).

48. 365 U.S. at 725.

49. *Howard*, 510 F.2d at 217-20, *Parish*, 506 F.2d at 1031-32, Wright v. Arkansas Activities Assoc., 501 F.2d 25 (8th Cir. 1974).

50. 548 F. Supp. at 717.

51. *Id.*

52. *Id.*

Public institutions also comprise much of the membership of the USOC.[53] The *DeFrantz* court's failure to use the NCAA cases to find significant state involvement with the USOC was the fatal flaw from which its decision of "no state action" resulted.

In ruling that Ayala had a protectible property interest, the *Duva* court touched upon another issue which had been dealt with before in cases concerning amateur athletics. The standard used to determine whether an individual has a constitutionally protectible property interest has been set down by the companion cases *Board of Regents v. Roth*[54] and *Perry v. Sindermann*.[55] Both cases involved non-tenured college professors who had been dismissed from their positions without a hearing. The professor in *Roth* had specifically been hired only for a fixed term of one year. The Court ruled that since he had been given no assurances of continued employment, the professor's claim of entitlement to it did not reach the level of a property right.[56] However, the professor in *Perry* had been employed for ten years in a state college system which had no official tenure system but impliedly gave tenure to its professors who had been employed for seven years or longer. The Court ruled in favor of the professor here, distinguishing this case from *Roth* by stating that the *Perry* professor's understanding with the university gave him a property interest in re-employment while the *Roth* professor had no such understanding.[57] Under *Roth* and *Perry*, a constitutionally protectible property interest exists if the individual has a reasonable expectation in a benefit created by a rule or mutually explicit understanding.[58]

WBA Regulation section 6 seems to be the type of rule which would give some sort of expectation to Ayala under *Perry*. But this does not resolve the question of whether the benefits Ayala might receive from competition are certain enough to make his expectation of benefit a reasonable one, giving him a protectible property interest.

Legal commentators have strongly supported the notion that an *amateur* athlete has a constitutionally protectible property interest in the right to compete in his chosen sport.[59] However, the courts have

53. Nafziger, *Amateur Sports Act*, 1 B.Y.U.L. Rev. 71 (1983).
54. 408 U.S. 564 (1972).
55. 408 U.S. 593 (1972).
56. 408 U.S. at 577-78.
57. 408 U.S. at 600-01.
58. 408 U.S. at 601-02.
59. Keyes, *The NCAA Amateurism and the Student-Athlete's Constitutional Rights Upon Ineligibility*, 15 New. Eng. L. Rev. 597 (1980), Riegel & Hanley, *Judicial Review of NCAA Decisions: Does the College Athlete Have a Property Interest in Interscholastic Athletics?*, 10

generally held that a high-school athlete has no such interest[60] and they have been cool to the idea of a college athlete having such an interest.[61] One argument which has been used to justify the viewpoint that a college athlete's right to compete is a property interest is that intercollegiate competition serves as a pre-professional training ground.[62] The courts have acknowledged that substantial economic rewards may be at stake when collegiate athletics is looked on as a prelude to professional competition.[63] Yet, the consensus of opinion is that a college athlete's interest in a future professional career seems too speculative to constitute a property right.[64]

This fact is significant in determining whether the *Duva* court was correct in holding that Ayala had a protectible property interest in his right to fight. For if the courts rule against college athletes solely on the ground that their interest in the rewards of a professional career is too speculative to constitute a property interest under *Roth*, they can hardly extend these rulings to cases involving professional athletes such as Ayala who have clearly worked their way into a position where they can receive such rewards. Obviously, Ayala, who was ranked Number Three Contender for the WBA Junior Middleweight World Championship, had an interest in competing which was more than speculative. Applying the decisions on the property rights of amateur athletics to

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Stetson L. Rev. 483 (1981), Shuck, *Administration of Amateur Athletics: The Time for an Amateur Athlete's Bill of Rights Has Arrived*, 48 Fordham L. Rev. 53 (1979).

60. Albach v. Odle, 531 F.2d 983 (10th Cir. 1976), Hamilton v. Tennessee Secondary School Athletic Association, 552 F.2d 681 (6th Cir. 1976), Mitchell v. Louisiana High School Athletic Association, 430 F.2d 1155 (5th Cir. 1970).

61. Dr. H. Appenzeller, Athletics and the Law 219-20 (1975), Shuck at 75-6, Riegel & Hanley at 491-99. Cases which have held that a college athlete has no such right or which have expressed doubt as to the existence of such a right include *Howard*, *Parrish*, and Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978). Cases which have upheld such a property interest on behalf of a college athlete or have indicated that such an interest may exist include Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972), Regents of the University of Minnesota v. NCAA, 422 F. supp. 1158 (D. Minn. 1976), *rev'd* 560 F.2d 352 (8th Cir. 1977), *cert. dismissed* 434 U.S. 978 (1977). (Federal district court recognized a protectible property right; court of appeals reversed on other grounds and did not reach this question), and Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass 1973) (Ineligibility for participation in collegiate athletics constituted irreparable harm for which injunctive relief could be granted).

62. Springer, *A Student Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions*, 10 Conn. L. Rev. 318, 342-43 (1978).

63. *See Behagan*, 346 F. Supp. at 604.

64. Springer at 342-43, *Parish*, 506 F.2d at 1034, *Colorado Seminary*, 417 F. Supp. at 895. In questioning the reasoning of the court in *Behagen*, Springer finds it significant that *Behagen* was decided before *Roth*.

Ayala's case gives Ayala a protectible property interest in fighting professionally.

Moreover, there is one case preceding *Duva* which touched upon the right of the professional athlete to compete. This case also involved a professional boxer. The *Duva* court, however, failed to cite it. In 1970, a United States District Court in New York enjoined the New York State Athletic Commission from denying Muhammed Ali the right to box in New York State because of Ali's conviction for draft evasion.[65] In doing so, the court stated, "[d]enial of a license to box has barred Ali from pursuing in New York his chosen trade from which he earned his living for most of his adult years . . . with but a limited number of years remaining in which he can meet the rigorous physical standards essential to engaging in such activity. It is clear that unless preliminary relief is granted, he will suffer irreparable injury."[66]

Obviously the *Ali* court felt that Ali's right to fight professionally was a constitutionally protectible interest. But since *Ali* preceded *Roth* and *Perry*, the *Ali* court did not refer to any rule or understanding which *Roth* and *Perry* say must exist in order for a protectible property interest to exist. However, *Duva* keeps the *Ali* rule intact after *Roth* and *Perry* by recognizing such a rule in WBA Regulation section 6.[67]

Clearly, the *Duva* court was correct in ruling that the WBA's activities constituted state action. This is because the regulation of professional boxing traditionally has been an exclusive state function and because of significant involvement in the WBA of public authorities.

It is also clear that an athlete who is in a position where he can readily utilize his skills for economic benefit has a protectible property interest in being able to do so, as long as there is some rule or understanding governing the relationship between himself and another party which places him in such a position.

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65. Muhammed Ali v. Division of State Athletic Comm'n, 316 F. Supp. 1246 (S.D.N.Y. 1970).

66. *Id.* at 1253.

67. 548 F. Supp. at 718-20. Another similarity between *Ali* and *Duva* was the fact that *Ali* involved a claim of due process similar to that in *Duva*. 316 F. Supp. at 1248. The *Ali* court recognized that a state athletic commission has the power to deny a boxing license to an individual for conviction of a felony but found that the state boxing commission had in at least 244 previous instances granted, renewed, or reinstated boxing licenses to applicants who had been convicted of felonies, misdemeanors, or military offenses involving moral turpitude. *Id.* at 1249. The court felt that revoking Ali's boxing license because of his conviction for draft evasion, under the circumstances, was an arbitrary, capricious, and invidious act and therefore was a denial of due process. Since *Duva* found that arbitrary, capricious, and invidious activity on the WBA's part constituted a due process violation, its failure to cite *Ali* for support on this issue is an example of carelessness on the court's part.

Duva does not create any new law with respect to these issues, but to some extent, it breaks new ground in applying existing law (as set down in cases dealing with amateur sports) to professional sports. However, even if other courts follow *Duva* in protecting a professional athlete's right to compete from being arbitrarily taken away by a body significantly involved with a public authority, the law concerning such matters is still likely to remain uncertain for the near future. Courts will be required to analyze their cases in the same way that the *Duva* court did, by examining the issues of state action, due process, and property interest. Furthermore, serious doubt exists as to whether the activities of purely private organizations which involve sports not regulated by the government (i.e., baseball's Major Leagues, the National Football League, the National Basketball Association, and the National Hockey League) constitute state action.[68]

In addition, an athlete's property interest in competition may be quite fragile since such an interest is not created by the Constitution but by existing rules of understandings that stem from another source, such as WBA Regulation section 6. Rules and regulations can be repealed and they can also be challenged as unlawful or unconstitutional. Most of the litigation involving professional athletes involves the issue of whether a rule promulgated by a sports organization has infringed a player's right to sell his services to the highest bidder in violation of the Sherman Anti-Trust Act.[69] The Act declares that "Every restraint of trade or commerce among the several states . . . is declared to be illegal."[70] It has been held to apply to all professional sports except baseball.[71] Arguably, a regulation such as WBA Regulation section 6

68. L.S. Sobel, Professional Sports & The Law, 435-36 (1977). At least two legal commentators have noted that private sports franchises generally lease municipally-owned stadiums and rely on the states for services such as construction of transportation facilities and provision of law enforcement personnel for security. They argue that this level of state involvement creates a sufficient basis for a court to find state action involved in the operation of these private organizations. *See* Falk & Scheler, *The Professional Athlete and the First Amendment: A Question of Judicial Intervention*, 4 Hofstra L. Rev. 417, 422-32 (1976) and *Discipline in Professional Sports: The Need for Player Protection*, 60 Georgetown L.J. 771, 790-92 (1972).

69. 15 U.S.C. §§ 1-7, 81 Legal Almanac Series, P.S. Sloan, The Athlete and the Law 74 (1983).

70. 15 U.S.C. § 1.

71. United States v. Int'l Boxing Club, 348 U.S. 236 (1955), Radovich v. Nat'l Football League, 352 U.S. 445 (1957), Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971). Baseball's exemption was upheld as recently as 1972 in Flood v. Kuhn, 407 U.S. 258 (1972). Since there appears to be no reason to distinguish baseball from other sports for the purposes of anti-trust analysis, the exemption is considered by legal commentators to be anachronistic. *See* Sobel, 30-82, McClelland, *Flood in the Land of Antitrust: Another Look at*

constitutes such a restraint of trade since it forbids a division champion from fighting any boxer other than the leading contender in the boxer's division.

In the future, if athletes such as Ayala are accorded rights under an applicable rule or regulation, it is quite likely that other athletes such as Davey Moore, who are thereby prevented from competing, will challenge that rule or regulation as being an illegal restraint of trade under the Sherman Act.[72]

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Professional Athletics, the Antitrust Laws and the Labor Law Exemption, 7 Ind. L. Rev. 541, 541-46 (1974).

72. Actually, in the end, the WBA was not restrained from sanctioning the Moore-Weir fight. On April 23, three days after the District Court decision and the day before the scheduled Moore-Weir title bout, Judge Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit stayed the district court's injunction which prevented the WBA from sanctioning the fight. The Moore-Weir fight took place as scheduled on April 24 in Johannesburg, South Africa. Moore knocked Weir out in the fifth round and was proclaimed WBA Junior Middleweight Champion. Since then, no action has been taken by the Third Circuit concerning this case. If it has maintained jurisdiction over it, it can still strip the Junior Middleweight Champion of his title. *See* New York Times, April 27, 1982, at C8, col. 5-6. Since the federal district court's decision has not been decided on its merits in the Circuit Court of Appeals, it remains good law. *Cf.* Hixon v. Durbin, 560 F. Supp. 654, 660 (E.D. Penn. 1983).