Denver Law Review

Volume 67
Issue 2 *Symposium - Sports Law*

Article 9

February 2021

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THOUGHTS ON INTERNATIONAL PROFESSIONAL SPORTS LEAGUES AND THE APPLICATION OF UNITED STATES ANTITRUST LAWS

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INTRODUCTION

The Soviet Union's victory in the 1988 Olympic basketball competition illustrates the growing popularity of "American" sports in foreign countries.[1] The National Basketball Association ("NBA"), Major League Baseball, National Football League ("NFL") and National Hockey League ("NHL") are all involved in some level of international competition. Major League Baseball and the NHL have franchises in Canada and all of the leagues have played a variety of exhibition games in Europe or Japan.[2] The NFL has announced that it may begin some form of international play as early as 1991 with its Worldwide League of American Football ("WLAF").[3]

There is a good deal of evidence to support the proposition that a truly international sports league could prove to be quite lucrative to league organizers. First, the value of the Olympic Games, the world's most popular sports competition, is largely based on international television viewer interest.[4] The Olympic television negotiators for the 1992 Barcelona Games were seeking a record $500 million for the network rights to broadcast the two week sporting event.[5] Similarly, the overseas broadcast rights for the NBA are currently $4 million and projected to be $25 million by 1995.[6] If an international professional sports league

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1. The New York Times in a sports section cover story titled, *U.S. Sports Heading Overseas* discussed the presence of U.S. based sports around the world. *See* Eskenazi, *U.S. Sports Heading Overseas: Pro Leagues in America Eye the Globe*, N.Y. Times, April 9, 1989, Sec. 8, at 1, col. 2. *See generally* B. RADER, AMERICAN SPORTS: FROM THE AGE OF FOLK GAMES TO THE AGE OF SPECTATORS (1983). The NHL's roots are Canadian. *See, e.g.*, Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 465-66 (E.D. Pa. 1972) (discussing the League's Canadian origins).

2. The NBA recently announced that it would be the first to play regular season games overseas, announcing two games in Japan for the 1990-91 season. *See* Sports Industry News, Feb. 24, 1989, at 62. *See, e.g.*, Delaney, *Celtics Victorious As Toast of Madrid*, N.Y. Times, Oct. 24, 1988, at C2, col. 5. *See also* Rosenblatt, *A Global NFL Scramble*, SPORTS INC. Oct. 10, 1988, at 3.

3. Most descriptions of the league refer to it as a sort of "minor" league or "farm system" for the NFL. Such a league could be used to develop athletes for the "major" leagues.

4. *See* Rosner, *Rights Talks Cut Off*, SPORTS INC., March 13, 1989 (noting that additional money will be paid for rights in other countries as well).

5. *See* Sports Industry News, Oct. 14, 1988, at 315.

6. *See* Cone, *Playing the Global Game*, FORBES, Jan. 23, 1989, at 90.

is successfully developed, the monetary demands on network bidders and potential sponsors and advertisers could be astronomical.[7] The economic equation must also include the dismantling of the Eastern Bloc and the unification of the European market in 1992.

In addition to these television revenues, the revenues from league licensing and endorsements may be quite large as well.[8] It is logical to assume that foreign interest in a sport will increase if the fans actually have their own home team. Along with greater interest comes increased television viewership and increased revenues to the networks and the leagues.

No defined structure of an international league or the nature of a true "world championship" has yet been publicly developed. For example, it would be simple enough for the champion of Major League Baseball, or the existing World Series, to play the champion of its Japanese counterpart. Individual games and series have taken place a number of times over the years between American and Japanese teams with no specific "championship" designation given to the winner.[9] Robert Whiting, in his examination of Japanese baseball *You Gotta Have Wa*, cites 28 visits by American professional baseball teams from 1908 to 1988.[10]

The focus of this article is on the potential antitrust issues in the operation of a truly international league. The article examines the potential sources of legal actions by private entities as well as actions that might be supported under various existing domestic and international government antitrust enforcement guidelines. The overall assumption is that the leagues hypothetically discussed are fully integrated international entities. This is not a discussion of an occasional meeting of teams, the special exhibition appearance, a minor league or the financial or social merits of such a league. There are certainly financial factors that point against the formation of such a league. The costs of travel for a team and equipment are just two monetary considerations.[11] Televi-

7. There certainly are strong arguments against the profitability of an international league as well. The arguments used by leagues against domestic expansion and the degree that the need to share league revenues with more partners might offset whatever franchise fee is paid in the long run is applicable to international expansion as well. *See generally* Noll, *The Economics of Sports in Leagues* in LAW OF PROFESSIONAL AND AMATEUR SPORTS (Uberstine ed.).

8. *See* Cone, *supra* note 6, noting that over $50 million worth of Converse brand NBA licensed shoes are sold outside of the United States. *Id.* at 91.

9. *See also* Sanger, *Japanese Team's Improvement Surprised U.S. All-Stars*, N.Y. Times, Nov. 15, 1988, at D27, col. 3, discussing a U.S. All-star team tour of Japan ending with a record of three victories, two losses and two ties.

Former Baseball Commissioner A. Bartlett Giamatti had stated that "the game must be brought abroad" but he cautioned that it must be done "without imperialistic desire to run it but to promote it." He did note that exposure to the game abroad will aid in marketing concerns. Address by A. Bartlett Giamatti, Seton Hall Law School Sports Law Symposium (April 28, 1989).

10. *See* R. WHITING, YOU GOTTA HAVE WA 331-332 (1989).

11. Obviously the travel costs for an NBA franchise are less than that for an NFL or Major League Baseball franchise. The squads in the NBA are smaller. However, it is possible that the Major League Baseball (American League/National League) format could be utilized. For example, the "European League" in basketball could play the champions of

sion time zones, language and exchange rates likewise are other factors that would have to be examined.

The focus here is on the antitrust issues and the policy considerations that will effect the application of these laws to global issues. This analysis uses three hypothetical models to outline the major antitrust issues that could confront an international sports league from its formation stage on through some of the ongoing problems that would be unique to an operational international professional sports league.

Model I examines a merger or joint venture that forms an international league. This would be the potential mode for creation in Major League Baseball, the NBA and the NHL.[12] In all of these sports, there are leagues already in existence in foreign countries.[13] In baseball, as was noted, there is a league in existence in Japan that has maintained its present format for over 30 years.[14] There are also fledgling leagues in existence elsewhere, including Italy.[15] The quality of play in these countries is much behind that of the U.S. The overseas basketball leagues have served as a final stop or a negotiating alternative for NBA players.[16] They too, someday, may be appropriate for a merger. Finally, there are more Americans playing hockey in leagues in Europe than in the National Hockey League in North America.[17]

Football serves as the example for Model II, which is the direct export of an existing American sports entity to a foreign country. The NFL does not currently have a counterpart outside of North America. Although the Canadian Football League ("CFL") has been in existence for decades, even a merger of those two North American entities would not give football the international flavor for a true world championship.[18] There are football teams in existence in a few European countries and a league that even has its own "super bowl" and a seasonal publication in Italy. These developed largely due to the influence of televised NFL games overseas and recent preseason games played in

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the NBA so that the NBA team would not have to travel overseas until that championship game.

12. These leagues could also certainly use the expansion mode set out in Model II, and in fact, as is discussed below, there may be many advantages to the expansion mode.

13. Professional basketball exists in Italy and Spain and professional baseball exists in Japan and to a lesser degree in Italy. *See XX* 60 Minutes Transcripts No. 53 at 10 (noting that 14 teams play baseball in the Seriat Nazionale, national league).

14. *Id.*

15. *Id.*

16. John Nash, General Manager of the NBA's Philadelphia 76ers, noted that many of the leagues in Europe can compete for players at the $200,000-$300,000 salary range. The major shortcoming at present for growth in Europe is the size of the arenas, seating a maximum of approximately 5,000 people. He estimates that by the year 2000 there will be real competition with the NBA. Presentation by John Nash at The Wharton School of the University of Pennsylvania (March 15, 1989) [hereinafter Nash presentation].

17. *See U.S., Canada Players Cross the Atlantic For Ice Time*, Philadelphia Inquirer, Feb. 19, 1989, at 1E, col. 5.

18. Interestingly, the CFL has made overtures of expanding into the United States, noting a particular interest in those cities that want, but have not been able to obtain, an NFL franchise. *See CFL—Looks to Expand*, USA Today, July 12, 1988, at C1, col. 1.

major European cities.[19] Because of the tremendous disparity in the quality of play between those teams and the NFL, however, it is not likely that a merger would take place. If Japanese baseball is a few decades off from its American counterpart, the club football teams are light-years away. In this second model it would actually be necessary to "expand" or place new franchises in foreign cities, thus causing a different set of international antitrust problems to arise.

Model III notes the possibility of the formation of a completely new league. It presents the pitfalls that can be avoided by taking care in forming the domestic or international entity. Furthermore, this section chronicles some operational concerns that may develop in a completely new entity.

The models are not meant to predict how the various leagues might "go international" or even that they in fact will. The models are truly the author's guess today of how internationalization might best occur. For example, there is talk of creation of a Global Hockey League as a newly created entity, as set out in Model III, not the discussed merger method herein.[20] Obviously there are initial jurisdictional concerns in any extraterritorial application of U.S. laws. As those jurisdictional concerns are addressed, the potential to apply a foreign states' antitrust laws should be considered as well.[21] An interpretation of antitrust issues, particularly the rule of reason, single entity defense, and the labor exemption, is quite complex in its own right. With the application of U.S. antitrust laws to the internationalization of professional sports leagues, the complexity only increases. This article begins with a brief overview of the jurisdictional issues in applying antitrust laws. Antitrust actions may be brought both by private individuals and the federal government under the Sherman Act. The analysis then covers the application and policy issues in the three hypothetical models. A look at the extraterritorial application of U.S. antitrust laws to sports franchise relocations and player movement issues concludes this article.

I. JURISDICTION

Generally the Sherman Act applies to activities "in" or "affecting" commerce in the United States.[22] U.S. ownership of a franchise located in a foreign state and a member of a U.S. based league would probably require that that entity be subject to U.S. antitrust laws. The traditional analysis emanates from *United States v. Aluminum Co. of America* ("*Al-*

19. *See* Telander, *Go Downpitch and Buttonhook Smartly, Mate*, SPORTS ILLUSTRATED, Aug. 11, 1986, at 22; Gammon, *The Brits are Having a Ball*, SPORTS ILLUSTRATED, July 7, 1986, at 34.

20. *See* Fitzpatrick, *Clarke Hits the Road as Super Scout*, Philadelphia Inquirer, Mar. 4, 1990, at 3-E, col. 1.

21. Obviously an examination of every possible law would be quite expansive and beyond the scope of this article. Therefore the substantive focus is on United States antitrust laws. An interesting fourth model that could be used to examine these foreign laws is a foreign based soccer league with a U.S. franchise.

22. 15 U.S.C. § 1 (1982).

coa"),[23] which introduced an "effects" test of subject matter jurisdiction under the antitrust laws. Under this test, the courts of the United States have jurisdiction over any conduct that has an intended effect on commerce within the United States.[24] The test for what constitutes a sufficient effect has varied among the different courts. Nonetheless, in an international league, the effects on U.S. commerce are clearly expected and intended, especially in the case of a U.S. based league. Any league activity in a foreign country necessarily affects the league as a whole and has an effect on commerce in the United States.

The Ninth Circuit Court of Appeals came up with a different analysis in 1976, in *Timberlane Lumber Co. v. Bank of America* ("*Timberlane I*").[25] The circuit court found fault with the *Alcoa* analysis for failing to consider the interests of the foreign nation, as well as the nature of the relationship of the actors and the U.S.[26] The court then established a multifactored analysis, including issues regarding both foreign and domestic interests. The test actually consists of balancing numerous interests, and has been referred to as a "jurisdictional rule of reason." This analysis has been accepted by the Third,[27] Fifth,[28] and Tenth[29] Circuits. Under this analysis in the international league cases, the balance would almost certainly fall on the side of U.S. courts having jurisdiction, as the U.S. interest in the entire league would be strong enough to outweigh the interests of foreign countries with smaller stakes. This would definitely be the case in a U.S. based league, but the issue might be more complicated in a European-based league with a smaller U.S. stake.

In 1982, the Foreign Trade Antitrust Improvement Act ("FTAIA")[30] further refined the appropriate jurisdictional analysis, maintaining that there must be a "direct, substantial and reasonably foreseeable" effect on U.S. domestic commerce in order to exert jurisdiction under the Sherman Act. Further amplification of this was expressed in *Laker Airways v. Sabena Belgian Airlines*,[31] where Judge Wilkey articulated that "[j]urisdiction exists under United States antitrust laws whenever conduct is intended to, and results in, substantial effects within the United States."[32]

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23. 148 F.2d 416 (2d Cir. 1945).
24. *Id.* at 444.
25. 549 F.2d 597 (9th Cir. 1976).
26. *Id.* at 611-12.
27. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1301 (3d Cir. 1979).
28. Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd., 671 F.2d 876, 884-5 (5th Cir. 1982).
29. Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).
30. *See* H.R. REP. No. 686, 97th Cong., 2d Sess. 13 (1982). The American Bar Association's sections of Antitrust Law and International Law and Practice formed a task force to review a draft of these rules. They criticized the Department on this point for not considering comity issues raised in Timberland Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). The jurisdictional standard which is probably applicable was more recently expressed in 549 F.2d at 925.
31. 731 F.2d 909 (D.C. Cir. 1984).
32. *Id.* at 925; *see also* A. Ahlstrom Osakeyhtio v. E.C. Commission, Case No. 89/85 (Ct. of Justice, 1988) (indicating that the FTAIA guidelines are appropriate).

Underlying any jurisdictional analysis is whether a court will actually be able to enforce an antitrust judgment. In dealing with a United States based entity that issue is not so problematic. A judgment can be enforced against individuals in this country or against their property. There has been, however, a great deal of activity by foreign states to deny the enforcement of judgments in their country based on United States antitrust law. The general basis for denying enforcement is sovereign immunity. That doctrine is based on the international law principle that the courts of one country cannot enforce their judgments against another country.[33] Thus, there is potentially a degree of protection for the foreign based segment of the merger or joint venture.

In summary, under the basic jurisdictional guidelines that do exist, an international merger, joint venture or other expansion activity by a United States based sports league is probably subject to the scrutiny of U.S. antitrust laws. However, there may be, as there is with any other international legal judgment, the problem of enforcement. Where there is American ownership of the foreign franchise the judgment should not be as difficult to enforce. There are judicial tools in place to bring a judgment personally against an owner based in the U.S. or his or her property located in the United States. The more difficult cases arise when the foreign portion of the international venture is, in fact, foreign owned.[34]

II. FORMATION ISSUES

A. *Model I: Merger or Joint Venture*

Of all the legal issues that might be addressed regarding the development of international leagues, possibly the most interesting is the application of U.S. antitrust laws to a U.S. based league entering into the international marketplace. This is largely due to the difficulty courts have had in applying antitrust laws to purely domestic sports issues. The application of antitrust laws in sports may be appropriately characterized as stare decisis gone awry.[35] In some situations, such as the judicially created antitrust exemption for baseball, the law has been relatively consistent.[36] In other areas, such as sports franchise reloca-

33. *See, e.g.*, International Ass'n of Machinists & Aerospaceworkers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The United Kingdom, Australia and Canada also have "clawback" provisions which allow suits against plaintiffs to force the return of antitrust awards through local court awards. *See, e.g.*, Protection of Trading Intersts Act (1980) and Exchange of Diplomatic Notes Concerning the Act, *reprinted in* 21 I.L.M. 834 (1982) (United Kingdom); Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3 AUSTL. ACTS (1984), *reprinted in* 24 I.L.M. 794 (1985) (Canada). Regarding controversy over "clawback" provisions. *See* Note, *Enjoining the Applications of the British Protections of Trading Act in Private American's Antitrust Litigation*, 79 MICH. L. REV. (1981).

34. For a thorough summary of the jurisdiction under Justice Department Guidelines *see*, S. GRIFFIN, U.S. INTERNATIONAL ANTITRUST ENFORCEMENT: A PRACTIAL GUIDE TO THE JUSTICE DEPARTMENT GUIDELINES A-11-18 (1989).

35. *See* Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943 (1988).

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

tions, many commentators have viewed the application of the law as extremely inconsistent.[37]

Historically, antitrust issues have been the basis for major sports' legal battles: Al Davis in his battle to move the Oakland Raiders to Los Angeles, Curt Flood in his battle not to be traded, and numerous player union actions against their respective leagues.[38] The initial issue in this first model is the level of antitrust scrutiny an international merger might receive.

1. Antitrust Generally

Most antitrust litigation in sports has involved Section 1 of the Sherman Act which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[39] Section 1 relates primarily to agreements between parties that impede competition. A number of the cases in this area have dealt with the rights of athletes to negotiate freely with various teams in a given league or with teams in a competing league. The restrictions that the teams agree to that bar a complete free market for the athletes are commonly referred to as restrictions on "free agency."

Section 1 of the Sherman Act is also applicable to league actions against member franchises. The area where this application has received the most attention is in cases involving sports franchise relocations. When franchise rights are granted, a specific geographic territory is assigned. The franchise owner further agrees not to move the home games of the franchise without the initial approval of fellow owners. Conflicts arise when the individual franchise owner disagrees with fellow owners and relocates without consent, or where league consent is denied. Improper denial by the league has been held to violate the antitrust laws. The leading case which addressed this issue is *Los Angeles Memorial Coliseum Commission v. National Football League*.[40] There the NFL was found to have restrained competition by voting not to allow the then Oakland Raiders to relocate to Los Angeles, a city already occupied by the Rams franchise.[41]

To a lesser degree, courts have analyzed league antitrust issues under Section 2 of the Sherman Act. The concern of Section 2, as it relates to sports leagues, is primarily whether the behavior of a league restricts entry by potential rival leagues and whether that behavior establishes the league as an illegal monopoly. The most recent sports league case to examine this issue was *United States Football League v. Na-*

37. *See* Roberts, *supra* note 33.

38. *Flood*, 407 U.S. at 258. *See also* Los Angeles Memorial Coliseum v. NFL, 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

39. 15 U.S.C. § 1 (1982).

40. 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987). *See also* National Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).

41. *Los Angeles Memorial Coliseum Commission*, 791 F.2d at 1356.

tional Football League, where the NFL was found to be an illegal monopoly.[42] In that case, the recently formed USFL brought an action against the NFL alleging, among other things, that the NFL monopolized the sport of professional football in this country and conspired to drive the USFL out of business.[43] Section 2 of the Sherman Act states in part, "[e]very 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, or with foreign nations, shall be deemed guilty of a felony . . . ."[44] Under Section 2, a plaintiff must also show that the defendant league willfully acquired and maintained monopoly power and as a result of these actions the plaintiff was injured.[45]

2. Mergers and Joint Ventures

a. *Mergers*

Mergers are fertile territory for the application of antitrust law. The main concern is that a horizontal merger which extends an existing market may result in the anticompetitive and social consequences the antitrust laws seek to protect against.[46] Any entities considering a merger must not only consult the case law, but also the merger guidelines issued by the Department of Justice[47] and the Federal Trade Commission.[48] Generally, if competing firms with substantial shares of a market merge, there may be a government challenge and a possible finding of a violation of Section 7 of the Clayton Act.[49] Private parties may bring lawsuits under the Clayton Act as well.[50] The Department of Justice guidelines also make specific reference to international mergers. The key concern of those guidelines are that the merger would not likely result in a net decrease in consumer welfare.[51]

A merger may also be scrutinized under the Sherman Act. Under that statute, the concern is whether the merger can be viewed as a "con-

42. *See* 644 F. Supp. 1040 (S.D.N.Y. 1986), 842 F.2d 1335, 1341 (2d Cir. 1988) (where the court found that the NFL had used its monopoly power particularly to injure the USFL. Although found to be a monopoly, damages were nominal. *Id.*). The first Section 2 case of the Sherman Act involving a sports league was American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963).

43. United States Football League v. National Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986).

44. 15 U.S.C. § 2 (Supp. 1976).

45. The *AFL* case, *supra* note 43, focused primarily on the possession of monopoly power; the *USFL* case on the intent to acquire or maintain monopoly power. In addition to monopolization action, Section 2 of the Sherman Act, can be used to attack attempts to monopolize as well as conspiracies to monopolize.

46. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 575-675 (1977).

47. Department of Justice, *Merger Guidelines*, 49 Fed. Reg. 26,823-03 (June 29, 1984) [hereinafter Guidelines].

48. For guidelines used by state attorneys general, *see Horizontal Merger Guidelines of the National Association of Attorneys General* (March 10, 1987), *reprinted in* 52 Antitrust & Trade Reg. Rep. (BNA) No. 1306, at 476 (March 12, 1987).

49. 15 U.S.C. § 18 (1988).

50. *Id.*

51. *See Guidelines*, *supra* note 48.

tract, combination . . . or conspiracy" under Section 1[52] or as a monopolization attempt or conspiracy to monopolize under Section 2.[53] Merger analysis, however, typically occurs under Section 7 of the Clayton Act.[54]

Section 7 specifically prohibits the acquisition of the stock or assets of another entity where the result of their acquisition "may be substantially to lessen competition, or to tend to create a monopoly . . . in any line of commerce . . . ."[55] Generally, the prima facie case, which must be established under the Clayton Act, requires a showing that the merger will lessen competition or tend to create a monopoly in the relevant product and geographic market. Historically, sports league mergers have been a key focus for antitrust scrutiny. In the past, the two largest modern sports league mergers were accomplished by a statutory exemption for the 1970 merger of the old American Football League and the NFL,[56] and the NBA-American Basketball Association merger through the court supervised Robertson Settlement Agreement.[57]

b. *Joint Ventures*

A joint venture analysis is similar to a merger and so the same general issues apply. A joint venture between a U.S. entity and a foreign-based league is a possible route for international play. A joint venture is generally defined as "[a] legal entity in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit."[58] The joint venture mode of operation allows for some autonomous operation of the separate leagues in their own countries.

The Justice Department Guidelines regarding international antitrust enforcement establish a four pronged analysis.[59] The first two prongs are similar to the basic enforcement policy of the Department, that is, whether the anticompetitive effect is outweighed by the procompetitive benefits.[60] The next prong examines the competitive effects of ancillary non-price vertical restraints. If these three steps indicate that the joint venture is likely to be anticompetitive, then the joint venturers must prove that the procompetitive efficiencies of the joint venture outweigh the risk of anticompetitive harm.[61] As with merger, the strongest argument against a successful antitrust action is that a joint venture does not decrease competition.

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52. 15 U.S.C. § 1 (1988).
53. 15 U.S.C. § 2 (1988).
54. 15 U.S.C. § 18 (1988).
55. *Id.*
56. Pub. L. No. 89-800, S. b(6)(1), 80 Stat. 1515 (1966), amending Pub. L. No. 87-331, S. 1, 75 Stat. 732 (1961), 15 U.S.C. 1291 (1961).
57. Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975).
58. BLACK'S LAW DICTIONARY 753 (5th ed. 1979).
59. Trade Regulations Rep. (CCH) ¶ 13,109 (Nov. 10, 1988) [hereinafter International Guidelines].
60. *International Guidelines*, at 20,599-20,605; *See Report: Analysis of Department of Justice Guidelines International Operations & Antitrust Enforcement Policy*, 57 ANTITRUST L.J. 957, 961 (1988) (analyzing the joint venture section of the International Guidelines).
61. *Id.*

3. Baseball

The sport of baseball is unique in that it enjoys a judicially created antitrust exemption.[62] The exemption originally applied specifically to the size and the power of the league and not to player restraints as it is generally applied today. Even though courts have continued to uphold the exemption over the years, an international sports league merger has never been contemplated by the courts. Many commentators, including Supreme Court Justices Thurgood Marshall and William Brennan, have argued that the exemption should not continue to exist.[63]

The exemption was originally created in *Federal Baseball Club of Baltimore Inc. v. National League of Professional Baseball Clubs*[64] because the sport of baseball was deemed excluded from "interstate commerce." Affecting interstate commerce is a necessary element to violate the Sherman Act. The Court noted specifically that the sport was merely a state affair.[65] Ironically, in one of the most illustrative examples of judicial adherence to the policy of stare decisis is the exemption of baseball from antitrust law. The exemption exists today even though baseball is now clearly recognized, even by the Supreme Court, as being part of interstate commerce.[66] Each time the exemption is challenged there is the opportunity for a court to inhibit further expansion of the exemption. An international application may be such an opportunity. The rationale used by the Court, in addition to stare decisis, is Congressional lack of action.[67] Since 1922, Congress has had the opportunity to pass legislation which would include baseball within the domain of antitrust law and it has not done so. Because of Congressional inactivity, the courts continue to follow the 1922 exemption.

One policy argument for the continuation of this exemption is that baseball developed within this antitrust protection, and it should not be removed now. A question that a court would be confronted with is whether this protection should continue beyond domestic borders into the international development of the sport?

Another factor that should influence courts in international antitrust actions is who the plaintiff is in the action. The parties most likely to test the continuing exemption would be a competing league or a player. In baseball, until recently, a competing league as a plaintiff was unlikely. Major League Baseball has not had any serious competition in 75 years.[68] An action by a player or possibly a players' union is the most

62. Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). *See also* Radovich v. National Football League, 352 U.S. 445 (1957).

63. Flood v. Kuhn, 407 U.S. 258, 292-93 (1972) (Marshall, J., dissenting).

64. 259 U.S. 200 (1922).

65. *Id.*

66. *Flood*, 407 U.S. at 258.

67. *Flood*, 407 U.S. at 281-83 (viewing the lack of congressional action regarding the baseball exemption over a 50 year period as "something other than mere congressional silence and passivity." *Id.* at 283).

68. *See* Chass, *New League Plots to Take Mound*, N.Y. Times, Aug. 13, 1989, sec. 8, at 1.

probable course.

Antitrust actions have been brought against mergers and joint ventures under the theory that they reduce competition. An action by a player or a players' union in baseball would probably raise that same issue. In *Robertson v. National Basketball Association*[69] an antitrust action was initiated because of the proposed merger between the National Basketball Association and the then competing American Basketball Association ("ABA").[70] A primary concern was the impact the merger of the two leagues would have on the market for players. The obvious fear being that the elimination of a competitor in the marketplace would eliminate the bidding for players' services and lower average contract prices. Although the *Robertson* case involved basketball, the possibility of a merger eliminating a source of competing bids is enlightening. A forty percent increase in NBA players' salaries in their first five years of competition from 1967-72 is directly attributed to the competition from the ABA.[71] The rapid salary growth slowed following the NBA/ABA merger to an initial annual rate of less than ten percent.[72]

It is this same issue, whether players' salaries would decrease, that might predominate in an international merger situation. Although player restraint actions have not been successful in baseball, this would be yet another opportunity to test the strength of the exemption of baseball from antitrust law reaffirmed by the Supreme Court in *Flood v. Kuhn*.[73] The *Robertson* analogy is particularly applicable because in recent years the threat of playing in Japan has been used as a negotiating tactic by several players, and some, most notably Bob Horner, then of the Atlanta Braves, have actually played there.[74] Reportedly Horner signed with the Yakult Swallows in Japan for one year at $1.3 million with a reported $500,000 signing bonus after rejecting an offer from the Atlanta Braves for a three year contract at $3.9 million.[75] Horner was unique in that at the age of 29 he was one of the first Major League Baseball players to go to Japan while still in his prime.[76] An existing league has been used for leverage during salary negotiations, as in *Robertson*, to increase player salaries. Obviously, with an international merger the alternative market afforded by the Japanese would be fore-

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There have, however, been recent discussions of creating a new domestic league partially in response to television network competition increasing for sports programming. *See* Sports Industry News, May 19, 1989, at 152.

69. 389 F. Supp. 867 (S.D.N.Y., 1975).

70. *Id.*

71. *See* Noll, *supra* note 7, at 45.

72. *Id.* at 46. There are other market factors that may cause player salaries to increase. Without competition from another league baseball salaries increased dramatically due to free agency following the *Messersmith-McNally* arbitration ruling giving baseball players the right to test the open market at some point in their career. *See* 66 LAB. ARB. DISP. SETTTLEMENTS 1011 (1975).

73. 407 U.S. 258 (1972).

74. *See* Wolff, *A New Kind of Orient Express*, SPORTS ILLUSTRATED, May 18, 1987, at 28.

75. *Id.*

76. *Id.*

closed to players and competition for athletes in the baseball market decreased.

It would seem that a court would give serious consideration to an antitrust action by a player or players' union if American baseball merged with Japanese baseball. The two factors that the plaintiffs would have to overcome first would be the antitrust exemption, and second to prove that competition in the market for baseball players was actually decreased.

To overcome the baseball exemption, a court would probably have to distinguish the international case from past cases or justify their policy decision not to adhere to the principle of stare decisis. Apart from the sentiment expressed in *Flood* against the exemption, one court did hold that the exemption was not applicable. In 1949, in *Gardella v. Chandler*,[77] Danny Gardella prevailed in his antitrust action against Major League Baseball, which he accused of "blacklisting" him because he played in the rival Mexican league. No Major League Baseball team would allow Gardella the opportunity to play with them. However, this case was settled before the appeal was heard.[78]

The effect that a merger would have on the market for baseball players is a factual question. If a court does not perceive the Japanese league as an alternative, then competition may not be viewed as being greatly affected. The less competition is affected, the less likely an antitrust action against baseball is to succeed.

4. Basketball

The *Robertson* case precedent would be directly applicable to an attempted merger of existing European league franchises with the NBA. Perhaps more importantly, no antitrust exemption exists in any sport other than baseball.[79] Similar to baseball in Japan, only on a more competitive level, the European leagues compete with the NBA for players.[80] Even if there is no genuine competition, the threat of playing in another country is used more often in basketball negotiations than in baseball. It appears that the experience is more "enjoyable" for the athlete and there are more opportunities. The ploy of having a European opportunity is used frequently by late first round draft picks. In the

77. 174 F.2d 919 (2d Cir. 1949).

78. Gardella reportedly received $60,000 from then Commissioner Chandler to drop the case. *See* Maher, *Danny Gardella Case Didn't Settle Anything*, L.A. Times, Sept. 24, 1975, Part III.

79. Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). *See also* Radovich v. National Football League, 352 U.S. 445 (1957).

80. Similarly in the NHL there is a steady stream of players to Europe. One report notes that there are more North American hockey players in Europe than in the National Hockey League. *See U.S., Canada Players Cross The Atlantic For Ice Time*, Philadelphia Inquirer Feb. 19, 1989, at E1, col. 5. *See also* Allen, *U.S. Born Hockey Players Find Europe an Attractive Alternative*, USA Today, March 10, 1989, at 4C (indicating that 20 more Americans are playing in Europe than in the NHL).

1989 draft the second pick in the entire draft, Danny Ferry, rejected the NBA Los Angeles Clippers and signed a reported one year contract for one million dollars with the Messaggero Rome team of the Italian professional league.[81] An international merger of basketball would raise many of the same issues that were cited in the *Robertson* case, particularly the elimination of a potential market for professional basketball players.

An antitrust action by a competing league against the NBA for attempting to monopolize the basketball market would probably enjoy a higher probability of success than in baseball. The simple explanation again is the non-existence of an antitrust exemption for basketball.

It is also more likely that a legal action would be brought in a basketball context than in baseball. The success of the ABA in the 1960's and early 1970's is a much more recent memory than competing baseball leagues of 75 years ago. The success of the "minor league" Continental Basketball Association lends some support to the proposition that a competing basketball league could survive as opposed to a competing baseball league as well.[82] The limited size of NBA squads indicates that there may be a surplus of players adequate to form a league that would attract fans.

Overall, the antitrust action by a competing league is more likely in basketball than in baseball if there is a merger with a foreign entity.

5. Hockey

When considering a merger, hockey is confronted with many of the same issues as basketball. There is no special exemption regarding the application of antitrust laws to the sport and similarly, rival leagues have competed with the NHL. In the first year of competition between the NHL and the World Hockey Association ("WHA"), the 1971-72 average NHL salary was $24,000.[83] One year later, the salaries nearly doubled to $40,000.[84] Following the merger, salaries only increased an average of seven percent per year the first six years.[85]

Without the existence of a competing league domestically, the international market has become an alternative for players in the NHL. Although clearly not a perfect substitute for a domestic playing opportunity, the European alternative does provide some competition. In 1989, particularly with the value of the U.S. dollar dipping, European teams were even better able to compete with the NHL. At present, however, the price competition does not appear to be as great as the NBA-European league scenario, and clearly not on par with the domestic league

81. *See* Thomas, *Ferry Reportedly Forgoing Clippers to Play for a Team in Rome*, N.Y. Times, Aug. 2, 1989, at A17, col. 2.

82. *See* SPORTS INDUSTRY NEWS, 296 (Sept. 22, 1989) (citing discussion between the NBA and leaders of amateur basketball regarding an international basketball league).

83. Noll *supra* note 7, at 47.

84. *Id.*

85. *Id.*

price wars.[86] An action by a competing league would be quite similar to the scenario, discussed earlier, which confronts the NBA.[87]

An NBA player action against a league merger in basketball may have the highest probability of success within the sports reviewed under this model. Although the salaries are clearly higher domestically, the European alternative is a viable alternative. Further, there is no possibility of an exemption being applied to basketball as in baseball.

B. *Model II: Expansion*

1. Antitrust

Under this model there will not be a merger between two existing leagues, instead, the growth of a league will be accomplished by placing new franchises in foreign countries, a method commonly referred to as expansion. This method of growth is likely to be subject to far less antitrust scrutiny than discussed in Model I.[88] Gradual growth brought about by expansion is subject to far less scrutiny than the dramatic creation of an entity through a merger.

The league most illustrative of the possibilities under this model is the NFL. The NFL has already expressed interest in developing a spring football league which would include franchises in foreign countries, to compliment its existing fall schedule.[89] The general jurisdictional issues of the applicability of antitrust laws discussed initially are relevant here.[90] Assuming the NFL remains based in the United States, franchises in foreign countries will "affect" commerce domestically.

A court would probably have to conclude that the placement of franchises in a few foreign cities would not constitute monopolization of the "world" market. A court, as did the Fourth Circuit Court of Appeals in *AFL v. NFL*, would probably hold that even with the NFL's occupation of a few foreign markets there are plenty of open markets for occupation by a new league.[91] In fact courts would probably view the initial entry into a city as a "natural monopoly."[92] In *AFL v. NFL* the court held that:

> American [Football League] complains that National [Football League], the first upon the scene, had occupied the more desirable of the thirty-one potential sites for team locations . . . the

86. U.S. and Canadian players tend to sign for the same or less than they would receive in the minor league American Hockey League or International Hockey League.

87. No copy.

88. Interestingly the argument raised most often regarding expansion is that not enough takes place. *See* Mid-South Grizzlies v. NFL, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984) (an action arguing unsuccessfully that the NFL violated antitrust laws by not granting the city of Memphis, Tennessee an NFL franchise).

89. *See supra* note 2.

90. *See infra* note 92.

91. 323 F.2d 124, 130-31 (4th Cir. 1963).

92. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945), where Judge Learned Hand defines a "natural monopoly" as "a market so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand." *Id.* (Obviously the analogy is that a city, or in the case of foreign markets, maybe a country, can only support one team).

> fact that its [NFL] teams . . . enjoyed a natural monopoly does not occasion a violation of the antitrust laws unless the natural monopoly power of those teams was misused to gain a competitive advantage for teams located in other cities, or for the league as a whole. It frequently happens that a first competitor in the field will acquire sites which a latecomer may think more desirable than the remaining available sites, but the firstcomer is not required to surrender any, or all, of its desirable sites to the latecomer simply to enable the latecomer to compete more effectively with it . . . . When one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly.[93]

This method of internationalization will probably not violate U.S. antitrust laws. Any case brought would not prevail so long as the expansion methods are reasonable and there is no predatory intent. This clearly differs from Model I where market competition is being instantly reduced by eliminating a market competitor.

The International Guidelines seem to confirm this view. They present a two pronged test to determine whether the Justice Department will pursue an action for monopolization. First, the market share of the entity is examined,[94] as well as the concentration of the entity in the market and the probability of new entrants. If this analysis results in the "dangerous probability" of creating or sustaining a monopoly, then the second prong of the test is applied to observe whether the conduct under scrutiny is predatory.[95]

It appears that there must be some intent on the part of the international league to bring harm to another entity.[96] Creators of new leagues have alleged, as well as the National Football League Players Association, that the intent of the NFL in creating its WLAF is to prevent the development of another competing league. Indeed, one likely plaintiff in this model would be an upstart league, which would argue that the expanding league is monopolizing the world market. The failure of earlier leagues with similar arguments within domestic markets, however, indicates the likely outcome of an international case.

Even more tenuous is the case for an athlete. Expansion does not directly decrease competition for the athlete's services because, unlike a merger, expansion generally does not negatively affect price competition and it simultaneously does increase the overall number of employment opportunities. A successful action by an athlete would have to

93. *AFL*, 323 F.2d at 131. Further the court noted that "[i]t is not unlike the choice a chain store company makes when it selects a particular corner lot as the location of a new store. It preempts that lot when it acquires it for that purpose, but, as long as there are other desirable locations for similar stores in a much broader area, it cannot be said to have monopolized the area, or, in a legal sense, the lot or its immediate vicinity." *Id.* at 130.

94. *International Guidelines*, *supra* note 60, at 20,595-20,596.

95. *Id.* at 20,595.

96. *Id.*

allege that the expansion prevented another league from forming that would have created price competition.

C. *Model III: Formation of a new entity*

The formation of a new entity, which has met with little success domestically, could avoid many of the legal pitfalls of the first two international league models. The creator of a completely new league could form the entity with each potential antitrust issue in mind. There exists enough sports league experience for international league developers to avoid many of the start-up pitfalls.

One recently formed entity tried to take advantage of some of this available experience. The sport of arena football was structured as a corporation, with each team acting as a subsidiary. The goal of such a structure is to, presumably, place all antitrust disputes between league members squarely within the so-called *Copperweld* or "single entity" exemption.[97] This single entity argument maintains that it takes two entities to conspire or enter into an agreement to limit competition, and a single entity cannot do that. That argument, from *Copperweld Corp. v. Independence Tube Corporation*,[98] has unsuccessfully been asserted as a defense by a number of plaintiffs in sports litigation.[99] In *Copperweld*, the issue was whether a parent corporation and its two subsidiaries, or two sister corporations, could conspire under Section 1 of the Sherman Act. The Supreme Court held that the parties were not capable of conspiring because they were a single entity.

Although forming the league as a single entity theoretically eliminates conspiracy problems, there is still the possibility that the entity can be found to be a monopoly. However, this is unlikely for a completely new entity, since it is not clear how such a monopoly could be created by an entity starting out with no market power at all. Detractors of the applicability of the single entity defense to sports leagues argue that no individual team could compete without its fellow league members. In response to that query, Professor Goldman within a recent article asked how have the Harlem Globetrotters managed to survive financially for years without being members of a professional sports league.[100] Their special brand of "barnstorming" was at one point more popular than the NBA and their games were used to boost attendance at NBA games.[101]

The new entity would be the most difficult to develop but, if organ-

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

98. *Id.*

99. *See, e.g.*, Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984).

100. Although Professor Goldman's point is quite valuable, it does not address the operation of a traditional sports league. A league by definition, contains member franchises that compete against each other. Goldman, *Sports Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751 (1989).

101. *See* L. SOBEL, PROFESSIONAL SPORTS & THE LAW 127 (1977).

ized properly it would be subject to the least amount of antitrust scrutiny.

III. Post Formation Issues

Once the international league is formed, whether by merger, expansion, or the creation of a new entity, all of the leagues will then be vulnerable to post formation antitrust issues. This section assumes the existence of an international league, regardless of the manner of creation, and examines how two troublesome antitrust outcomes may vary due to their international nature.

A. *International Franchise Relocations*

Once the league is in operation, it may be confronted with an issue that has dominated the 1980's - - unilateral franchise relocation. The primary concern of league officials is the relocation of a franchise by an owner without first obtaining league permission. The leading franchise relocation case is *Los Angeles Memorial Coliseum Commission v. National Football League*.[102]

Although it has not been tested in the courts, in general, a league could probably ban an international relocation without consent. This conclusion requires two assumptions. First, the decision not to allow a franchise to relocate must be based on objective standards set forth in league constitutions and by-laws as outlined in *Los Angeles Memorial Coliseum Commission*. The second assumption is that there is no existing franchise in the city where the franchise relocates.[103] The apparent rule is that a move by a franchise to a city with an existing franchise increases competition; the head-to-head competition between two franchises in the same city which, according to the case law, is the type of competition the Sherman Act desires to promote.[104] In contrast, a move to a city where there is no franchise would not increase competition and thus courts would probably uphold a league action denying a relocation request.[105]

The one issue worth considering is how broadly an individual fran-

102. 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984).

103. *Id.* This is presumed to be the case even though there was a relocation without consent in the NFL and no antitrust action brought by the League. This was, however, probably due to the unique circumstances of the case. The former Baltimore Colts move to Indianapolis without NFL consent came on the heels of the multi-million dollar damage award against the NFL in Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984). Ironically, Indianapolis is a city that did not have a NFL franchise and a league action barring the relocation may not have been found by a court to be anticompetitive.

104. *Id.* A primary issue in that case was the fact that there was already a franchise in the metropolitan Los Angeles area.

105. This has not been tested. In the NFL the two most recent relocations, Baltimore to Indianapolis and St. Louis to Phoenix occurred without League legal action. *See Sneak Play*, TIME 71 (April 9, 1984) (Baltimore Colts' relocation to Baltimore); Eskenazi, *N.F.L. Votes to Approve Cardinals' Move West*, N.Y. Times, Mar. 16, 1988, at B6, col. 3. (St. Louis Cardinals' relocation to Phoenix).

chisee's territory would be viewed. Initially, would there be a plan to have only one team per country? And, if that is the case, for antitrust analysis purposes, should a country be viewed as analogous to a city, or does it merit different classification?

No court has formally approved the relocation rules of a professional sports league. One rationale for the league relocation rules is that leagues know best where franchises should be located. Seemingly, placement in the international markets would be that much more sensitive, so a league would have a greater interest or rationale for controlling international relocations. Thus, even if there is no franchise in the foreign city where a team relocates, there is probably greater validity to the league barring that relocation than exists in a domestic relocation under similar circumstances.

B. *Player Movement*

Athletes in all major sports are subject to, in varying degrees, involuntary "transfer" to another team. Most commonly this occurs through trades, where a team exchanges a player, cash, draft picks, or some combination of these for the same from a franchise in the same league. Some star players may have "no-trade" clauses in their contracts, however, most athletes do not.

Once an international league is established, issues regarding an athlete's right to determine where he plays expand as well. It is not difficult to sympathize with a player's desire not to be traded from say, St. Louis to Philadelphia, particularly when one considers the social, family, and business attachments that may have been developed in the former city. That sentiment increases that much more if the move to be considered is one from St. Louis to Madrid, Spain.

The move from St. Louis to Philadelphia was the act that prompted former Major League Baseball player Curt Flood to bring an antitrust action against Major League Baseball in *Flood v. Kuhn* in 1972.[106] Flood lost and the domestic trade was allowed. Also present in that case was the interpretation by the court of the labor exemption to the antitrust laws. This exemption allows the athletes, through their players' union, to agree to an act or restrictions on their rights that would otherwise violate the antitrust laws. Through collective bargaining the athletes may bargain away certain rights, including the right to have complete freedom of movement or the right to negotiate freely with the team of their choice.

In the international context, if a collective bargaining agreement is not revised to reflect the international nature of a league, the players may have an argument against any involuntary relocations such as trades. It would seem that absent this specific consent by the players, such a trade or reassignment by other means would exceed the agreement between the parties.

106. 407 U.S. 258 (1972).

Another group that may have a particular concern are amateur athletes subject to the draft. Can an athlete be drafted by a team in a foreign country and required to play there if he does not desire to? The answer is probably yes. The draft in professional football was found to be a violation of the Sherman Act in *Smith v. National Football League*.[107] The NFL owners maintained that the draft provided a competitive balance, however, the court held that the NFL needed to use less restrictive means to preserve its competitive balance. Thus, the court forbade the NFL to have a sixteen round draft. However, following this decision the National Football League Players' Association agreed to a twelve-round draft in collective bargaining. That, via the labor exemption, caused the draft to be "legalized." The collective bargaining process legalized the draft in other leagues as well.

The unsuccessful challenge that college athletes eligible for the draft have made, argues that they are not parties to the collective bargaining agreement while they are in college and, therefore, they should not be bound by an otherwise illegal restraint negotiated in a collective bargaining agreement. In *Wood v. National Basketball Association* this was the argument Leon Wood, a recently drafted basketball player, made.[108] Wood argued that he should be able to negotiate with any NBA franchise, not just the one that drafted him. The court held that the National Basketball Players Association inclusively represented his rights.[109]

Under the *Wood* ruling, if the respective players' union has agreed to the international draft, newly drafted parties will be subject to negotiating solely with the team that drafts them. It does seem, however, that *Smith* would certainly operate to the advantage of the newly drafted player if there is not a collective bargaining agreement including the international provisions. Before any internationalization, a league would be wise to renegotiate relevant collective bargaining provisions with its players' union.

CONCLUSION

The potential growth of American professional sports leagues into international markets raises a number of intriguing issues. As has been the case domestically, antitrust issues will probably continue to predominate. Should the government decide not to pursue any potential antitrust violations, there is always the possibility that private entities and individuals in the sports industry will. Historically, the government has avoided extensive involvement.

With international growth, other existing problems in professional leagues will have global implications as well, particularly labor issues and the regulation of sports agents. All of these issues, including the

107. 593 F.2d 1173 (D.C. Cir. 1978).
108. 809 F.2d 954 (2d Cir. 1987).
109. *Id.* at 963.

antitrust issues, should be considered at length prior to the entry of professional sports leagues into the international market.

Although, from a legal standpoint, the creation of an entirely new league would be the wisest route to avoid legal entanglements, it almost certainly would not be the best business decision. History has clearly illustrated that expansion or merger of existing leagues is the most successful route. The short life span of the United States Football League illustrates this, as does the growth of the NFL after its merger with the AFL and the growth of the NBA after its merger with the ABA. There is no indication that adding an international aspect to a completely new league would make it any more successful.