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FRASER v. MLS, L.L.C.: IS THERE A SHAM EXCEPTION TO THE COPPERWELD SINGLE ENTITY IMMUNITY?

MICHAEL P. WAXMAN*

“Sports law” is an amalgamation of a diverse collection of legal subject areas.¹ Judicial decisions often consider the special nature of sports when they apply these areas of law to cases addressing the sports industry.² However, “sports law” decisions affect these various legal subject areas well beyond the “sports law” context. This is particularly true in antitrust law.

In *Fraser v. Major League Soccer, L.L.C.*,³ the United States District Court for Massachusetts addressed several aspects of antitrust law as they relate to professional sports leagues. A particular issue the *Fraser* court considered and resolved was whether “single entity” immunity⁴ from section one of the Sherman Antitrust Act⁵ (Sherman Act) was available to Major League Soccer (MLS), a limited liability company⁶ that is primarily composed of a professional soccer league and its constituent investor-operators. In response to MLS’s claim of single entity im-

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1. Timothy J. Davis, *What Is Sports Law?*, 11 MARQ. SPORTS L. REV. 211 (2001).

2. *See, e.g.*, Nat’l Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85 (1984).

3. 97 F. Supp. 2d 130 (D. Mass. 2000).

4. For an explanation of the single entity immunity, see *infra* § I, ¶ 1. Although the plaintiffs in *Fraser* refer to the single entity defense, 97 F. Supp. 2d at 131, this article will use the term immunity because it, rather than defense, properly describes the legal context of the decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The *Copperweld* decision presumes that being a single entity makes that entity immune from enforcement of section one of the Sherman Act because the Act’s coverage addresses only acts through combinations, conspiracies, and contracts. Therefore, because acts by a single entity cannot be greater than that provided by Congress, the actor and its acts would be immune from the reach of section one. Conversely, if *Copperweld* only granted an affirmative defense, the defendant could waive the defense affirmatively or by omission.

5. 15 U.S.C. § 1 (1994).

6. A limited liability company is a modern business entity that is a hybrid made up of the limited liability of a corporation, the tax benefits of a partnership and the managerial operation of a limited partnership. The court in *Fraser* treated a limited liability company the same as a corporation for the purpose of assessing the single entity immunity. 97 F. Supp. 2d at 134. This article will treat a limited liability company in the same manner.

munity, the plaintiffs asserted that MLS is a “sham” corporation and therefore not entitled to single entity immunity.

Because the sham exception aspect of the *Fraser* decision could have significant ramifications for antitrust law well beyond sports leagues, this article will focus on the plaintiffs’ claim in *Fraser* that MLS is a sham corporation unqualified for single entity immunity.⁷ Despite the *Fraser* court’s scant analysis of the sham corporation argument, the limited use of a sham exception in single entity immunity cases can be reasonable and necessary. In fact, the use of the sham exception in single entity cases would conform in many ways with the use of the sham exception as applied to the petitioning immunity established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁸ (*Noerr*). Initially, this article will discuss the facts, decision, and legal analysis by the court in the *Fraser* case as they relate to the single entity immunity established in *Copperweld Corporation v. Independence Tube Corporation*.⁹ Then, the role of the sham exception as it relates to the single entity immunity will be compared to the sham exception as it applies in the *Noerr* context.

I. BACKGROUND

Section one of the Sherman Act states that “every contract, combination. . . or conspiracy, in restraint of trade. . . is declared to be illegal.”¹⁰ In *Copperweld*, the Supreme Court decided that because a contract, combination, or conspiracy requires more than one party, a single entity is immune from prosecution under section one for its “anticompetitive” acts taken alone because an entity cannot conspire with itself.¹¹ In particular, the Court in *Copperweld* found that a formal corporate legal distinction between a parent corporation and its wholly owned subsidiary can be ignored when dealing with Sherman Act section one claims.¹²

7. Judge O’Toole’s opinion is structured in a very odd way. The natural construction would be to address first whether the corporation has single entity immunity (including the application of the sham exception). Then, once the single entity immunity has been established, such a natural construction would examine whether the interests and activities of the investors show a variance from the now valid corporation such that the investors have gone beyond the bounds of a single entity. Instead, Judge O’Toole analyzes the “independent personal stake exception” claim first, and then the sham exception. See generally *Fraser*, 97 F. Supp. 2d 130. The rationale for this approach is far from clear.

8. 365 U.S. 127 (1961).

9. 467 U.S. 752 (1984).

10. 15 U.S.C. § 1. As against the need for two parties to be acting under section one, section two of the Sherman Act declares unitary acts by a dominant entity illegal when these acts constitute monopolization or attempted monopolization. *Id.* § 2.

11. 467 U.S. at 769-71.

12. *Id.* at 771-74.

The Court applied an economic reality test and accepted that there was a sufficient economic unity of interests for these related corporations to be treated as a single entity.¹³

Since the *Copperweld* decision, various professional sports leagues, which are each a collection of separate team owners acting under a sports league banner, have tried to claim that they constitute a single entity when faced with antitrust litigation.¹⁴ In response to these claims, courts have developed a series of factors to examine in determining whether such a sports league is a single entity or a collection of separate entities.¹⁵ Aware of these decisions, MLS tried to construct a corporate structure that met both the factors noted by the courts in the sports league cases that might establish a single entity immunity, as well as form a limited liability company that included the common and self-interests of the “competitor” investors.¹⁶ The *Fraser* court did not address

13. *Id.*

14. The claims by these sports leagues were usually denied. *See generally* *Sullivan v. National Football League*, 34 F.3d 1091 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995); *Chicago Prof'l Sports Ltd. v. National Basketball Assoc.*, 95 F.3d 593 (7th Cir. 1996); *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988), *aff'd*, 887 F.2d (2d Cir. N.Y. 1989), *cert. denied*, 493 U.S. 1071 (1990); *L.A. Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984). *But see* *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Seabury Mgmt. v. Professional Golfers' Ass'n of Am., Inc.*, 878 F. Supp. 771 (D. Md. 1994). In a non-sports context, see *Okansen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992); *City of Mount Pleasant v. Associated Elec. Corp., Inc.*, 838 F.2d 268 (8th Cir. 1988).

15. The Ninth Circuit rejected the NFL's single entity claim. The court provided several factors that should be examined when faced with such an alleged single entity. Does the league function, corporately and economically, as a unified entity or separately from the team owners? Do the teams operate as separate business entities whose products have an independent ownership and/or value? Assessing the degree of revenue sharing among the teams of the league, who sets the policies for the teams and the league – the league itself, the teams acting jointly or each team for itself? Do the teams compete “off-the-field,” e.g., for players, coaches and management personnel? Where there are two or more teams, do the teams compete for fan support and media coverage in the geographic region? *L.A. Mem'l Coliseum Comm'n.*, 348 F.2d at 1388-90. The First Circuit added off-the-field competition for the sale of ownership interests as an additional factor. *Sullivan*, 34 F.3d at 1099.

16. *Chicago Prof'l Sports, Ltd.*, 95 F.3d 593 (7th Cir. 1996). The court in the *Chicago Prof'l Sports, Ltd.* case indicated that a business arrangement might be deemed a single entity when it engages in some activities and a joint venture when it participates in other activities. Further, divergent interests would not preclude a finding that, for certain activities, the franchises could function as a single enterprise. *Id.* at 598-600. The Seventh Circuit concluded that the reasoning in *Copperweld* dictated no single universal characterization of sports leagues and instead might require the question of status to be determined “one league at a time – and perhaps one facet of a league at a time.” *Id.* at 600. Therefore, the NBA could be “one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities.” *Id.*

whether MLS could qualify as a “single entity” under the factors set forth in the cases where pre-existing corporations and other entities joined together under a “league” corporate umbrella while also continuing their separate existence. Instead, the *Fraser* court found that MLS is immune from section one of the Sherman Act because it is a limited liability company.¹⁷ However, in order to determine whether the election to put the whole league into a single corporation in itself qualifies for single entity immunity, it is essential to assess whether and to what extent there is a sham exception prior to a finding of single entity immunity.

II. THE CASE OF *FRASER V. MLS*

A. *The Facts*

MLS (a representative defendant) was formed in Delaware as a limited liability company (MLS, L.L.C.) in 1994 and is owned by a set of investor-operators of the teams in the MLS soccer league and some passive investors.¹⁸ Although the structure and operation of MLS appears to be consistent with a properly functioning limited liability company, the plaintiffs have asserted that in reality MLS, L.L.C., in both its structure and operation, functions more like an amalgamation of interested investor-operators hiding behind a screen of corporate formality.¹⁹ The individual plaintiffs in *Fraser* are the representatives of [a] certified class of professional soccer players who are or who have been employed by . . . [MLS].²⁰ Among the several antitrust claims asserted by the plaintiffs are two allegations that “MLS and several of its owner-investors . . . [had] unlawfully combined to restrain trade . . . in violation of [section] 1 of the Sherman [] Act. . . .”²¹ First, “by contracting for player services centrally, through MLS, [the defendants] effectively eliminat[ed] the competition for those [players’] services that would have taken place if

17. 97 F. Supp. 2d at 142.

18. The defendants in this case included MLS, L.L.C., United States Soccer Federation, and many of the investor-operators of the teams in MLS. None of the passive investors were defendants in *Fraser*. *Id.* at 131.

19. On the surface, MLS is operated like a fully functioning “corporate” business entity. The structure and mode of operation of MLS is governed by its Limited Liability Company Agreement. The MLS Agreement establishes a Management Committee consisting of representatives of each of the investor-operators. *Id.* at 132-33. The Management Committee has authority to manage the business and affairs of MLS. However, as the plaintiffs assert, the reality may vary significantly from the appearance. *Id.* at 136-38.

20. *Id.* at 131.

21. *Id.*

each MLS team were free to bid for and sign players directly.”²² Second, “the defendants . . . conspired to impose anti-competitive ‘transfer fees’ on player relocation that have the effect of restricting the ability of soccer players to move from one team to another, thus dampening competition for players’ services worldwide.”²³

The defendants moved for summary judgment claiming that MLS is a single entity and therefore could not commit, unilaterally, a violation of section one of the Sherman Act. The plaintiffs moved for summary judgment as to the defendants’ single entity immunity claim. The gist of the plaintiffs’ argument was that, although MLS appears to be a properly formed Delaware L.L.C., the corporate organizational form is really a sham.²⁴ Therefore, MLS should not be allowed to use the single entity immunity to insulate the defendants from condemnation for concerted “illegal horizontal restraints on the hiring of players.”²⁵

B. Judge O’Toole’s Opinion

The plaintiffs claimed in their primary argument addressing § one that the corporate structure of MLS is a “sham designed to allow what is actually an illegal combination of plural actors to masquerade” as a single business entity.²⁶ They asserted that the economic reality test used in *Copperweld* should also be used to determine whether a corporation has sufficient “corporateness” to be treated as a single entity and thus avoid liability under section one.²⁷ In effect, the plaintiffs argued that al-

22. *Fraser*, 97 F. Supp. 2d at 131.

23. *Id.*

24. *Id.* at 131-32.

25. *Id.* at 132. Alternatively, the plaintiffs argued that if the corporation is insulated from section one as a single entity, the investor-operators have such “independent personal stakes” that those interests constitute an exception to the single entity immunity and, thus, permit suit against those investor-shareholders for a violation of section one. *Id.* at 136. Despite the plaintiffs’ assertions of the factual foundations that support the application of the personal stake exception, Judge O’Toole stated that the independent personal stake exception has not been squarely addressed in his circuit (First Circuit) and expressed fears about a broad application of the exception. “[R]ecognizing the risk that this exception, if left unchecked, might swallow the rule, courts that employ it have done so conservatively.” *Id.* at 135. After weighing the evidence, Judge O’Toole concluded that despite some competing interests the MLS’s owner-operators consistently met the “unity of interests” test of the corporation rather than the self-interest necessary to apply the independent personal stake exception. *Id.* at 139.

26. *Id.* at 137-38.

27. *Fraser*, 97 F. Supp. 2d at 138. It is clear that Judge O’Toole understood the plaintiffs’ argument “that the structure of MLS is a sham designed to allow what is actually an illegal combination of plural actors to masquerade as the business conduct of a single entity.” *Id.* at 137-38. He paraphrases the plaintiffs’ claim as “. . .even if MLS is a legitimate LLC [for Delaware corporations law purposes,] . . . a court should disregard that legal form in evaluat-

though MLS appears to be a properly formed and operating Delaware L.L.C., the plan for MLS's formation and the activities within that "legal person" after "incorporation" reveal distinctions that would be more accurately described as a product of a collection of competitors, when put to the "economic reality" test used in *Copperweld*. Thus, the plaintiffs argued that the court should disregard the legal form in evaluating whether the operator-investors are engaged in horizontal anti-competitive practices.²⁸

The court in *Fraser* rejected the plaintiffs' sham argument as a failed attempt to "put a reverse spin on the *Copperweld* holding."²⁹ Although it conceded that the plaintiffs' economic reality argument had some superficial appeal, it concluded that, on "close[r] examination[, the plaintiffs' argument rested] on a misconception of the scope of the *Copperweld* principle."³⁰ The court found that MLS was properly formed, and that MLS continues to operate as an L.L.C. under Delaware's corporation law. Therefore, MLS was a single entity, immune from section one of the Sherman Act.³¹

In *Copperweld*, the Supreme Court ignored the corporate law distinction between a parent corporation and its separately incorporated, wholly owned subsidiary and declared them an economic unit for anti-trust law purposes.³² The *Fraser* court's conclusion implies that it interpreted *Copperweld* to readopt the principles of the law of corporations as primary once *Copperweld*'s subsidiary was inside the economically unitary corporate structure.³³ While this may make factual sense when looking at the corporations involved in *Copperweld*, the facts and issues alleged in *Fraser*, if correct, are inapposite to *Copperweld*.³⁴ As the *Fraser* court conceded, *Copperweld* and its progeny have focused on

ing under antitrust principles whether the operator-investors are engaged in a horizontal restraint in the market for players' services." *Id.* at 138.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 139.

32. *Fraser*, 97 F. Supp. 2d at 138-39.

33. *Id.*

34. *Copperweld* involved a fully functioning parent corporation and a separate, fully functioning subsidiary. The Court in *Copperweld* understood that it was dealing with two corporations that were parts of a whole, under the control of the parent. 467 U.S. at 771-73. Conversely, in *Fraser*, MLS has not yet established that it is functioning effectively as a corporation. Indeed, the plaintiffs have alleged that MLS is in effect a "sham" corporation. Despite this allegation, Judge O'Toole refused to review or analyze MLS's corporate operations. Rather, he only reviewed the corporate documents (e.g., Bylaws) and accepted MLS as a fully functioning corporation. In fact, he excused his lack of exploration. 97 F. Supp. 2d at 139.

whether to disregard corporation law distinctions between entities, due to their inter-corporate relationships, in order to find economic singularity for the purposes of Sherman Act.³⁵ But, the Court, in *Copperweld*, never endorsed an all-but-hollow shell of a corporate form to be sufficient as a single entity, immune from application of section one of the Sherman Act. In fact, the Court's discussion in *Copperweld* might raise the opposite impression.³⁶

Despite the significant gap between the solidity of the corporations in *Copperweld* and the allegations of sham incorporation in *Fraser*, the *Fraser* court applied the law of corporations to the plaintiffs' claims without considering the antitrust context. For example, the court measured whether MLS, L.L.C. had violated its corporate structure by references to piercing the corporate veil.³⁷ The court in *Fraser* asserts that "*Copperweld* does not support the proposition that a business organized as a single legal entity should have its form ignored, or its 'veil' pierced, so that courts could examine whether participants in the firm have conducted concerted activity that would violate § 1."³⁸ Indeed, Judge O'Toole seemed to fear that an examination "would permit the atomization of firms into their constituent parts, [and] then . . . have the relationships of those parts examined to see if they produced anticompetitive effects that, had they been brought about by independent economic actors, would have violated § 1. . . . No case has suggested that it would be appropriate to deconstruct a corporate entity in that way."³⁹ However, the *Fraser* court's conclusion that it would be inappropriate to open up a corporation to examine whether it, in fact, is operating in a manner consistent with the antitrust laws also has no case support. *Copperweld* had nothing to do with piercing the corporate veil (unless one considers ignoring the independent corporate status of the two corporations as piercing the corporate veil).⁴⁰ Indeed, the issue of sham incorporation, as raised in *Fraser*, is unique.

To determine whether the claims made by the plaintiffs in *Fraser* are valid, the court must be willing to consider the purposes of the antitrust laws as against those of the corporation laws. To wit, despite compliance with the incorporation laws and superficial conformity with the corporate formalities, is the corporation a sham because its real purpose is to

35. *Fraser*, 97 F. Supp. 2d at 138.

36. *Cf. infra* § III, ¶ 4.

37. *Fraser*, 97 F. Supp. 2d at 139.

38. *Id.*

39. *Id.*

40. *See generally Copperweld*, 467 U.S. 752.

accomplish anti-competitive acts under an emperor's new clothes, corporate formality?

First, there must be a determination as to whether a single entity immunity shield is automatically presumed upon incorporation or whether the corporation must first pass a "sham" test to qualify for the shield. Further, if the immunity shield is automatic, then the issue remains as to what must be shown by the plaintiffs to overcome the shield.⁴¹ Although the evidence necessary to prove sham incorporation may be the same, whether the immunity shield is automatic or not, the erection of an immunity shield shifts the burden from the defendant, who must establish a single entity immunity, to the plaintiff, who must disprove the appropriateness of that shield. Modern courts have accepted that a business entity should receive a limited liability shield for corporate law purposes (barring defective incorporation – which is not present here) upon submission of the filing of incorporation papers with the state of the incorporation. However, some cases point to the possibility that the limited liability shield should not be recognized where the incorporation has been done to avoid a "clear legislative purpose."⁴² It would seem that antitrust law would fit as a clear legislative purpose. Further, Delaware corporation law permits a "judicial inquiry into . . . lawful possession of any corporate power [a putative corporation] may assert in any other suit or proceeding where its corporate existence or the power to exercise the corporate rights it asserts [are] challenged, and [any] evidence tending to sustain the challenge shall be admissible in any such suit or proceeding."⁴³

41. If the single entity immunity shield is recognized automatically upon incorporation, there can be procedural piercing, i.e., for a sham corporation, or substantive piercing, i.e., the "independent personal stake" exception. The factors to be considered in addressing the substantive piercing of the corporate veil issue, the "independent personal stake" exception, address whether the shield created upon incorporation has been disregarded in practice by those within the corporation. This "piercing" standard is appropriate to examine the disregard of the corporate entity through antitrust activities by the directors, officers, or shareholders that vary significantly from the interests of the functioning corporate entity.

42. *Schenley Distillers. Corp. v. United States*, 326 U.S. 432, 437 (1946). Still, the corporate entity "will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Id.* See also *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965) ("[T]he Dealers' Day in Court Act would be subverted . . . if the corporate format adopted by the parties were given recognition. Hence, we must 'pierce the veil' of the corporate entity and look to the substance and reality of the situation. In the interest of justice, the corporate fiction must be ignored.").

43. DEL. CODE ANN. tit. 6, § 329 (1991).

In effect, the court in *Fraser* has declared that incorporation under the corporation law trumps antitrust law. Yet, there is no support in antitrust law for artificially expanding the gap between sections one and two of the Sherman Act so that corporate form automatically overcomes economic reality.⁴⁴ Indeed, *Copperweld* did not discuss, much less approve, legitimizing, for antitrust purposes, all activity performed by a corporate entity, solely because it meets the quite relaxed standards of incorporation law. If formal incorporation can become a shield against antitrust challenges under section one of the Sherman Act, current or newly developing potential competitors can incorporate as one unit to coordinate their common interests and implement otherwise illegal activities in labor negotiations, vendor contracts, vertical price-fixing, and non-price practices. By skillful drafting of the corporate documents, these competitors could form a corporation that could coordinate hiring practices and divide markets in ways that would otherwise constitute per se horizontal antitrust violations. Judge O'Toole's treatment of the "sham" argument in *Fraser* seems to imply that he did not contemplate, much less address, the grand implications of his analysis and conclusions. *Copperweld* clearly recognizes that a parent and its wholly owned subsidiary should be treated as a single entity for purposes of the antitrust laws.⁴⁵ However, the *Copperweld* Court never commented upon "sham" corporations that appear to be a functioning single entity, but are, in actuality, created solely to circumvent the antitrust laws.⁴⁶

III. THE SHAM EXCEPTION

The concept of "sham" in antitrust law has been applied most prominently as an "exception" to the immunity from the antitrust laws recognized in the "Noerr-Pennington" doctrine (*Noerr doctrine*).⁴⁷ The *Noerr doctrine* arose in response to efforts to influence the government, which, if successful, would have anticompetitive effects. The *Noerr doctrine* line of cases has established the general rule that lobbying, and other efforts to obtain legislative or executive action, "do not violate the antitrust laws, even when those efforts are intended to eliminate [the] competi-

44. See *infra* § III B, ¶ 7.

45. *Fraser*, 97 F. Supp. 2d at 138.

46. See generally *Copperweld*, 467 U.S. 752.

47. The cases that make up the foundation of the "Noerr-Pennington" doctrine are: *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), *aff'd in part, reversed in part*, 400 F.2d 806 (1968), *cert. denied*, 393 U.S. 983 (1968); *Noerr*, 365 U.S. 127.

tion or otherwise restrain trade” (*Noerr immunity*).⁴⁸ This immunity was subsequently extended beyond legislative and executive action to judicial and quasi-judicial bodies.⁴⁹ The Supreme Court in *Noerr* excepted (in dicta) from *Noerr immunity* petitioning activity that is a mere “sham” used not to gain government action, but to cloak direct interference with the business of a competitor.⁵⁰ In effect, the sham exception recognizes that some petitioning is used solely to obfuscate and thereby thwart other parties. The *Noerr* Court conceded that such petitioning does not warrant immunity.⁵¹

The Supreme Court announced more specific standards for petitioning legislative and administrative bodies in *City of Columbia v. Omni Outdoor Advertising, Inc.*⁵² The Court in *Omni* noted that “the sham exception encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anti-competitive weapon.”⁵³ The *Omni* Court cited its decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*⁵⁴ for the principle that sham conduct “involves a defendant whose activities are ‘not genuinely aimed at procuring favorable government action’ at all.”⁵⁵

A substantial parallel can be drawn between the *Noerr immunity* and the single entity immunity recognized in *Copperweld*. First, the rationale

48. JULIAN O. VON KALINOWSKI ET AL., 3 ANTITRUST LAW AND TRADE REGULATIONS § 47.04, at 47-25 (2d ed. 2001). See generally *Noerr*, 365 U.S. 127; *Pennington*, 381 U.S. 657.

49. See generally *Cal. Motor Transp.*, 404 U.S. 508.

50. *Noerr*, 365 U.S. at 144

51. *Id.* See also *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 381 (1991). However, the Supreme Court has suggested that the protection that the First Amendment affords to petitioning activity, before courts and administrative tribunals, was less robust than the protections applicable to petitions addressed to executive and legislative branches of government. *But see Cal. Motor Transp.* 404 U.S. at 512-513.

52. 499 U.S. 365.

53. *Id.* at 380 (emphasis omitted).

54. 486 U.S. 492 (1988).

55. *Omni Outdoor Adver. Inc.*, 499 U.S. at 380 (citing *Allied Tube & Conduit*, 486 U.S. at 500 n.4). A few years later, the Court set a more specific standard for adjudication activity in *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993). In *Prof'l Real Estate Investors, Inc.* the Court set out a two-part definition of sham litigation that adopted a hybrid objective-subjective test. First, the lawsuit must be “objectively baseless.” *Id.* at 60-61. If an objective, reasonable, litigant could realistically expect a favorable outcome of the suit on the merits, then the suit is entitled to *Noerr immunity*. *Id.* at 63. If, on the other hand, the challenged suit is objectively baseless, the court must then examine the subjective motivation of the party bringing the questioned suit to determine whether the “baseless lawsuit [constitutes] ‘an attempt to interfere directly’ with a competitor’s business by using ‘the governmental process[, rather than] the outcome of that process[,] as an anticompetitive weapon.’” *Id.* at 60-61 (quoting *Omni Outdoor Adver., Inc.*, 499 U.S. at 380 (emphasis omitted)).

for the immunities in *Noerr* and *Copperweld* are similar. The *Noerr* immunity was provided to shield from antitrust liability petitioning of the government, whatever its goal. Thus, the fact that the petitioning resulted in a less competitive marketplace was irrelevant. Similarly, in *Copperweld*, the Court immunized from section one of the Sherman Act, coordinated corporate action by throwing a broad net over a parent and wholly owned subsidiary corporate structure (even ignoring corporate law distinctions recognized in other areas of the law, e.g., tax) and declaring it a single entity for antitrust purposes.⁵⁶ However, mistakenly relying on *Copperweld*, the court in *Fraser* accepted that compliance with the minimal standards for the formation of a Delaware L.L.C. also warranted qualification for single entity immunity.⁵⁷ Thereafter, the court entertained only corporation law standards to assess the legality of the single entity, e.g. defective incorporation and piercing the corporate veil.⁵⁸ The court in *Fraser* failed to consider the existence of, much less the standards for, a sham exception to the single entity immunity for antitrust purposes. However, as in *Noerr*, the *Copperweld* single entity immunity must be limited by a sham exception to prevent the use of a governmental sanctioning process, incorporation, as an anticompetitive weapon that will be used solely, or primarily, as an artifice to evade the antitrust laws, rather than as a way to create a real corporation.

Second, the Sherman Act's limitations are a significant part of the basis for the immunities, in both *Noerr* and *Copperweld*. In *Noerr*, Justice Black noted that the Court acted not on First Amendment grounds, but because "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."⁵⁹ Like *Noerr*, the Court in *Copperweld* recognized that Congress did not intend to apply section one of the Sherman Act to certain activities, here, those of a corporate family,⁶⁰ and thus, the single entity immunity was born. However, unlike *Noerr*, the *Copperweld* Court never addressed the possibility of the creation of a corporation solely to gain the single entity shield by the de minimus formalistic requirements of incorporation law

56. 467 U.S. at 776-77.

57. 97 F. Supp. 2d at 134-135.

58. *Id.* at 138-139.

59. *Noerr*, 365 U.S. at 135. Courts have identified several bases for the *Noerr* doctrine's antitrust immunity. Among these bases have been, the First Amendment right of citizens to petition their government. *See, e.g., California Motor Transport*, 404 U.S. at 510; *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983). For a statutory interpretation of the Sherman Act under which Congress is viewed as not intending the Act to reach governmental action or the political process, see *Omni Outdoor Adver., Inc.*, 499 U.S. at 380.

60. *Copperweld*, 467 U.S. at 768-69.

today. Yet, where this practice occurs, it is essential that a court be able to prevent form from overtaking substance by stripping the immunity through a sham exception.

Finally, the sham exception creates an extremely small but essential opening in the immunity shield. Of necessity, the courts must have a mechanism to prevent abuse of the section one immunity. Thus, the *Copperweld* Court stated that the focus of section one "on concerted behavior leaves a 'gap' in the [Sherman] Act's proscription against unreasonable restraints of trade."⁶¹ The Court also noted that the size of the gap between Sherman Act sections one and two is "open to serious question."⁶² Indeed, *Copperweld* cites examples of factual situations that would close the entry to single entity immunity. The Court notes, "[i]t has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct."⁶³ The *Copperweld* Court also cites *Northern Securities Co. v. United States*⁶⁴ to express the limitations in the formation of the company in the *Copperweld* context. "All the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose."⁶⁵ Further, interpreting the decision of *United States v. Yellow Cab Co.*,⁶⁶ the *Copperweld* Court notes that the "affiliation of the defendants was irrelevant because [the] original acquisitions were *themselves* illegal. An affiliation 'flowing from an illegal conspiracy' would not avert sanctions. Common ownership and control were irrelevant because the restraint of trade was 'the primary object of the combination' which was created in a 'deliberate, calculated manner.'⁶⁷ In *Fiberglass Insulators, Inc. v. Dupuy*,⁶⁸ the *Copperweld* immunity was held not to apply where individual defendants conspired before the formation of the corporation and the corporation "was merely the instrumentality through which the objects of the

61. *Id.* at 774-75.

62. *Id.* at 776-77.

63. *Id.* at 761.

64. 193 U.S. 197 (1904).

65. *Id.* at 354. The *Copperweld* Court also cites for this principle, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

66. 332 U.S. 218 (1947).

67. 467 U.S. at 761-62 (citing *Yellow Cab*, 332 U.S. 218).

68. 1986-2 Trade Cas. (CCH) para. 67, 316 (D. S.C. 1986).

conspiracy would be achieved.”⁶⁹ Although these cases relate to a collection of existing corporations “merging” into a single entity, these cases clearly show the Court’s concern that the entry way to becoming a single entity must be guarded. “A corporation’s initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act. . . .”⁷⁰

IV. CONCLUSION

Courts facing antitrust issues in the sports business context must contemplate the ramifications of their decisions well beyond the world of sports business. In *Fraser*, the district court was faced with the claim of a sham exception to the single entity immunity recognized in *Copperweld*. Rather than address this novel issue, Judge O’Toole, once he saw an incorporation, retreated to the application of the corporation laws and applied an absolute immunity from the antitrust laws for what he saw as a legitimate single entity. Whether or not the facts in *Fraser* warrant the application of a sham exception, consideration of a sham exception, and the antitrust reasoning behind it, is essential to assure that false corporate fronts do not become automatic shields against antitrust enforcement. The ramifications of the decision in *Fraser* will reach far beyond “sports” leagues and sports law. Unless reversed by the First Circuit, this decision will affect the nature of antitrust planning throughout the business community and create immunity shields for some competitors who otherwise would be appropriately subject to section one of the Sherman Act.

69. *Id.* at 61, 63. See also *Rio Vista Oil, Ltd. v. Southland Corp.*, 667 F. Supp. 757, 761 (D. Utah 1987).

70. *Copperweld*, 467 U.S. at 777.

