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FACILITY ISSUES IN MAJOR LEAGUE SOCCER: WHAT DO SOCCER STADIUMS HAVE TO DO WITH ANTITRUST LIABILITY?

Major League Soccer ("MLS" or "the league") survived its legal christening on October 7, 2002, when the U.S. Supreme Court denied certiorari on the league’s first antitrust challenge in Fraser v. Major League Soccer L.L.C.¹ Although the District Court in Fraser found that MLS was a single entity for antitrust purposes,² the First Circuit Court of Appeals left the question open for future review.³ The lawsuit took nearly six years from start to finish and cost MLS over $10 million in legal expenses.⁴ Assuming MLS survives its early losses and eventually begins to operate in the black,⁵ its single-entity defense will likely face other antitrust challenges in the future.

At the top of MLS’s priority list is building soccer-specific stadiums in order to increase the long-term ticket revenue necessary for the league’s survival. Funding for MLS stadiums has traditionally come from private investors; however, MLS’s financial losses have reduced private investors’ interest significantly. With limits on private funding, MLS will experience the panoply of public-funding issues faced by other professional sports leagues, which have typically used combinations of private and public funding to realize stadium plans.⁶

This comment will explore the extent MLS investors’ involvement in stadium planning, financing, and management (collectively hereinafter “facility issues”) jeopardizes and erodes the league’s single entity defense in future antitrust litigation. Before fully discussing this thesis, an overview of MLS’s organizational structure and history are presented, followed by a brief summary of antitrust litigation and the single-entity defense in professional sports leagues.

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2. Fraser, 97 F. Supp. 2d at 142.
3. Fraser, 284 F.3d at 58 (indicating that MLS is a “hybrid arrangement, somewhere between a single company... and a cooperative arrangement between existing competitors”).
5. Id. (Commissioner Don Garber stating, “We have not forecasted a break-even point yet.”).
Overview of Major League Soccer's Organizational Structure and History

The United States Soccer Federation, Inc. (USSF) is the national governing body of soccer in the United States. In 1988, the USSF promised to establish a viable Division I, professional, soccer league (top-tier, international status) in the United States if awarded the right to host the World Cup soccer tournament by the Federation Internationale de Football Association (FIFA). FIFA accepted the USSF’s promise and awarded the United States rights to the 1994 World Cup tournament. Early in the process, the USSF chose to develop only one Division I league in the United States, fearing that rival soccer leagues would reduce the likelihood of success. By 1993, several organizations had submitted proposals, but ultimately the USSF accepted the plan submitted by its own president, Alan Rothenberg. Although the USSF rejected all other proposals, it stated that Division I proposals would be considered again in 1998, providing that suitors could meet additional financial and operating standards.

Rothenberg’s business plan seriously considered antitrust liability, which has traditionally plagued professional sports leagues. Before submitting the plan to the USSF, Rothenberg had lengthy consultations with private investors and antitrust counsel. Based on these meetings, MLS was organized as a Limited Liability Company (L.L.C.) under Delaware law in 1995. MLS investors are governed by the Limited Liability Company Agreement (“MLS Agreement”), which establishes a Management Committee given the authority

7. Fraser, 284 F.3d at 52 (establishing the background facts of MLS’s inception).
8. Id. at 52-53.
9. Id.
10. Id. at 53. This concern was fully justifiable by the past failure of the North American Soccer League (NASL), which was a U.S. Division I soccer league that ultimately failed in 1985 after limited success. Id. at 52; See also Fraser v. Major League Soccer, L.L.C., 97 F. Supp. 2d 130, 132 (D. Mass. 2000), aff’d, 284 F.3d 47 (1st Cir. 2002), cert. denied, 537 U.S. 885 (2002). The decision to launch only one league is also fully justified on an international standard because no other country has sanctioned multiple Division I leagues. Fraser, 284 F.3d at 53.
11. Three organizations submitted plans to develop a league: League One America, the American Professional Soccer League, and Major League Professional Soccer (the precursor to MLS). Fraser, 284 F.3d at 53.
12. Id.
13. Id.
15. Fraser, 97 F. Supp. 2d at 132.
16. Id.
to regulate the league as a business.\textsuperscript{17}

Under this corporate umbrella, investors may sign Operating Agreements that give them exclusive rights to operate specific MLS teams within a geographic market or "home territory," and are granted limited discretion in team operations and local business strategies.\textsuperscript{18} As the First Circuit elaborated,

\begin{quote}
[O]perator/investors hire, at their own expense and discretion, local staff..., and are responsible for local office expenses, local promotional costs for home games, and one-half the stadium rent. . . . In addition, they license local broadcast rights, sell home tickets, and conduct all local marketing on behalf of MLS; agreements regarding these matters do not require the prior approval of MLS.\textsuperscript{19}
\end{quote}

For his services, MLS pays each operator-investor a management fee, which is principally calculated by the market performance of his individual team.\textsuperscript{20}

However, not all investors are required to operate teams.\textsuperscript{21} These "passive investors" share in league profits and losses without contributing to ancillary operating expenses.\textsuperscript{22} MLS owns all teams that compose the league and "retains significant centralized control over both league and individual team operations."\textsuperscript{23} Players are hired and assigned to teams by the league and player trades among operator-investors are allowed only with prior league approval.\textsuperscript{24} This discretionary balancing act between operator-investor decision-making and MLS's central ownership is unique to professional sports.\textsuperscript{25} The complexity and legal recognition of this "hybrid arrangement"\textsuperscript{26} is discussed below.

MLS has been the only Division I professional soccer league in the United

\textsuperscript{17} Id.
\textsuperscript{18} Fraser, 284 F.3d at 53-54.
\textsuperscript{19} Id. at 54.
\textsuperscript{20} Id. The management fee is calculated by adding "one-half of local ticket receipts and concessions; the first $1,125,000 of local broadcast revenues[.]. . . a 30% share. . . of any amount above the [league's] base amount; all revenues from overseas tours; . . . [and] one-half the net revenues from the MLS Championship Game and. . . other exhibition games." Id.
\textsuperscript{21} Fraser, 97 F. Supp. 2d at 132 (noting that these "passive investors" were not named as defendants).
\textsuperscript{22} Id. at 133.
\textsuperscript{23} Fraser, 284 F.3d at 53.
\textsuperscript{24} Fraser, 97 F. Supp. 2d at 133.
\textsuperscript{25} Id.; see also Paul D. Abbott, Antitrust and Sports: Why Major League Soccer Succeeds Where Other Sports Leagues Have Failed, 8 SPORTS LAW. J. 1, 4 (2001) (noting differences between operator-investors in MLS and other professional sports leagues' owners).
\textsuperscript{26} Fraser, 284 F.3d at 58.
States since its inaugural season in 1996. While the league has survived seven seasons and continues to define a niche of U.S. fans, the ultimate success of MLS is uncertain. From a purely business perspective, MLS has been a failure, losing a reported $250 million over its first five seasons and presently failing to attract new investors.

Perhaps the most obvious barometer of MLS's financial struggles is the fluctuating number of teams in the league. MLS began with ten teams and expanded to twelve in 1998, adding teams in Chicago and Miami. In January of 2002, the league contracted both of its Florida-based teams, including the Miami team from the 1998 expansion. However, MLS does not intend to remain a ten-team league for long. The league promised potential investors that it will expand again to twelve teams in 2005. Assuming that this proposed expansion occurs, the future of the league's financial success can be no more certain than the future of its size.

MLS also has a history of investor-retention problems. Nine operator-investors fronted the league's twelve teams in February of 2000. Presently, only three operator-investors remain:


31. MLS Overview, supra note 27.

32. See Francisco Ojeda, Beauty Is Inside the Beast: Aged Wantland Intrigues MLS, DAILY OKLAHOMAN, Feb. 3, 2003, at 1B (stating that MLS will announce the two cities where it intends to expand in late 2003).

33. Fraser, 284 F.3d at 52 n.1 (naming nine operator investors in the suit: "Kraft Soccer, LP; Anschutz Soccer, Inc.; Anschutz Chicago Soccer, Inc.; South Florida Soccer, L.L.C.; Team Columbus Soccer, L.L.C.; Team Kansas City Soccer, L.L.C.; Los Angeles Soccer Partners, LP; Empire Soccer Club, LP; and Washington Soccer, LP."); Major League Soccer, L.L.C., MLS Statement on Player Lawsuit, MLSNET.COM, at http://www.mlsnet.com/content/00/mls0224lawsuit.html (Feb. 24, 2000).
1. Anschutz Entertainment Group (AEG), headed by billionaire Philip Anschutz, controls six of the ten teams;[34]

2. The Hunt family, headed by international tournament sponsor Lamar Hunt, currently controls two teams;[35] and

3. The Kraft family, headed by the National Football League’s New England Patriots’ owner, Robert Kraft, controls one team.[36]

MLS, now largely comprised of these three investors, operates the remaining franchise; however, Lamar Hunt has reportedly sought to acquire its operating rights.[37]

This consolidation of operator-investor assets renews the question raised in Fraser: Is this league arrangement a single-entity or is this merely a joint venture by three individuals—Anschutz, Hunt, and Kraft?

*MLS’s Current Focus on Soccer-Specific Stadiums*

At the forefront of MLS’s corporate goals and, perhaps, corporate success, is the development of appropriate facilities in which teams compete. The league’s goal is to have a guaranteed stream of revenue, which purportedly would aid the long-term survival of the league more than increasing the star-quality of play on the field by importing overseas players.[38] Ticket sales represent a significant portion of MLS’s revenue stream,[39] but increasing the percentage of revenue kept by investors is as important to long-term prosperity

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38. Bell, *supra* note 34.

as the number of tickets sold. The media has recognized the importance MLS is placing on this goal, prompting one reporter to remark, “Soccer stadiums are being portrayed as the answer for all that ails [MLS].”

The league has repeatedly expressed that potential investors must provide realistic proposals for a soccer-specific stadium in order for their city to be seriously considered as an expansion site candidate. MLS Commissioner Don Garber specifically stated that the “three key areas” analyzed when considering expansion proposals are “1. How the market supports soccer. […] 2. Current or future facilities where an MLS team would play its games. […] and] 3. The desire of an investor … to place a team in [a] specific market.” However, the league has also asserted that “the quality of facilities” will be the key component to its expansion decision. Thus, satisfaction of each of Garber’s “three key areas” appear contingent upon whether the prospective investor will provide MLS with an appropriate venue within a given market. This over-emphasis on soccer stadiums has even caused some MLS reporters to take sarcastic tones on this issue; as one placated, “OK, kids, what do we need for expansion? All together now: venue and ownership.”

The league has also expressed a need for current teams to pursue soccer-specific stadiums in order to generate increased ticket revenue. However, investors are not guaranteed success merely by obtaining an appropriate facility. For example, the Miami Fusion were one of two teams contracted in 2001 despite increasing season ticket sales by twenty-six percent in 1999, spending over $4 million dollars on renovations to Lockhart Stadium in 2000, and providing a fan-friendly atmosphere “thick enough to impress

40. See generally Tobias Xavier Lopez, Frisco a Suitor for Burn Home, FORT WORTH STAR-TELEGRAM, Oct. 28, 2002, at C1. (discussing MLS’s three “financially favorable stadiums”).
41. Bell, supra note 34.
42. See Ojeda, supra note 32 (building a soccer-specific stadium “drives the efforts” for expansion site consideration); cf. Don Walker, Milwaukee Not On List for MLS Expansion Franchise, MILWAUKEE J. SENTINEL, available at http://www.jsonline.com/sports/socc/feb03/116355.asp?format=print (last updated Feb. 6, 2003) (an MLS spokesman is quoted: “If stadium prospects come back [to] Milwaukee, then we’ll be back talking.”).
44. Don Garber., MLS All-Star Weekend Press Conference, MLSNET.COM, at http://www.mlsnet.com/content/00/00/s0729sotla.html (July 29, 2000).
46. See Bell, supra note 34.
even the most cynical of the sport.”

Despite all of these positives, the Fusion failed to take root in their community and sufficiently attract television ratings and attendance. Lamar Hunt built the league’s first soccer-specific stadium in Columbus, Ohio, which has been the model example for MLS stadium development in the wake of the Columbus Crew’s financial success thereafter. Columbus Crew Stadium offers 22,485 seats, a much more intimate venue than retrofitted football stadiums such as the nearly 100,000-seat Cotton Bowl in which MLS’s Dallas Burn team played through 2002. Former Commissioner Douglas Logan set the tone for the league’s stadium plans when he stated, “[w]e certainly would like to see Lamar’s partners follow his example on a city-by-city basis and follow the lead he has taken in Columbus, Ohio.” Commissioner Garber reiterated this plan in his 2000 State of the League Address, stating that “Columbus Crew Stadium is the pride, and envy, of everyone in Major League Soccer, but we need more.”

In addition to providing atmosphere-killing attendance capacities that MLS cannot fill, retrofitted football stadiums often cannot satisfactorily accommodate soccer fields, which generally require a wider, longer, and flatter playing surface than American football fields. Furthermore, soccer fields are conventionally natural grass, unlike various artificial surfaces found

Stadium Debut](noting Fusion operator-investor Kenneth A. Horrowitz’s investment to convert the former high school stadium into a 20,450 capacity MLS-ready venue). See also Major League Soccer, L.L.C., Fusion to Spruce Up Lockhart Stadium for 2000, MLSNET.COM, at http://www.mlsnet.com/content/00/mia0106lockhart.html (Jan. 6, 2000) (detailing the renovations undertaken in 2000).


50. See Paul Oliu, Grow, Then Expand, MLSNET.COM, at http://www.mlsnet.com/content/03/oped0328oliu.html (Mar. 28, 2003) (discussing the failure of the Fusion and the possibility of future MLS expansion).

51. See Columbus Stadium Debut, supra note 48; Major League Soccer, L.L.C., Columbus Crew Stadium Named Top Sports Facility of the Year, MLSNET.COM, at http://www.mlsnet.com/content/00/clb0111crewstadium.html (Jan. 11, 2000). See also MLS Ticket Sales, supra note 47 (noting that the Columbus Crew increased ticket sales by 49% in its stadium’s inaugural year –1999).

52. Id. See also Chapman, supra note 49. The Dallas Burn recently left the cavernous Cotton Bowl in search of a more intimate stadium. Major League Soccer, L.L.C., Burn To Play In Dragon Stadium, MLSNET.COM, at http://www.mlsnet.com/content/03/dal0114dragon.html (Jan. 14, 2003) (announcing that the Burn will play the 2003 season in nearby Dragon Stadium, which holds only a modest 12,000 at overflow capacity).

53. Columbus Stadium Debut, supra note 48 (reporting Logan’s opening remarks in the MLS weekly teleconference call).


in many football stadiums.⁵⁶ Recognizing these advantages, AEG built the Taj Mahal of soccer-specific stadiums in Los Angeles, California.⁵⁷ The corporately named Home Depot Center, will provide the L.A. Galaxy with a permanent home and serve as the National Training Center for U.S. soccer players.⁵⁸ The $112 million, privately financed facility is part of several plans to bring soccer-specific stadiums to every home territory.⁵⁹ The bar has been set very high for potential investors with hopes of gaining an expansion team for their city in 2005.

The "Unity of Interest" Begins to Fade

While the reasons underlying MLS's focus on soccer-specific stadium development are clear, uniform acceptance of Hunt's Columbus model is somewhat mixed. MLS seems unfettered in its goals: "In order to [maintain] the success of the first seven seasons, the League's Board of Governors will continue seeking the funding and construction of soccer-specific stadiums in each market."⁶⁰ Yet, two operator-investors' actions have not followed MLS's soccer-specific mantra in home territories where each operator-investor also own NFL franchises.

Hunt himself was skeptical of soccer-specific stadiums' practicality as the only model for every MLS home territory. Hunt, who is also the operator-investor for MLS's Kansas City Wizards and owner of the NFL's Kansas City Chiefs franchise, rejected the feasibility of anything but a dual-purpose stadium in Kansas City even before his new soccer-specific stadium in Columbus had opened its turnstiles.⁶¹ Hunt specifically stated that the union of his marketing staffs for the Wizards and Chiefs eliminates the practicality

⁵６. See Paul Oliu, Beyond the Stadiums, MLSNET.COM, at http://www.mlsnet.com/content/03/oped0221oliu.html (Feb. 21, 2003) (commenting that in 2003 "the Metros will be yet [again] one more MLS team that will be playing on plastic grass").
⁵⁷. Major League Soccer, L.L.C., Galaxy Announces Soccer Specific Stadium Plans in Pasadena, MLSNET.COM, at http://www.mlsnet.com/content/00/la0315stadium.html (Mar. 15, 2000) (Galaxy club president, Tim Leiweke, announcing the plans to build a "soccer academy and stadium that will make Southern California the capitol for soccer in the United States"). See also Major League Soccer, L.L.C, Don Garber Comments on the State of the League, MSLNET.COM, at http://www.mlsnet.com/content/01/mls0727sotlhtml (July 27, 2001) (voicing league excitement about the planned facility) [hereinafter Garber's 2001 Address].
⁵⁹. Garber's 2001 Address, supra note 57. AEG is also perusing stadiums for the N.Y. MetroStars and Chicago Fire teams. Id.
⁶⁰. MLS Overview, supra note 27 (emphasis added).
⁶¹. Columbus Stadium Debut, supra note 48.
of building a soccer-specific stadium in Kansas City, which has forced the Wizards to continue to play alongside the Chiefs in the 79,500-seat Arrowhead stadium. Hunt’s decision “flies against what [MLS] hopes is a growing trend toward 15,000 to 25,000-seat [soccer-specific] stadiums.”

Operator-investor Robert Kraft also chose not to follow the soccer-specific stadium model, building a dual-purpose NFL/MLS stadium to house both of his New England teams. The privately financed, $325-million, state-of-the-art CMGI Field holds a 68,000 capacity crowd for Patriot football games, but upper-level seats are closed off for MLS games, leaving a 30,000 capacity lower bowl for Revolution fans. The Revolution general manager commented that “what soccer people have to appreciate and understand is the correlation between the NFL, the Krafts, and soccer.” It is clear that Kraft was not interested in building anything except a dual-use facility for both of his professional sports teams.

MLS embraced Kraft’s contribution because it provides the league with a venue large enough to hold international events, such as future World Cup or other tournaments; brings in ancillary revenue from Kraft’s ownership of the stadium; and accommodates the wider soccer-regulation field without needing to remove seats. However, it is unlikely that MLS will approve of additional dual-use stadiums in other home territories because of the exclusivity of these benefits to CMGI Field and the Krafts, the substantial private cost involved, and the soccer-specific stadium goals of the league. Approval is also unlikely because, aside from each of Kraft’s and Hunt’s ownerships in an NFL franchise, neither AEG, Hunt, or Kraft currently own

62. Id.
64. Id.
66. Id.
67. Frank Dell’Apa, New Facility Has a Multipurpose; Soccer and Football May Be a Perfect Mix, BOSTON GLOBE, May 10, 2002, at E8. The GM further commented, “If [soccer fans] have to have a Big Brother, it’s great to have one you can respect.” Id. (referring to the Super Bowl Champion New England Patriots).
68. “[I]t would have been unrealistic to expect [the Krafts] to finance two stadiums for their teams out of their own pockets. . . . The more intimate soccer venues are the right way to go for most places. The Krafts are hoping to show that it is not the only road to success.” Chapman, supra note 65.
69. Dell’Apa, supra note 67.
70. Lopez, supra note 40.
71. Chapman, supra note 65.
other U.S. professional sports franchises. Hunt could conceivably build another dual-use facility in Kansas City, but this possibility is purely speculative in light of his current decision that both teams continue to play in Arrowhead Stadium.  

Overview of Relevant Legal Principles: Antitrust, the Single-Entity Defense, the Fraser Decision, and "Facility Issues"

Unlike several recent start-up professional sports leagues, the four major professional sports leagues in the United States—Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), and the National Hockey League (NHL)—were organized to benefit and promote the success of the individual teams. Courts struggled to define the legal boundaries of traditional model leagues and ultimately applied the laws governing private associations to MLB and subsequent leagues. MLS presents a unique twist for legal application because it was organized specifically to avoid the same antitrust liability faced by these predecessor leagues. Thus, actually avoiding litigation and antitrust liability is at the heart of MLS league structure and, perhaps, the future success of single-entity sports leagues.

Historically, antitrust claims have been brought by a variety of plaintiffs, claiming that a league has restrained trade through an even larger variety of actions. Antitrust law is implicated to prevent monopolies and monopolistic conspiracies that restrain trade and limit consumer benefit. The Sherman Antitrust Act governs federal antitrust claims and provides in Section 1 that “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade... is declared to be illegal...” To prevail under a Section 1 claim, a plaintiff must show that a contract, agreement, or conspiracy restrains trade in a relevant market affecting interstate commerce.

72. See Columbus Stadium Debut, supra note 48 and accompanying text.

73. See generally COZZILLIO & LEVENSTEIN, supra note 14, at 7-19 (discussing the formation of modern sports leagues); see also Panel Discussion, supra note 28, at 420 (Kenneth Shropshire presenting).

74. Panel Discussion, supra note 28, at 420.

75. Id. at 434-35 (Jeffrey Kessler presenting issues surrounding the single-entity structure of MLS).

76. See generally ANDERSON, supra note 14, at 79-90 (discussing antitrust law’s application to professional sports leagues).


Section 2 of the Sherman Act provides that "[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 trade. . . , shall be deemed guilty of a felony. . . ." To prevail under a Section 2 claim, a plaintiff must show that the defendant could monopolize a relevant market and that it purposefully engaged in conduct in furtherance of monopolizing that market, causing the plaintiff harm. 

Plaintiffs can bring antitrust claims under either section depending on the alleged restraint. Under the Sherman Act, courts scrutinize claims as either "illegal per se" restraints of trade—i.e. obvious monopolistic practices— or illegal under a "rule of reason" balancing test—i.e. whether the justifications behind an anticompetitive action are reasonable in light of the effect on the relevant market. Because professional sports leagues necessarily restrain trade among players, owners, and in some cases competitor leagues, traditional model sports leagues have continually challenged the boundaries of these tests in their operations and implementation of rules. Thus, defenses to antitrust challenges have been exhausted and new leagues, such as MLS, have attempted to limit Section 1 antitrust liability by organizing themselves as single entities, incapable of conspiring in restraint of trade.

In 1984, the U.S. Supreme Court held that a parent corporation and its wholly owned subsidiaries operate like a single firm for antitrust purposes. Because Section 1 requires a plaintiff to demonstrate that multiple economic actors engaged in an agreement in restraint of trade, logically a defendant can rebut the claim if the agreement only involved one economic actor. Accordingly, the Supreme Court ruled in Copperweld Corp. v. Independence Tube Corp. that just as a single firm cannot conspire with itself, corporations that have "a complete unity of interest" are also exempt from Section 1 scrutiny. Traditional model leagues' attempts to implement this new antitrust defense were largely unsuccessful because courts view sports

81. See ANDERSON, supra note 14, at 79-80; COZZILLIO & LEVENSTEIN, supra note 14, at 257-58.
82. See generally COZZILLIO & LEVENSTEIN, supra note 14, at 19-20 (discussing traditional model leagues' struggles to survive and handle antitrust liability).
84. See id.
85. Id. at 771-72.
86. In one partly-successful use of the single-entity defense, the Seventh Circuit found that teams could act as a single firm in some endeavors, such as when acting in the broadcasting market, but act
leagues individually, based on the league’s founding constitution, bylaws, or other operating agreement(s).  

On the coattails of Copperweld, several start-up sports leagues, including MLS, attempted to organize as pure single-entity structures. However, MLS adapted its organizational structure after it failed to attract investors, granting investors limited operating rights to individual teams. This adaptation is not dispositive; the single-entity defense is effective so long as operator-investors do not act autonomously from the league or otherwise act outside the “unity of interest,” Copperweld standard. As one legal scholar asserted,

The fact that some teams have an “owner-operator” is irrelevant. These operator-investors merely act as quasi-shareholders and directors in the larger MLS entity. Operator-investors are similar to high ranking corporate executives and officers that [a parent corporation] might assign to operate [its] Boston and Dallas offices...  

This assertion was tested in Fraser v. Major League Soccer L.L.C., where relevancy of the operator-investor action was not the absolute focus, but one of many other considerations that prompted the court to find that MLS is not a pure single-entity structure.

In February of 1997, eight MLS players sued the league, its operator-investors, and the USSF, alleging numerous Section 1 and 2 antitrust violations. Among these violations, the players claimed that MLS and its

as multiple economic actors in other actions. See generally Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n, 95 F.3d 593 (7th Cir. 1996). For examples of sports leagues attempting to raise the single-entity defense pre-Copperweld, see N. Am. Soccer League v. Nat’l Football League, 670 F.2d 1249, 1257 (2d Cir. 1982) (rejecting the NFL’s argument because owners participate in a joint venture league); L.A. Memorial Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1389 (9th Cir. 1984) (finding that the NFL clubs are “separate business entities,” and thus, do not act as a single firm).

87. See Panel Discussion, supra note 28, at 421 (Shropshire presenting).

88. See generally Karen Jordan, Note, Forming a Single Entity: A Recipe for Success for New Professional Sports Leagues, 3 VAND. J. ENT. L. & PRAC. 235 (2001) (discussing start-up leagues such as the Women’s National Basketball Association (WNBA), the now-folded XFL, a women’s professional soccer league known as WUSA, and the Continental Basketball Association (CBA)).

89. Panel Discussion, supra note 28, at 437 (Jeffrey Kessler stating, “The MLS owners never [really] formed a... single entity because they did not want to give up individual team control.”).

90. Abbott, supra note 25, at 12.

91. 284 F.3d 47 (1st Cir. 2002).

92. Id. at 58.

93. Id. at 54-55. Two of these allegations are beyond of the scope of this paper, including the players’ challenge to FIFA’s transfer fee policies, id. at 55 n.2; and the players’ allegation that the MLS and USSF attempted to monopolize or conspired to monopolize the U.S. market for Division I soccer players, id. at 55.
operator-investors agreed not to compete for player services and that the combination of assets of the operator-investors, in effect, created a monopoly by significantly reducing competition in its relevant market.

In Fraser, the District Court found that (under Copperweld) MLS and its operator-investors comprised a single entity. On appeal, the First Circuit distinguished MLS from Copperweld, stating that the league’s single-entity status was weakened by the dual control MLS operator-investors exercise over the teams and the league. The court concluded that “MLS and its operator/investors comprise a hybrid arrangement, somewhere between a single company... and a cooperative arrangement between existing competitors,” which ultimately leaves the issue of whether the league’s structure precludes Section 1 scrutiny under a rule of reason analysis open to future developments in the law. Therefore, future Section 1 challenges to MLS may not be automatically defeated by the single-entity defense, and courts will likely be forced to reevaluate operator-investors’ roles to determine the legal status of this “hybrid arrangement.”

As the First Circuit in Fraser stated, “the existence of distinct entrepreneurial interests possessed by separate legal entities distinguishes Copperweld; it further indicates that certain functions have already been disaggregated and assigned to different entities; and it makes the potential for actual competition closer to feasible realization.” Thus, the more autonomy operator-investors wield, or the more their actions display entrepreneurial interests separate from those of MLS, the less effective the single-entity defense will be in protecting the league from Section 1 scrutiny. Issues surrounding the development of MLS stadiums may be the critical factor, evidencing a lack of unity between the interests of operator-investors and the league.

Other professional sports leagues have experienced an exceptional boom in stadium development over the last decade, and all indications are that the MLS will be no exception. With private investor support waning, however, future MLS stadium planning will likely include public funding partnerships

94. Fraser, 284 F.3d at 54-55 (discussing count I of the players’ claim).
95. Id. at 55 (discussing count IV of the players’ claim).
96. Id. at 56.
97. Id. at 57.
98. Id. at 58.
99. Fraser, 284 F.3d at 59.
100. Id. at 57.
101. ANDERSON, supra note 14, at 154 (citing WILLIAM S. MILLER & PAUL MUCH, INSIDE THE OWNERSHIP OF PROFESSIONAL SPORTS TEAMS (1999)).
with its private investors, much like all other professional sports’ leagues have utilized in recent stadium development plans. Additionally, Anschutz’s status as one of the wealthiest men in the world has reportedly been shaken in recent years, which increases the likelihood that AEG will utilize public funding in the future for stadium proposals in AEG’s six home territories. In fact, AEG is currently taking steps to gain public investment in the MetroStars’ new facility in Hudson County, New Jersey. While the bill supporting this public investment has been somewhat derailed due to an ongoing federal investigation of a separate company founded by Anschutz, AEG’s proposal is a strong indicator that MLS plans to utilize public funding to accelerate its stadium goals.

Conventional plans for stadium development use combinations of financing methods and revenue sources, creating plans that are “palatable” to the needs of both the team and the municipality. The public financed portion may commonly include general obligation bonds, project revenue bonds, or tax-backed revenue bonds. Private investors kick in taxable debt, equity from developers and concessionaires, or vendor financing. A wide spectrum of legal issues naturally flow from the allocation of these funds, but more importantly for the MLS is the extent to which operator-investors involvement in reaching these agreements expose individual, entrepreneurial interests that jeopardize the future of its single-entity defense.

When Lamar Hunt built the model soccer-specific stadium in Columbus, he bypassed delays from public funding and privately financed the stadium’s construction himself. However, this level of private investment is not

102. See id. at 161 (“every sports facility project is a public/private partnership”).

103. Bell, supra note 34 (noting that Anschutz’s rank among billionaires dropped from 16th to 54th in 2001—an estimated $10.2 billion fall off).


105. Qwest Communications, a company founded by Anschutz, is under investigation by the Securities and Exchange Commission and the U.S. Department of Justice for questionable accounting practices. See Michael Hiestand, One Man the Hope of a Sport: Donovan, 20, Carries MLS’ Dream of Big-Time Status, USA TODAY, Dec. 17, 2002, at C3; Jack Bell, Soccer: Notebook; Avalanche of Goals In Men’s Tournament, N.Y. TIMES, Dec. 10, 2002, at D6 (stating that the a New Jersey Senate committee decided to delay the vote for a state subsidies bill to help build the new stadium when members learned of the investigation).

106. ANDERSON, supra note 14, at 162.

107. GREENBERG, supra note 6, at 182.

108. Id.

109. See generally ANDERSON, supra note 14, at 166-69.

110. Columbus Stadium Debut, supra note 48.
feasible for every MLS home territory.\textsuperscript{111} Gaining public funds often requires lobbying a community for local support.\textsuperscript{112} When an operator-investor assumes this role and individually negotiates with the public sector, these actions smack of entrepreneurial interests, rather than promotions of the league. In one sense, MLS is advanced and bettered by this type of public funding. In another sense, an operator-investor, influenced by his own interests in financing the stadium,\textsuperscript{113} may negotiate more public involvement than the league would otherwise desire. In this way, operator-investors' connection in public financing options may evidence autonomous actions that diminish the "unity of interest" between the operator-investor and the league.

\textit{The Intersection of "Facility Issues" and Future Antitrust Claims}

The First Circuit's opinion in \textit{Fraser} noted that in MLS, the league "sets the team's schedules[,] negotiates all stadium leases[,] and assumes all related liabilities."\textsuperscript{114} The court weighed these facts among others when considering whether MLS was more akin to a single firm or a joint venture.\textsuperscript{115} However, the court did not consider that MLS operator-investors may build their own stadiums and assume some liability for those projects separate from the league.\textsuperscript{116} This assumption of liability is certainly the case where potential investors build a stadium in hopes of winning a bid for an expansion team.\textsuperscript{117} In these instances, potential investors are acting solely under individual, entrepreneurial interests, hoping that MLS will grant them a team and the right to buy into the league—a $25 million entrance fee.\textsuperscript{118}

Once in the door, the new expansion teams will be operated by investors who directly competed for rights to enter the league at their own financial risk.

\textsuperscript{111} See \textit{Harrison Project}, supra note 104 (discussing a public funding proposal for financing a new stadium for the Metrostars).

\textsuperscript{112} See \textit{GREENBERG}, supra note 6, at 151.

\textsuperscript{113} For example, every dollar of the project that is generated by public funding decreases the total amount of private funding needed to complete the project. Since the private funding of the project may come solely from the individual operator-investor, it would be economical for the individual operator-investor to generate as much public funding as possible.

\textsuperscript{114} Fraser, 284 F.3d at 53.

\textsuperscript{115} See id.

\textsuperscript{116} See supra notes 51, 57, 64 and accompanying text. See also Major League Soccer, L.L.C., Frisco Soccer Complex Marks Historic Milestone In U.S. Soccer, MLSNET.COM, at http://www.mlsnet.com/special/events/dbfrisco0402/frisco.html (Apr. 4, 2003) (discussing the Hunt family's involvement in securing a soccer-specific stadium for the Dallas Burn).

\textsuperscript{117} See supra notes 42-45 and accompanying text.

It is unclear if this type of former competition among expansion candidates could jeopardize the single-entity status, but the First Circuit noted "[t]hat a stockholder may be insulated by Copperweld when making ordinary governance decisions[, but this] does not mean automatic protection when the stockholder is also an entrepreneur separately contracting with the company."\textsuperscript{119} While competition ceases once the expansion candidate is granted entrance to the league, these investors will have acted purely as entrepreneurs, separately contracting with the league in their efforts to win the expansion bid. Additionally, investors who build stadiums will likely continue to negotiate the terms of the stadium's use and contract with the league over either leasing and scheduling of the stadium or the "sale" of the stadium to the league. As the First Circuit warned in Fraser, these types of entrepreneurial contracts jeopardize the protection under Copperweld.\textsuperscript{120} In this regard, any MLS expansion that is predicated on the private realization of stadiums as a prerequisite to league entry, jeopardizes MLS's single-entity status.

Scheduling of MLS games also creates a potential conflict of interest between the league and current operator-investors who privately own stadiums. In a related example, a Section 1 antitrust suit was filed by the Los Angeles Memorial Coliseum Commission against the United States Soccer Federation (USSF) and MLS, which sought an injunction declaring that the USSF had no jurisdiction over game scheduling.\textsuperscript{121} While this claim is somewhat irrelevant to this discussion because it was brought by a stadium commission rather than an operator-investor, it decidedly illustrates how interest in controlling a stadium's use could boil over into an antitrust suit if the league and an operator-investor have differing agendas for scheduling stadium events. This potential conflict is very possible in dual-use stadiums where both a stadium and another professional sports team are owned by a single operator-investor: i.e. the Kraft family's ownership of CMGI Field along with the NFL's New England Patriots, or the Hunt family's ownership of a dual-use stadium in Kansas City along with ownership of the NFL's Kansas City Chiefs.

It is indisputable that NFL franchises are currently more lucrative ventures than their MLS counterparts. In instances where an operator-investor has competing interests for the use of his stadium — e.g. potentially MLS and the NFL could both want to schedule an event at the same time — it is almost

\textsuperscript{119} Fraser, 284 F.3d at 57.

\textsuperscript{120} Id.

certain that each owner would favor the interests of his NFL franchise over the interests of MLS. At the very least, MLS would be compelled to cater to these private interests at the risk of irritating one if its few remaining investors.\textsuperscript{122} Therefore, dual ownership of stadiums or multiple professional sports franchises may also expose private, entrepreneurial interests that jeopardize the balance of MLS's single-entity defense.

\textit{Potential Consequences}

Arguably, MLS's single entity status prevailed in \textit{Fraser} in that the First Circuit chose not to definitively answer the "single entity problem;" thus, the league may still assert this defense in future Section 1 antitrust claims.\textsuperscript{123} However, the issues raised by operator-investor involvement in facility issues combined with the uncertainty of the First Circuit's characterization of MLS as a "hybrid arrangement"\textsuperscript{124} may defeat the league's future assertion of the single-entity defense. The question now becomes: What consequences will MLS face if it loses its single-entity defense in addition to the obvious potential for Section 1 liability?

Legal scholars are divided on the issue of whether the single-entity league structure has independent economic value apart from the legal benefits of Section 1 immunity.\textsuperscript{125} There is clearly some value to the single-entity model sports league because it mitigates antitrust risk,\textsuperscript{126} but if the legal benefit is removed, are there any advantages to structuring a sports league as a single corporation instead of the traditional league structure?\textsuperscript{127} At least one scholar has asserted that the single-entity structure has no independent economic value apart from its legal benefits.\textsuperscript{128} Jeffrey Kessler, a prominent attorney in sports-related antitrust and labor issues, claims, "[i]f the so-called single-entity structure had independent economic value, it would have been adopted thirty years ago. It would not have taken until now for lawyers to think of it for purely legal reasons."\textsuperscript{129} This claim is supported by MLS's early financial

\textsuperscript{122} Arguably, the MLS was forced to cater to Kraft's desire to build a dual-use stadium for both of his New England teams, rather than taking a hard-line stance to the league goals for soccer-specific stadiums. \textit{See generally, supra} notes 64-67 and accompanying text.

\textsuperscript{123} \textit{Fraser}, 284 F.3d at 59. "The case for expanding \textit{Copperweld} is debatable and, more so, the case for applying the single entity label to MLS." \textit{Id.}

\textsuperscript{124} \textit{Id.} at 58.

\textsuperscript{125} \textit{See generally Panel Discussion, supra} note 28, at 413-14.

\textsuperscript{126} \textit{Id.} at 427.

\textsuperscript{127} \textit{See generally id.}

\textsuperscript{128} \textit{Id.} at 433-436 (Jeffrey Kessler presenting).

\textsuperscript{129} \textit{Id.} at 434-35.
losses and its current failure to estimate a break-even point. If Kessler is correct, the resulting consequence from losing single-entity status may inversely benefit MLS by providing it with little, if any, reason to uphold the current league structure should financial losses continue.

Some legal scholars, however, argue that the single-entity league structure has economic value absent its legal benefits. Tandy O'Donoghue, an attorney who represented MLS in Fraser, asserts that the single-entity structure gives business partners the ability to utilize league assets to the fullest economic advantage as well as limiting the risk of rogue owners, who might otherwise act to the benefit of their individual club and to the detriment of the league. O'Donoghue opined, "what [the single-entity leagues] are really trying to do is avoid having an owner make deals on his own that are not beneficial for the entire league and its survival." If MLS does eventually turn a profit, these might be reasonable justifications to support the current league structure; the actual consequences of losing the single entity defense would then be minimized. Except for Major League Baseball, no major, professional, U.S. sports league has categorically avoided Section 1 antitrust liability. Therefore, exposing MLS to this potential liability will not necessarily lead to its ruin.

The advantages to gaining soccer-specific stadiums that MLS asserts seem to clearly outweigh the benefits for preserving the single-entity defense. Arguably, MLS’s foremost concern should be its own survival, rather than future susceptibility to Section 1 antitrust claims. Indeed, if the best interests of the league are to gain soccer-specific stadiums, allowing these types of autonomous and entrepreneurial activities is essential, even though these activities jeopardize the future viability of MLS’s single-entity defense.

Conclusion

Based on Fraser and current MLS operator-investor involvement in facility issues, MLS is slowly giving up its single-entity status. As the First

130. A reported $250 million in its first five years. Panel Discussion, supra note 28, at 433.
131. See supra note 5.
132. See supra note 28, at 427-33 (Tandy O'Donoghue presenting).
133. Id. at 427-28.
134. Id. at 428.
135. Future antitrust challenges to the league could reference examples where operator-investor involvement in facility issues casts doubt on the Copperweld "unity of interest" standard. However, the consequences of this legal defeat may be minimal.
136. See COZZILLO & LEVENSTEIN, supra note 14, at 251-52, 277-78.
137. See supra notes 41-44 and accompanying text.
Circuit in *Fraser* recognized, merely giving operator-investors individual control doesn’t automatically defeat single-entity status;\(^\text{138}\) however, operator-investors’ entrepreneurial interests in stadium development may expose flaws in MLS’s single-entity defense. While the court in *Fraser* thoroughly considered the roles of operator-investors in local, team management within their home territories, the court did not focus on operator-investors’ interests and involvement in stadium development. The autonomous actions of Anschutz, Hunt, and Kraft in these “facility issues” creates the potential for competition among operator-investors contemplated by the First Circuit. MLS’s current inability to coordinate facility issues among its three primary investors further erodes the appearance of a true “unity of interest,” and thus, further erodes the league’s single-entity defense.

Even though these activities jeopardize the future viability of this antitrust defense, the league’s stadium development plans appear necessary for its survival. MLS has undertaken a very aggressive agenda to achieve a soccer-specific stadium in every home territory and, perhaps, this goal is not possible without individual, autonomous actions by operator-investors that will ultimately defeat MLS’s single-entity status. It is this inability to resolve facility issues that distinguishes this “hybrid arrangement” from the single-entity antitrust exemption carved out in *Copperweld* and increases the likelihood that MLS’s future attempts to implement the single-entity defense in Section 1 litigation will be unsuccessful.

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138. *Fraser*, 284 F.3d at 57-58.