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MLS’ DESIGNATED PLAYER RULE: HAS DAVID BECKHAM SINGLE-HANDEDLY DESTROYED MAJOR LEAGUE SOCCER’S SINGLE-ENTITY ANTITRUST DEFENSE?

I. INTRODUCTION

Major League Soccer’s (MLS) recently implemented Designated Player Rule and the subsequent signing of worldwide superstar David Beckham to the Los Angeles Galaxy have signaled the league’s attempt to build its prestige and establish itself as a true “major league.” While such developments have certainly brought heightened publicity to the American brand of soccer, they may have much more far-reaching effects in the eyes of the law.

One major legal concern with which professional sports leagues continuously struggle is antitrust. Antitrust law is a crucial check on the power of professional sports leagues and teams in terms of internal governance, outside competition, and labor disputes. Because single entities enjoy exemption from § 1 of the Sherman Antitrust Act,¹ which prohibits concerted actions that unreasonably restrain trade, professional sports leagues have continually attempted to characterize themselves as such, largely to no avail.² This comment will examine the reasons MLS was initially successful in its single-entity defense in Fraser v. Major League Soccer, L.L.C.,³ and what implications the Designated Player Rule may have on the league’s antitrust characterization and legal status in the future.

This comment will begin by discussing the history and organization of MLS compared to other major professional sports leagues in the United States. It will then discuss the origin of the single-entity antitrust defense and how it has been applied by courts to the other major professional sports leagues. Further, it will discuss the reasons MLS was victorious in Fraser at the district court level, why MLS was successful on appeal in the First Circuit, and how

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these two decisions affect MLS’s status for antitrust analysis. Finally, this comment will introduce the Designated Player Rule, examine whether it could change MLS’s single-entity status, and discuss whether such a change could be important as the league continues to grow and develop.

II. HISTORY AND ORGANIZATION OF MAJOR LEAGUE SOCCER

Major League Soccer was organized in 1995 as part of the consideration for the United States’ bid to host the 1994 Federation Internationale de Football Association (FIFA) World Cup. Organizers of the event promised to re-establish premier professional soccer in America, which had been without a major soccer league since the North American Soccer League (NASL) collapsed in 1985. Seeking to eliminate problems such as franchise control and rapidly escalating player salaries, which were largely to blame for the demise of the NASL, MLS was organized as a single limited-liability company with several operator-investors in lieu of the traditional model of American professional sport leagues that consist of an unincorporated association of individual clubs.

Originally, players contracted directly with MLS rather than with the individual teams. The league allocated the marquee players among the teams, while the rest of the players were acquired either by drafts or trades. MLS’s management committee, comprised of representatives of its investors, exercised centralized control over league and team operations, including instituting a maximum salary amount for its teams. Profits and losses were distributed by MLS to its operator-investors akin to distributions paid by corporations. Aside from costs such as one-half of the stadium rent, certain local promotions, and general team administration (including coach and management staff salaries), which were paid by the team operators, all other costs were paid by MLS (including player salaries).

Major League Soccer began play in April 1996 with ten teams operated by six investors, culminating its inaugural season in October with the D.C. United
winning the MLS Cup, the league’s first-ever championship.\textsuperscript{12}

III. ANTITRUST, PROFESSIONAL SPORTS LEAGUES, AND THE SINGLE-ENTITY DEFENSE

The Sherman Antitrust Act,\textsuperscript{13} enacted by Congress in 1890, is designed to promote consumer welfare by preserving a competitive marketplace.\textsuperscript{14} Section 1 of the Act prohibits any (1) concerted action, that (2) unreasonably restrains, (3) interstate trade or commerce.\textsuperscript{15} Section 2 prohibits monopolization and attempted monopolization in interstate commerce.\textsuperscript{16} Although the Act is concerned with how concerted action affects consumers, when courts attempt to apply the Act to professional sports, they often find it difficult to apply it fairly and consistently.\textsuperscript{17} They also have trouble determining whether a particular league or team rule or act actually helps or hurts consumers.\textsuperscript{18} In fact, the Supreme Court has recognized that the essence of sports is producing competition, that sports is “an industry in which horizontal restraints on competition are essential if the product is to be available at all,”\textsuperscript{19} and that “the integrity of the ‘product’ cannot be preserved except by mutual agreement.”\textsuperscript{20} These recognitions have caused courts to forego traditional \textit{per se} antitrust analysis in favor of the rule of reason.\textsuperscript{21}

Because professional sports league rules are almost always a result of concerted action in interstate trade or commerce, rule of reason analysis comes into play under the “unreasonable restraint” portion of section 1 of the Sherman Act.\textsuperscript{22} Instead of \textit{per se} analysis in which a naked restraint such as a reduction in output or increase in price is presumed to be illegal as a matter of law, rule of reason analysis causes courts to balance the challenged restraint on

\textsuperscript{12} Major League Soccer, \textit{About MLS}, MLSNET.COM, http://www.mlsnet.com/about/ (last visited Mar. 21, 2007). The original MLS franchise cities included Boston, Columbus, Dallas, Denver, Kansas City, Los Angeles, New York/New Jersey, San Jose, Tampa, and Washington, D.C. Two investors operated two teams, while MLS operated the Dallas and Tampa teams. \textit{Id}.


\textsuperscript{16} \textit{Id.} § 2.

\textsuperscript{17} See, e.g., Chi. Prof’l Sports Ltd. v. Nat’l Basketball Ass’n, 95 F.3d 593 (7th Cir. 1996).

\textsuperscript{18} \textit{Id}.


\textsuperscript{20} \textit{Id.} at 102.

\textsuperscript{21} \textit{Id.} at 101-03.

\textsuperscript{22} \textit{Id.}
trade against its pro-competitive virtues on a case-by-case basis.23 Rule of
reason employs shifting burdens of proof in which a plaintiff must first plead
and prove actual and obvious anticompetitive effects by showing an increase
in price or a reduction in output (known as “quick look” analysis).24 If the
plaintiff cannot succeed under quick look analysis, it can also meet its initial
burden by proving that the defendant has market power in a relevant product
and geographic market (known as “full blown” analysis).25 If the plaintiff
succeeds in showing anticompetitive effects, the defendant then must show
legitimate pro-competitive economic justifications for the anticompetitive
restraint.26 If the defendant is successful, the burden shifts for a final time
back to the plaintiff to show less-restrictive alternatives to the defendant’s
restraint.27

Section 2 analysis employs a substantially similar market power test to
determine whether an entity has attained monopoly power, in that it examines
whether a defendant has monopoly power both in a relevant product and
geographic market.28 However, showing § 2 monopoly power, in which
courts generally require entities to maintain a market share of about seventy
percent, is more difficult than showing § 1 market power, in which the
required market share is merely thirty percent.29

A. The Single-Entity Defense

Antitrust law has been a major concern for professional sports leagues
because it affects how leagues can make and enforce their own rules.30 Any
league rule or collective decision resulting from a vote of its member clubs is a
concerted act and certainly affects interstate commerce, as the business of

23. Id.
25. Id. at 1019.
26. Id.
27. Id.
1982); Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977).
29. Courts have defined monopoly power as “the power to control market prices or exclude
have hesitated to definitively establish a threshold market share for monopoly power, the Second
Circuit has shed some light on monopoly power analysis: “[s]ometimes, but not inevitably, it will be
useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share
between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually
strong evidence of monopoly power.” Broadway Delivery v. United Parcel Serv., 651 F.2d 122, 129
(2d Cir. 1981).
30. See generally Mid-South Grizzlies, 550 F. Supp. 558; Hecht, 570 F.2d 982.
professional sports is nationwide. Therefore, if the rule or decision unreasonably restrains trade, it could violate the Sherman Act. Thus, the leagues have continually sought exemption from the Act. One such exemption that has been particularly attractive (although largely elusive) to professional sports leagues is the single-entity defense. The single-entity defense attempts to circumvent the concerted action element of § 1 of the Sherman Act, because if a sports league is deemed to be a single entity, its members would be incapable of conspiring amongst themselves.

B. Pre-Copperweld Single-Entity Sports Cases

The first sports case to address the single-entity defense was San Francisco Seals, Ltd. v. National Hockey League, where the court upheld the defense in the context of the National Hockey League’s (NHL) refusal to allow the Seals club to move to Vancouver. The United States District Court for the Central District of California said that the league’s refusal was not a conspiracy to restrain trade because its teams were not economic competitors in the production of professional hockey in North America.

Following Seals, the tide turned for the single-entity defense in North American Soccer League v. National Football League (NASL), when the United States Court of Appeals for the Second Circuit rejected the National Football League’s (NFL) single-entity defense on grounds that the teams were distinct, separately owned legal entities that did not share profits or losses. Characterizing the league as a joint venture, the court applied the intra-enterprise conspiracy doctrine and held that such an organization was not exempt from § 1 of the Sherman Act. The intra-enterprise conspiracy

33. Aside from the aberration of Major League Baseball, which has been granted a unique exemption from antitrust law by the courts, other major professional sports leagues have not been as fortunate in evading antitrust law. See generally Toolson v. N.Y. Yankees, 346 U.S. 356 (1953); Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof. Baseball Clubs, 259 U.S. 200 (1922).
37. Id. at 967.
38. Id. at 969-70.
40. Id. at 1257-58.
41. Clifford Mendelsohn, Fraser v. Major League Soccer: A New Window of Opportunity for the
doctrine states that "section1 liability is not foreclosed merely because a parent and its subsidiary [have] common ownership." Thus, if the doctrine applied to a parent and its subsidiary, the court reasoned, it surely applied to professional sports leagues where each team was an independently owned entity.

The NFL failed again in its attempt at the single-entity defense three years later in *Los Angeles Memorial Coliseum Commission v. National Football League (Raiders I)*, when the United States Court of Appeals for the Ninth Circuit found the NFL's franchise relocation rule violated § 1. Like the Second Circuit in *NASL*, the Ninth Circuit emphasized the NFL's distinct independent team ownership in rejecting the defense, also expressing concern that if the league were to be exempted for franchise relocation purposes, it could presumably evade § 1 liability in all other areas as well. In applying the intra-enterprise conspiracy doctrine, the court found illegal concerted action because "NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly." After *NASL* and *Raiders I* and in light of the intra-enterprise conspiracy doctrine, professional sports leagues could not be very optimistic about any attempt at the single-entity defense. However, the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.* provided a possible "window of opportunity" for a resurrection of the single-entity defense.

C. Copperweld

In *Copperweld*, the Supreme Court repudiated the intra-enterprise conspiracy doctrine, holding that concerted actions between a parent and its wholly owned subsidiary were not subject to § 1 of the Sherman Act because such entities must be treated as a single actor. The Court held that when legally separate entities have a "complete unity of interest," § 1 does not apply. "They are not unlike a multiple team of horses drawing a vehicle

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43. Mendelsohn, *supra* note 41, at 76.
44. 726 F.2d 1381 (9th Cir. 1984).
45. *Id.* at 1386.
46. *Id.* at 1388-89.
47. *Id.* at 1389.
49. Mendelsohn, *supra* note 41, at 78.
50. *Copperweld*, 467 U.S. at 771.
51. *Id.*
under the control of a single driver.” Copperweld recognized that it may be necessary for a single business enterprise to coordinate its efforts in order to effectively compete in a competitive marketplace, and therefore, a single entity’s internal agreement “does not raise the antitrust dangers that [section] 1 was designed to police.” The Court’s reasoning for discarding the intra-enterprise doctrine centered on the fact that antitrust law is aimed at the substance of the entities’ relationship, rather than the form.

Although Copperweld only discussed parents and their wholly owned subsidiaries, the Court’s reasoning hinted that other organizational structures might be exempt from § 1 scrutiny, as long as the entities involved had unified interests. Armed with Copperweld and with the intra-enterprise doctrine out of the picture, professional sports leagues gained a new incentive to assert the single-entity defense, arguing that their clubs represent a “complete unity of interests.”

D. Post-Copperweld Single-Entity Cases

Even though Copperweld dismissed the intra-enterprise doctrine, subsequent league attempts at the single-entity defense proved no more successful than those in the pre-Copperweld cases. In the 1990s, the courts in both McNeil v. National Football League and Sullivan v. National Football League denied the NFL’s single-entity defense, finding fatal the clubs’ independent ownership and their competition off the field for things such as players, coaches, management, ticket sales, merchandise, and other revenues. The court in Sullivan found that “the critical inquiry is whether the alleged antitrust conspirators have a ‘unity of interests’ or whether, instead, ‘any of the defendants has pursued interests diverse from those of the cooperative itself.’” Sullivan simply reaffirmed McNeil, swatting down the NFL’s second “Hail Mary” in holding that its clubs clearly had diverse interests from that of the NFL as a whole, and therefore were precluded from asserting the single-entity defense.

52. Id.
53. Id. at 769.
54. Id. at 772.
55. Id.
57. 34 F.3d 1091 (1st Cir. 1994).
58. Mendelsohn, supra note 41, at 80-82.
59. Sullivan, 34 F.3d at 1099 (quoting City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-op., Inc., 838 F.2d 268 (8th Cir. 1988)).
60. Id.
Two years after Sullivan, the National Basketball Association (NBA) gave its best shot at the single-entity defense in Chicago Professional Sports Ltd. v. National Basketball Ass’n,61 arguing that although it was an organization of separately owned clubs, it was a single-entity in the broadcast market because it created a single product—NBA basketball—which competed with other basketball leagues as well as other sports leagues and entertainment options.62 This argument in favor of inter-brand competition was particularly appealing to the court, which stated that “[w]e see no reason why a sports league cannot be treated as a single firm in this typology. It produces a single product [and] cooperation is essential . . .”63 Thus, the Seventh Circuit broke from the previous post-Copperweld decisions in that it held the NBA could be a single entity in one facet but a joint venture in other facets.64 This functionalist approach squares with Copperweld’s assertion that the substance of the relationship, rather than form, should be the key, and possibly opened the door for other leagues to argue the same.65

E. Fraser v. Major League Soccer, L.L.C.

Major League Soccer had already been organized and begun play by the time Chicago Professional Sports was decided, so the case likely did not influence the league’s decision to organize itself as a limited-liability company. As previously discussed, MLS was initially organized as a limited-liability company, with operator-investors sharing in both the profits and losses of the company, akin to that of investors in a corporation.66 Although one of the main reasons MLS founders organized their league as a limited-liability company was to circumvent antitrust problems, its first antitrust battle began within a year of its inaugural season.67 In February 1997, eight players sued MLS and its operator-investors; the injunctive class was certified in January of the following year.68 The players brought suit in the United States

61. 95 F.3d 593 (7th Cir. 1996).
62. Id. at 599-600.
63. Id. at 598.
64. Id.
65. Id.
67. Fraser v. Major League Soccer L.L.C. (Fraser II), 284 F.3d 47, 54 (1st Cir. 2002).
68. Id. Another exemption from antitrust scrutiny is found in the statutory and non-statutory labor exemptions, which preclude unions from bringing antitrust challenges while they are engaged in collective bargaining with employers. The idea is that if unions or employers have labor law remedies, antitrust challenge is inappropriate. However, these exemptions do not apply if employees have not unionized, which was the case of the MLS players when Fraser was brought. Because MLS players were not unionized until 2003, they were not precluded from antitrust challenge. MATTHEW
District Court for the District of Massachusetts under various antitrust theories, including (1) that the MLS violated § 1 of the Sherman Act by conspiring not to compete for player services, and (2) that the MLS violated § 2 of the Sherman Act by monopolizing or attempting to monopolize the market for premiere, division one soccer players in the United States by preventing any other entity from competing with MLS as an American division one soccer league.69

Major League Soccer moved for summary judgment on both the § 1 and § 2 claims, asserting the single-entity defense for the § 1 claim and alleging the players’ failure to establish a relevant market for the § 2 claim.70

i. District Court Fraser Analysis

The district court began its analysis with the players’ § 1 claim and MLS’s single-entity defense.71 Because MLS was organized as a limited-liability company with its investors owning undivided interests and sharing profits and losses according to those interests, the court likened it to a corporation and treated it as such for its single-entity analysis.72 This formalistic approach in viewing the league solely in terms of its organizational setup rather than focusing on the practical effect of its organizational scheme led the court to conclude that MLS and its investors could not be subject to § 1 of the Sherman Act because the investors’ interests and the league’s interests were one and the same.73 Only if the investors were acting in their own interests and against the league’s could § 1 apply.74 The court dismissed the players’ argument that MLS investors did in fact compete with each other on and off the field, finding that even the off-field competition (i.e. coaches’ salaries) enhanced on-field competition, which “is what makes MLS games worth watching.”75 A key feature of MLS’s organization was that its operator-investors did not have the ability to withdraw from the league and join or form a rival league.76 The court also emphasized the league’s centralized business structure, including

69. Fraser II, 284 F. 3d at 54-55.
70. Id. at 55.
71. Fraser I, 97 F. Supp. 2d at 134.
72. Id. at 134-35.
73. Id. at 135.
74. Id.
75. Id. at 136-37.
76. Id. at 137.
MLS's ownership of its teams as well as its direct contracts with its players. The court distinguished MLS further by noting that unlike other professional sports leagues, in creating its business structure MLS operator-investors surrendered a level of autonomy (such as direct contracting with players) that owners of teams in plural leagues enjoy.

The players urged the court to disregard MLS's formal structure, characterizing it as a "sham designed to allow what is actually an illegal combination of plural actors to masquerade as the business conduct of a single entity." In relying on Copperweld, which ignored formal distinctions between a parent and its subsidiary, the players argued that the "economic reality" test should be applied to envision distinctions in MLS's limited-liability structure. The court refused to accept this "reverse Copperweld" argument, reasoning that "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." Although the district court acknowledged that the Copperweld court concentrated on function rather than form, it still found MLS's corporate-like form to be relevant. It finished its § 1 analysis by saying rather bluntly:

MLS is what it is. As a single entity, it cannot conspire or combine with its investors in violation of § 1, and its investors do not combine or conspire with each other in pursuing the economic interests of the entity. MLS's policy of contracting centrally for player services is unilateral activity of a single firm. Since § 1 does not apply to unilateral activity—even unilateral activity that tends to restrain trade—the claim set forth in Count I cannot succeed as a matter of law.

Thus, the district court granted MLS summary judgment on the players'
The court did not discuss the players' § 2 monopolization and attempted monopolization claims, which were decided in a jury trial commencing in September 2000. The court eventually dismissed the players' § 2 claims after a jury found that the players had failed to limit the market to division one professional soccer players in the United States. In fact, the jury found the relevant product market to be all professional soccer players, not just division one, and the geographic market to be worldwide rather than just the United States. The players subsequently appealed to the United States Court of Appeals for the First Circuit.

ii. First Circuit *Fraser* Analysis

The First Circuit began its analysis by noting that in characterizing MLS as a single-entity, the district court parted somewhat with previous circuit precedent, when the First Circuit denied the defense to the NFL in *Sullivan*. The court also "disagree[d] completely" with the players' "sham" characterization of MLS's limited-liability structure, but refused to discuss the merits of MLS's single-entity defense, instead focusing on the jury's determination that the players had not proved a relevant market.

Although the First Circuit refused to answer the single-entity question definitively, it did express concern that the league may not be a true single-entity with a "complete unity of interests," highlighting several functional differences that distinguish it from the structure in *Copperweld*. Such differences include MLS operator-investors' various out-of-pocket expenses, local revenues, and limited sale rights in their teams. The court also noted the important fact that the operator-investors were not "mere servants" of MLS, but actually controlled it through its managing board. According to the court, MLS "has two roles: one as an entrepreneur with its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e., limiting competition among

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84. *Id.* at 142.
85. *Fraser v. Major League Soccer, L.L.C. (Fraser II)*, 284 F.3d 47, 55 (1st Cir. 2002).
86. *Id.*.
87. *Id.* at 59.
88. *Id.* at 55.
90. *Fraser II*, 284 F.3d at 56.
91. *Id.* at 56—57.
92. *Id.* at 57.
93. *Id.*
Consequently, the First Circuit characterized MLS's structure as a sort of "hybrid arrangement" somewhere between a single-entity and a collaboration of existing independent competitors. It noted the difficulty in applying single-entity analysis to such hybrid arrangements, that the case for expanding Copperweld was debatable, and that the case for labeling MLS as a single-entity was even more so. Even though the court expressed doubt as to MLS's single-entity defense, it did not decide the single-entity question definitively, as it instead focused on the asserted relevant market. Under the rule of reason, the players had to show "that MLS exercised significant market power in a properly defined market, that the practices in question adversely affected competition in that market and that on balance the adverse effects on competition outweighed the competitive benefits." Because market power analysis is the same in both §1 and §2 analysis, and the district court jury trial decided that the players' §2 claim must fail because they failed to show that MLS had power in any relevant market, the First Circuit concluded that the players could not prove market power in their §1 claim as well. Thus, the First Circuit affirmed the district court's decision regarding the players' §1 claim as well as their §2 claim using market power analysis, avoiding the difficult single-entity analysis.

IV. CURRENT MAKEUP OF MLS, THE BECKHAM RULE, AND ITS FUTURE IMPLICATIONS

Since the First Circuit's decision in 2002, MLS has gone through a number of changes. In an organizational sense, it still retains its limited-liability company classification, but now operator/investors control all fourteen MLS clubs, and the league itself controls zero. Additionally, MLS

94. Id.
95. Id. at 58.
96. Id. at 59.
97. Id.
98. Id.
99. Id. at 60-61.
100. Major League Soccer, About MLS, MLSNET.COM, http://www.mlsnet.com/about (last visited Feb. 25, 2008). MLS itself no longer solely operates any of its clubs. The fourteen clubs are operated by: Phil Anschutz & the Anschutz Entertainment Group (Houston Dynamo, Los Angeles Galaxy); Andrew Hauptman (Chicago Fire); The Hunt Family (FC Dallas, Columbus Crew); Red Bull Company (New York Red Bulls); The Kraft Family (New England Revolution); Kroenke Sports Enterprises (Colorado Rapids); Dave Checketts & Sports Capital Partners (Real Salt Lake); Jorge Vergara & Antonio Cue (Club Deportivo Chivas USA); Maple Leaf Sports & Entertainment (Toronto FC); OnGoal, LLC (Kansas City Wizards); D.C. United Holdings (D.C. United); Lew Wolff & John
has made it a priority to build soccer-specific stadiums for its clubs, as eight of the thirteen will play in their own stadiums by 2008.\textsuperscript{101} Also, in terms of broadcasting, 2007 marks the first season in which every MLS game will be broadcast on either national or regional television, as well as the first time that MLS will not have to pay to have any of its games broadcast.\textsuperscript{102} Recently, MLS has witnessed lucrative franchise operation rights sales, including the March 2006 sale of the New York/New Jersey MetroStars (previously owned by Anschutz Entertainment Group (AEG)) to Austrian energy drink company Red Bull for a reported $100 million, a price that included the team and its new stadium’s naming rights.\textsuperscript{103} Most recently in January 2007, D.C. United Holdings, L.L.C. purchased the operating rights to the D.C. United from AEG for $33 million.\textsuperscript{104}

These recent developments indicate a promising trend for MLS in terms of financial stability and viability, as more investors are getting involved and the league is garnering more and more media attention. In fact, MLS commissioner Don Garber has indicated that he expects all league clubs to be profitable by 2010.\textsuperscript{105} However, perhaps none of these developments will have as drastic an effect on the face of MLS as its new Designated Player Rule.

\section*{A. Designated Player Rule}

Major League Soccer announced its Designated Player Rule in November 2006.\textsuperscript{106} The rule allows MLS clubs to exceed the salary cap (roughly $2 million per team in 2006) in order to pursue high-profile players.\textsuperscript{107} Previously, the collective group of MLS investors paid all player salaries,
including those that exceeded $400,000. Under the new rule, the league will pay only $400,000 of the designated player’s salary, with the club to pick up the remainder. Although there is no cap on the total amount that a club can pay its designated player, only $400,000 will count against its cap figure. Each team will be allotted one designated player slot, which can be traded among the teams, but no team is allowed to acquire more than two designated players. The rule will be in effect for three years through 2009 when its future will be reviewed. In addition to the Designated Player Rule, MLS simultaneously instituted an initiative to increase the clubs’ shares of transfer revenues generated from player transfers to clubs in other leagues—allocating more money to the operator-investors—so long as they commit to reinvest all of such revenue into a replacement player or players.

Upon its inception, the Designated Player Rule was nicknamed the “Beckham Rule” as many speculated it was implemented in order to lure English worldwide superstar David Beckham to MLS. Indeed, the league announced in January 2007 that it had signed Beckham to become a member of the Los Angeles Galaxy for $250 million over five years. This landmark signing launched the once-fledgling MLS into the global spotlight, opening up

108. Id. When the rule was announced, several players including Landon Donovan, Freddy Adu, Carlos Ruiz, and Eddie Johnson had salaries that exceeded the $400,000 figure. These players will be grandfathered for one year, after which they will need to renegotiate their contracts or assume Designated Player status. Id.
109. Id.
110. Id.
112. Major League Soccer Communications, supra note 106.
speculation that the league would attract other international superstars such as Portugal’s Luis Figo or Brazil’s Ronaldo. Commissioner Garber commented on the signing: “David Beckham coming to MLS might be viewed by some as one of the most important moments for soccer in this country and perhaps the history of professional sport.” Although perhaps slightly overstated, the Commissioner was not alone in his excitement over the Beckham signing, as the news garnered headlines around the United States and the world. The Designated Player Rule and the subsequent signing of Beckham surely have changed the face of MLS in the eyes of the global public, but they may also have changed the league’s characterization in the eyes of the law.

B. The Designated Player Rule’s Implications for MLS Antitrust Analysis

In its short lifetime, the Beckham Rule has had a tremendous impact on the league, as it has brought to the MLS one of the world’s most recognized athletes as well as the global publicity that came along with him. However, the rule may also change the way the courts view the league, particularly in terms of antitrust. The single-entity defense continues to be an attractive, if not particularly viable, defense for professional sports leagues. However, when courts decide single-entity cases in the sports context, they usually find that professional sports leagues are a group of separate entities with divergent economic interests rather than single-entities. Even so, the First Circuit in Fraser hinted that some sort of hybrid approach is more appropriate. Regardless, the controlling factor that ultimately decided the MLS players’ demise in the First Circuit’s Fraser decision was their failure to prove a relevant market. Major League Soccer’s Designated Player Rule could have some impact on all of these aspects.

i. Single-Entity Analysis

Although the First Circuit expressed doubt as to whether MLS should be characterized as a single entity for antitrust purposes, because it did not expressly deny the defense, the league still has an interest in protecting its

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117. Id.
single-entity status. However, MLS's various innovations since the First Circuit Fraser decision, most notably the implementation of the Beckham Rule, may make asserting the single-entity defense much more difficult. When the district court upheld MLS's single-entity defense, it used a formalistic approach, reasoning that the league's limited-liability structure likened it to a corporation and therefore its members (shareholders) were incapable of colluding. The district court found crucial the fact that MLS contracted directly with the players, and downplayed the fact that its operator-investors did not absolutely share all costs and revenues. Conversely, the First Circuit, using a more functional approach, found that although the operator-investors were technically shareholders, in practical effect the various costs and revenues that were not shared by all the clubs led the court to doubt they held a "complete unity of interests."

The Beckham Rule works against the district court's analysis and fuels the First Circuit's doubt that MLS is a pure single entity. Because under the rule the league will pay only $400,000 of the designated player's salary, the individual operator-investors will have even more independent expenses, and the league will no longer pay all player contracts. These increased player costs, even though they can at most apply to two players per team, will likely dwarf the clubs' previous independent costs of management and coaching personnel. The "unity of interests" diminishes as the designated player contracts rise.

In addition to the Beckham Rule, the new innovation that allows operator-investors to retain a larger portion of player transfer revenue when their players leave for a foreign club could reduce the "unity of interests" in a similar way. In order to receive the larger share of transfer revenues, the operator-investors must agree to reinvest such revenues into player acquisitions. Although the transfer revenues do not go directly into the operator-investors' pockets, the scheme creates possible divergent interests that could give some clubs more player acquisition funds (which may be applied to a designated player) than others if they were to sell a player to a foreign club.

119. See Fraser v. Major League Soccer, L.L.C. (Fraser II), 284 F.3d 47, 59 (1st Cir. 2002).
121. See id.
122. Fraser II, 284 F.3d at 56-57.
123. Indeed, David Beckham's reported $5.5 million per year salary is more than double the salary cap for the other teams, especially those such as Chivas USA, who has already traded away its designated player slot. Red Bulls Trade Guevara to Chivas USA, supra note 111.
124. Major League Soccer Communications, supra note 106.
If there was any doubt as to MLS’s single-entity status after the First Circuit’s *Fraser* decision, it was likely eliminated after the league’s implementation of the Designated Player Rule and the rationing of transfer fees. Consequently, it will probably be much more difficult for the MLS to be successful in asserting itself as a pure single-entity in the future.

ii. Hybrid Analysis

Although MLS may no longer be able to claim that it is a pure single entity for Sherman Act § 1 purposes, the First Circuit hinted that especially in sports, perhaps some sort of hybrid analysis is more appropriate.125 However, it also noted the difficulty in applying such a standard.126

If a court were to apply a hybrid standard, MLS would still have an incentive to maintain its current structure to stay nearer to the single-entity scheme than the collaborating competitor scheme. Both the district court and the First Circuit acknowledged the inherent differences between MLS and other U.S. professional sports leagues, such as its limited-liability structure, the central contracting of player salaries, and its shared profits and losses.127 Another important distinction made by the district court (in comparing MLS to the NFL) is that the NFL “is fundamentally different from MLS. The NFL is a confederation fused from agreements among preexisting, independently owned teams; unlike MLS, NFL football clubs do not exist as part of an overarching corporate structure.”128 As the court noted, unlike teams in other professional sports leagues, MLS clubs did not exist prior to the forming of the league, and their operator-investors have not and could not secede in order to join or form a rival soccer league.

If a court were to apply a hybrid analysis to sports leagues when deciding a single-entity defense, even with the Beckham Rule, MLS is more akin to a true single-entity than the other U.S. professional sports leagues. It still shares most of its revenues, the league still contracts directly with the vast majority of its players, and its operator-investors are still tied to one another (organizationally and financially) unlike any other league. The First Circuit’s hint that some sort of hybrid analysis in single-entity cases might be proper provides the league with an incentive to retain these favorable distinctions.

125. *Fraser II*, 284 F.3d at 58.
126. Id.
iii. Relevant Market Analysis

The most important aspect to the First Circuit's appellate decision was the district court jury finding that the players failed to prove any relevant geographic and product market. Because the jury found the proper geographic market to be worldwide and the proper product market to be all professional soccer players, it determined that MLS did not have market power in any relevant market.\footnote{129} This allowed the First Circuit to avoid the single-entity question, because if MLS did not have market power, it could not unreasonably restrain trade, monopolize, or attempt to monopolize.\footnote{130} Unlike Major League Baseball (MLB), the NBA, and the NFL, which all have market power as the premier top-flight league in their respective sports worldwide, MLS faces competition from several more prestigious premier soccer leagues throughout Europe, South America, and the world.

It is unlikely that MLS will join its American professional sports league brethren as the worldwide premiere league for its sport in the near future. However, the Beckham Rule could pave the way for such a development. Although foreign leagues are well-established and have thrived for a substantial amount of time, the lure of American endorsements and increased marketability may lure other superstar players to follow Beckham to the U.S.\footnote{131} MLS's current television deals cannot compare to those of other U.S. sports leagues or premier European soccer leagues, and consequently cannot support the astronomical salaries those leagues currently provide.\footnote{132} However, if MLS's popularity explodes in the way Commissioner Garber dreams, MLS as a premier league may not be such a fanciful idea. Although the relevant geographic market for antitrust purposes will likely remain worldwide and MLS surely does not currently enjoy market power over professional soccer players in the worldwide market, if the Beckham Rule has its intended effect, MLS could become the premier soccer league in the world and subsequently attain such market power.

\footnote{129} Fraser II, 284 F.3d at 55.
\footnote{130} Id. at 59.
\footnote{132} American broadcast giants CBS and FOX currently pay the NFL more than $1.3 billion per year collectively to broadcast the league's games, while British broadcaster BSkyB paid more than $442 million per year for the exclusive right to broadcast live English Premier League games from 2003-07. To contrast, MLS's 2007 television deal stands to net the league around $18 million. See Late Season Games Can Be Moved to Monday Nights, ESPN.COM, Nov. 9, 2004, http://sports.espn.go.com/nfl/news/story?id=1918761; Q&A: Premier League TV Rights, BBCNEWS.COM, Apr. 27, 2006, http://news.bbc.co.uk/2/hi/business/4949998.stm; Major League Soccer, supra note 100.
V. CONCLUSION

Major League Soccer’s limited-liability company structure and various organizational features allowed it to win summary judgment in its single-entity defense in the district court’s hearing of Fraser. However, the United States Court of Appeals for the First Circuit affirmed the district court’s judgment on grounds of relevant market, refusing to answer the single-entity question definitively. The players argued, and some scholars have agreed, that MLS’s single-entity structure as a limited liability company is simply a “sham” designed to circumvent antitrust law, and even the First Circuit expressed doubt as to whether MLS should properly be deemed a single-entity or whether some sort of hybrid definition is more applicable.133 Regardless, no court has expressly overruled the district court’s finding that MLS is a single-entity. Consequently, for various reasons, where other professional sports leagues failed in single-entity defenses, MLS succeeded.

The Designated Player Rule may work against this single-entity characterization. Features such as league-funded player contracts as well as its corporation-like profit sharing scheme distinguished MLS from other professional sports leagues in the district court’s Fraser holding. Although the First Circuit affirmed the district court’s summary judgment for MLS without expressly deciding its single-entity defense, the league still has an interest in maintaining the defense as a viable option. A successful single-entity defense blocks a § 1 claim under the Sherman Act without even analyzing market power, pro-competitive effects, and less-restrictive alternatives under the rule of reason. The new rule allowing investor-operators to pay a designated player from their own funds may provide a significant shift away from a “unity of interests” and into a more individualistic realm. Viewed in conjunction with the First Circuit’s prior doubt as to MLS’s single-entity status, the Beckham Rule may be the final straw.

Although MLS may no longer be a pure single entity, if courts were to apply a hybrid analysis, the league is likely still much closer to a “unity of interests” than other U.S. professional sports leagues, and may be treated accordingly in the eyes of the law. Therefore, it still maintains an interest in keeping its limited liability form.

In addition to single-entity implications, the Designated Player Rule may have implications relating to the market for major professional soccer talent, which was the focus in the First Circuit’s Fraser decision. Although MLS does not currently have power in the international market for division one

133. See, e.g., Waxman, supra note 79; see also Fraser v. Major League Soccer, L.L.C. (Fraser II), 284 F.3d 47 (1st Cir. 2002).
soccer talent, the Beckham Rule could spur a transformation that may launch the league into global powerhouse status.

The Designated Player Rule is an important step in the growth and development of Major League Soccer. It will likely change the landscape of the sport in America, hopefully for the better. With newfound publicity and respect across the globe, the league can move forward and establish itself as a premier soccer organization. However, such changes could also impact the league’s legal atmosphere, particularly regarding antitrust. If the league wishes to compete with the other U.S. sports leagues, perhaps it will need to accept the newfound legal difficulties that come with being a high-profile economic player. Time will tell whether the league can attain true premier status and what legal implications this power might bring.

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