

**DEWEY RANCH AND THE ROLE OF THE  
BANKRUPTCY COURT IN DECISIONS  
RELATING TO THE PERMISSIBLE CONTROL  
OF NATIONAL SPORTS LEAGUES OVER  
INDIVIDUAL FRANCHISE OWNERS**

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## INTRODUCTION

The degree of permissible control national sports leagues have over individual franchise owners is an issue that has been debated in American sports and in the courts over the last hundred years. The debate generally has centered on antitrust law and, in 1922, the Supreme Court issued a landmark decision that exempted what we now call Major League Baseball (MLB) from the prohibitions of antitrust law.<sup>1</sup> Presumably, that decision was significantly influenced by the perception of MLB as America’s “National Pastime” and its entitlement to protection against antitrust litigation’s potential disruptive results.<sup>2</sup> Although courts have not extended similar wholesale exemptions to other national sports leagues, the Seventh Circuit functionally exempted at least some professional sports leagues by holding that leagues are single entities and, therefore, cannot violate section 1 of the Sherman Antitrust Act.<sup>3</sup>

Until recently, however, the issue was anything but settled. In 2006, the Supreme Court demonstrated a willingness to address the antitrust issue in a factual setting

1. See generally *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922) (explaining that a baseball exhibition is not considered trade or commerce in the commonly accepted use of those words because a personal effort that is not associated with production cannot be a subject of commerce).

2. Mitchell Nathanson, *The Irrelevance of Baseball’s Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1, 2 (2005).

3. See generally *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736 (7th Cir. 2008) (holding that professional football teams must be considered a single entity for antitrust purposes); see also generally *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593 (7th Cir. 1996) (finding that the National Basketball Association (NBA) functions as a single entity).

analogous to the sports league scenario in *Texaco Inc. v. Dagher*<sup>4</sup> and, more recently, on June 29, 2009, the Supreme Court granted certiorari in the Seventh Circuit's decision, *American Needle, Inc. v. National Football League*, that finally resolved the single entity issue as it pertains to national sports leagues.<sup>5</sup> On May 24, 2010, a unanimous Court held that the National Football League (NFL) could not be considered a single entity in the context of intellectual property licensing; rather, the NFL must be viewed as thirty-two separate teams that are capable of engaging in concerted activity in violation of section 1 of the Sherman Act.<sup>6</sup> While the Court's holding in *American Needle* was narrowly tailored, the opinion "strongly suggested" that most activities of professional sports leagues also involve concerted conduct.<sup>7</sup> The Court, however, neither fully rejected the single-entity defense nor articulated any test for determining when it should be accepted.<sup>8</sup>

Prior to the Court's decision in *American Needle*, the question remained as to whether another recent decision out of the United States Bankruptcy Court for the District of Arizona, *In re Dewey Ranch Hockey, LLC*,<sup>9</sup> would become more or less important to the question of the ability of individual franchises to challenge decisions by sports leagues. In light of the Court's holding in *American Needle*, however, it appears that franchise owners may be even more inclined to bring their claims against a sports league in federal district court. Nevertheless, the bankruptcy court may continue to function as an "end run" for claimants seeking redress from sports leagues in certain situations.

The role of the bankruptcy court in decisions relating to the permissible control of national sports leagues over individual franchise owners is the subject of this Comment. In particular, this Comment will address antitrust law as it

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4. See generally *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (holding that two oil companies' joint venture to sell gasoline was not per se illegal because the companies were not competing and, rather, price setting like a single entity).

5. *Am. Needle*, 538 F.3d 736, cert. granted, 129 S. Ct. 2859 (2009) (No. 08-661).

6. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2206-07 (2010).

7. Gregory J. Werden, *Initial Thoughts on the American Needle Decision*, ANTITRUST SOURCE, Aug. 2010, at 1, 7, available at <http://www.abanet.org/antitrust/at-source/at-source.html>.

8. *Id.*

9. *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (2009).

pertains to professional sports leagues and its interplay with sections 363 and 365 of the United States Bankruptcy Code (“the Code”). For clarity, the procedural hearing in the *Dewey Ranch* case will be referred to as *Dewey Ranch I* and the decision of the court in that case will be referred to as *Dewey Ranch II*.

## I. CHAPTER 11 BANKRUPTCY

As a result of the current economic recession, many financially troubled businesses have been forced to seek bankruptcy protection.<sup>10</sup> The sports industry is no exception, and the prospect of sports teams filing for bankruptcy has become a reality. The bankruptcy system in the United States serves the “dual role” of providing relief to debtors that have accrued debt beyond their income level while also protecting the rights of creditors that are owed money from the debtors.<sup>11</sup> Maintaining this balance is often difficult, so bankruptcy judges are afforded wide decision-making discretion.<sup>12</sup> As a result, there is a strong sense of unpredictability associated with bankruptcy filings because the stakes are high and the outcomes are far from certain.

Many struggling businesses seek financial protection by filing for bankruptcy under Chapter 11 of the Code as a means of “reorganizing” their debt and continuing to pursue their business.<sup>13</sup> Once a bankruptcy petition is filed, an automatic stay is issued to prevent creditors from engaging in further debt collection efforts.<sup>14</sup> Thereafter, a debtor proffers a “plan of reorganization” and, thereby, agrees to repay a portion of the debt over a specified period of time.<sup>15</sup> The

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10. Michael Doyle, *Struggling Economy Keeps Bankruptcy Courts Busy*, MCCLATCHY (Aug. 17, 2010), <http://www.mcclatchydc.com/2010/08/17/99315/struggling-economy-keeps-bankruptcy.html>.

11. See Anthony C. Convey, *Saying Goodbye to Texas’s Homestead Protection: One Step Toward Economic Efficiency with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 44 HOUS. L. R. 433, 434 n.2 (2007) (citing Charles G. Hallinan, *The “Fresh Start” Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 50 (1986)) (noting the dual roles of bankruptcy).

12. See, e.g., 11 U.S.C. § 105(a) (2006) (allowing a bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title”).

13. See generally *id.* §§ 1101–1174.

14. *Id.* § 362.

15. See §§ 1121–1129.

debtor's management assumes an additional role as debtor in possession (DIP) and maintains control of the business and its assets while the plan of reorganization is negotiated between the debtor and a committee appointed by United States Trustee on behalf of the creditors.<sup>16</sup> During the stay period and with the bankruptcy court's permission, DIP financing is often permitted to allow the bankrupt business to carry on its operations.<sup>17</sup> Once the reorganization plan is finalized, Chapter 11 rules require the creditors to either accept or reject the plan.<sup>18</sup> The reorganization plan is approved if the following two criteria are met: 1) the plan is accepted by more than half of the total number of claimants in each class; and 2) the amount claimed by those "accepting" claimants is at least two-thirds of the total amount claimed against the debtor by that class.<sup>19</sup> If all classes of creditors do not meet these criteria and the creditors reject the reorganization plan, the bankruptcy judge still has the discretion to approve the plan over an objection by the creditors.<sup>20</sup>

In the Chapter 11 bankruptcy case filed by the Phoenix Coyotes's ownership in the *Dewey Ranch* case, the bankruptcy judge was afforded the power of approval because the debtors and creditors could not agree on a reorganization plan.<sup>21</sup> In particular, the franchise's interest in securing a maximum bid for the team conflicted with the National Hockey League's (NHL) interest in preventing the team's relocation to Canada.<sup>22</sup> The Coyotes's filing is the first time that a bankruptcy court has been called upon to resolve issues involving a professional sports team's efforts to circumvent league control of sales agreements and franchise relocation.<sup>23</sup>

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16. See §§1101–1107; see also Harvey R. Miller, *Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations*, 23 SETON HALL L. REV. 1467, 1467–68 (1993).

17. Robert R. Bliss & George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation*, 2 VA. L. & BUS. REV. 143, 162 (2007).

18. § 1126.

19. § 1126(c).

20. § 1129(b); Jeffery M. Sharp, *Bankruptcy Reorganizations, Section 1129, and the New Capital Quagmire: A Call for Congressional Response*, 28 AM. BUS. L.J. 525, 550 (1991); Jeffrey I. Werbalowsky, *Reforming Chapter 11: Building an International Restructuring Model*, 8 J. BANKR. L. & PRAC. 561, 574 n.40 (1999).

21. See generally *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (Bankr. D. Ariz. 2009).

22. *Id.* at 589.

23. *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 35 (Bankr. D. Ariz. 2009).

Prior to this bankruptcy filing, it remained unclear as to how such a matter would be decided in consideration of the antitrust law provisions and the complicated contractual responsibilities and obligations between sports leagues and member teams.

## II. FACTUAL BACKGROUND OF THE PHOENIX COYOTES BANKRUPTCY CASE

### A. *Changing Hunting Grounds: From Canada to Phoenix and Back Again*

The NHL is an organization comprised of thirty competitive member teams throughout North America, including six teams located in Canada and twenty-four teams located in the United States.<sup>24</sup> In January 1996, the NHL granted a change of ownership to what was then the Winnipeg Jets and authorized the team's move to Phoenix, Arizona.<sup>25</sup> The team was subsequently renamed the Coyotes and, until December 2003, the team played its home games in the Phoenix Suns's arena.<sup>26</sup> In 2001, Jerry Moyes invested necessary cash assets in the team and, in November of that year, three related entities (collectively referred to as "the Debtors")<sup>27</sup> and the City of Glendale entered into an agreement to build a new hockey facility adjoining the Westgate Shopping Center in Glendale.<sup>28</sup> Under the agreement, Glendale agreed to fund the construction of the new arena and, in return, the Coyotes's ownership promised that: 1) all Coyotes home games would be played at the arena through 2035; 2) Glendale had the right to seek specific performance to enforce this promise; and 3) if the agreement was terminated early and the specific performance right was not available, liquidated damages would be assessed.<sup>29</sup> In

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24. *In re Dewey Ranch*, 414 B.R. at 581.

25. *Id.* at 579.

26. *In re Dewey Ranch*, 406 B.R. at 33. The Phoenix Suns is an NBA franchise that plays its home games in Phoenix's US Airways Center. See U.S. AIRWAYS CENTER, <http://www.usairwayscenter.com/start/> (last visited Nov. 26, 2010).

27. The "Debtors" refers to the following parties who filed the Chapter 11 petition on May 5, 2009: Dewey Ranch Hockey, LLC; Coyotes Holdings, LLC; Coyotes Hockey, LLC; and Arena Management Group, LLC. Amended Complaint at 1, *In re Dewey Ranch*, 414 B.R. 577 (No. 2:09-bk-09488).

28. *In re Dewey Ranch*, 406 B.R. at 33.

29. *Id.* Glendale predicted that it would acquire \$795 million in various taxes and

December 2003, the team played its first home game in the arena and, since that time, the team has continued to play there.<sup>30</sup>

*B. The Steady Decline of the Coyotes Franchise*

By 2006, the Coyotes were experiencing financial difficulties, and, after certain litigation ensued, the Coyotes entered into a consent agreement, which included, among other provisions, that Moyes would become the team's controlling owner.<sup>31</sup> The financial difficulties continued, however, and, by the summer of 2008, the Coyotes were in serious financial trouble.<sup>32</sup> The team had a losing record and had failed to make the NHL playoffs since moving to Arizona.<sup>33</sup> In addition, the Coyotes had lost considerable money since the move.<sup>34</sup> Moyes advanced substantial funds<sup>35</sup> to prolong operations, but the losses continued from 2006 to 2008.<sup>36</sup> At that point, Moyes informed the NHL that he no longer would fund the operating losses of the Coyotes and, upon Moyes's request, the NHL began providing funds to the Coyotes through loans and advances based upon the expectation of future Coyotes revenues.<sup>37</sup> In an effort to alleviate the grave financial situation, both Moyes and the NHL actively sought new owners and investors for the Coyotes.<sup>38</sup>

In early 2009, Moyes instructed his attorney, Earl Scudder, to formally seek a new owner for the team, and Scudder periodically informed the NHL—particularly Commissioner Gary Bettman and Deputy Commissioner William Daley—of his marketing efforts.<sup>39</sup> In the spring of 2009, PSE Sports and Entertainment LP (“PSE”), through its principal James Balsillie, contacted Scudder regarding PSE's

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fees from the new arena over the thirty-year period set out in the agreement. *Id.*

30. *Id.*

31. *In re Dewey Ranch*, 414 B.R. at 580.

32. *In re Dewey Ranch*, 406 B.R. at 33.

33. *In re Dewey Ranch*, 414 B.R. at 579.

34. *Id.*

35. The funds are estimated at over \$300 million. *See In re Dewey Ranch*, 406 B.R. at 33.

36. *Id.*

37. *Id.* at 33–34.

38. *Id.*

39. *In re Dewey Ranch*, 414 B.R. at 580.

interest in acquiring the team and moving it back to Canada.<sup>40</sup> PSE's offer was not formally pursued until April 2009 when efforts to find other purchasers proved futile.<sup>41</sup> PSE proposed to purchase the Coyotes and move the team to Hamilton, Ontario.<sup>42</sup> Hamilton, however, is located in close proximity to Buffalo, New York and Toronto, Ontario, where NHL franchises are currently located.<sup>43</sup> Allegedly, when Scudder contacted Bettman regarding PSE's interest in acquiring the team and moving it to Southern Ontario, Bettman advised Scudder that "he wanted the team to stay in Glendale and that there would be no relocation to Canada because Southern Ontario was the NHL's territory."<sup>44</sup> This was PSE's third attempt to acquire an NHL franchise and, for a third time, the NHL rejected PSE's offer.<sup>45</sup>

### *C. Relief Sought in the Bankruptcy Proceeding*

By May 5, 2009, the battle over the Coyotes's relocation was underway. Realizing that the fate of the Coyotes was on the line, Bettman and Daley flew to Arizona and presented a letter of intent for the NHL to purchase both the Coyotes and the arena rights.<sup>46</sup> On that same day, however, the Debtors sought bankruptcy protection by filing a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Arizona.<sup>47</sup> Also on that same day, the Coyotes entered into an Asset Purchase Agreement ("APA") to sell the team to PSE.<sup>48</sup> The APA required that: 1) PSE would pay the Coyotes \$212,500,000 in cash for the team and most of its assets, including the rights as a member team in the NHL; 2) any bankruptcy court order approving the sale would expressly provide that the home games would be played in Southern Ontario, despite the NHL or its members' lack of consent or agreement; and 3) the APA would terminate on

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40. *Id.*

41. *Id.*

42. *In re Dewey Ranch*, 406 B.R. at 32.

43. Amended Complaint, *supra* note 27, at 7.

44. *In re Dewey Ranch*, 406 B.R. at 34. The Coyotes's proposed relocation would place the team within the home territory of both Buffalo and Toronto. Amended Complaint, *supra* note 27, at 8.

45. *In re Dewey Ranch*, 414 B.R. at 581.

46. *In re Dewey Ranch*, 406 B.R. at 34.

47. Amended Complaint, *supra* note 27, at 3.

48. *In re Dewey Ranch*, 406 B.R. at 32.

June 29, 2009 if the requisite bankruptcy sale order had not been issued.<sup>49</sup> In light of this agreement, the Debtors filed a motion requesting the bankruptcy court to approve the team's sale to PSE and to permit the team's relocation to Canada.<sup>50</sup> By filing for bankruptcy, Moyes and the Debtors temporarily dodged the NHL's intervention, and the team's fate was left in the hands of a judge with broad discretion and a legislative mandate to balance the rights of the Debtor and creditors as a class.

#### *D. Antitrust Violations Raised During the Bankruptcy Proceeding*

On May 7, 2009, the Coyotes, through Coyotes Hockey LLC, filed an adversary proceeding as a part of the pending bankruptcy proceeding against the NHL.<sup>51</sup> Pursuant to section 16 of the Clayton Act, the Coyotes sought to enjoin the NHL from prohibiting the relocation of the Coyotes to Hamilton, Canada in violation of sections 1 and 2 of the Sherman Act.<sup>52</sup> Specifically, the team sought relief under federal and state antitrust laws due to claimed impending loss or damages resulting from the NHL's exercise of market power to prevent the Coyotes from moving to Canada while continuing to play in the league.<sup>53</sup>

Traditionally, antitrust laws safeguard consumer interests by preventing the "concentration of economic power in the

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49. *Id.*

50. *Id.* at 34–35. The NHL and Glendale strongly opposed this motion and urged the court to deny the sale and relocation of the team. *Id.*

51. *See* Amended Complaint, *supra* note 27, at 1.

52. *Id.* at 3.

53. *Id.* at 2. The Amended Complaint identifies the relevant "market" as major league men's professional ice hockey. *Id.* at 5. When an adversary proceeding arises in or is related to cases under title 11, the district court has original but not exclusive jurisdiction. 28 U.S.C. § 1334(b) (2006). With the consent of all parties, the district court may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and enter appropriate orders or judgments. *Id.* § 157(c). On the motion of a party, the district court may withdraw a proceeding if it requires "consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." § 157(d). In the Coyotes's adversary proceeding, bankruptcy court jurisdiction was never contested, and the NHL requested that the bankruptcy judge rule on its substantive grounds for dismissal. National Hockey League's Motion to Dismiss or in the Alternative for Summary Judgment at 1, *In re Dewey Ranch Hockey*, 406 B.R. 30 (2009) (No. 2:09-bk-09488-RTBP) [hereinafter NHL's Motion to Dismiss].

hands of a few” and, thereby, preserving competition in the marketplace.<sup>54</sup> In relying on established antitrust law, the Coyotes claimed that the NHL’s action was unlawful because the NHL’s Constitution and Bylaws serve to unreasonably restrict trade and exclude competition.<sup>55</sup> Article 4.3 of the NHL Constitution states in part that: “No franchise shall be granted for home territory within the home territory of a member without the written consent of such member.”<sup>56</sup> This provision is particularly relevant to the proposed relocation of the Coyotes because the team’s relocation to Hamilton would have placed the Coyotes within the “home territory” of the Toronto Maple Leafs.<sup>57</sup> The Coyotes argued that permitting another franchise to exercise veto power over a competitor’s relocation is anticompetitive and detrimental to consumers who benefit from increased competition.<sup>58</sup>

Similarly, the Coyotes argued that other provisions in the NHL’s Constitution and Bylaws pertaining to relocation “are equally exclusionary and anticompetitive and are without any pro-competitive justification.”<sup>59</sup> Section 4.2 of the NHL Constitution states in part that: “No member shall transfer its club and franchise to a different city or borough. No additional cities or boroughs shall be added to the League circuit without consent of three-fourths of all the members of the League.”<sup>60</sup> Further, section 36 of the NHL Bylaws indicates that an application for relocation must be filed by January 1 of the year preceding the year in which the relocating team wishes to begin playing in its new stadium.<sup>61</sup> The Coyotes argued that this provision imposed an unreasonable process of relocation because the requirement would result in a lengthy investigation that would effectively delay a proposed sale and relocation and, therefore, grant the NHL a “pocket veto” of the transaction.<sup>62</sup>

When considered collectively, the Coyotes argued that

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54. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 274 (1966).

55. Amended Complaint, *supra* note 27, at 2.

56. *Id.* at 8.

57. *Id.* The Toronto Maple Leafs plays its home games in Air Canada Center, located only forty-one miles from Hamilton. *Id.*

58. *Id.* at 8.

59. *Id.* at 9.

60. *Id.* at 10.

61. Amended Complaint, *supra* note 27, at 10.

62. *Id.* at 11.

such restrictions “unduly and unlawfully” restrict the ability of the Coyotes and other member clubs from relocating and that such provisions are illegal under antitrust laws because they serve no purpose except to lessen competition and maintain a competitor team’s dominant position in the league.<sup>63</sup> Although the court focused on bankruptcy-related issues for its ruling in the *Dewey Ranch* decisions,<sup>64</sup> the legal issues presented in the bankruptcy proceeding trigger both bankruptcy law and antitrust law. Additionally, the court in the *Dewey Ranch* decisions was expansive in discussing the antitrust implications and past case law on the antitrust issues. To gain a thorough understanding of the decisions, it is important to review antitrust law and its application to sports leagues.

### III. ANTITRUST LAW AND PROFESSIONAL SPORTS LEAGUES

#### A. *The Sherman Act, Section 1*

Section 1 of the Sherman Act states that “every contract, combination . . . or conspiracy in restraint of trade . . . is declared to be illegal.”<sup>65</sup> In essence, section 1 prohibits concerted action from independent entities that unreasonably restrains trade.<sup>66</sup> To establish concerted action, there must be evidence that the defendants were not acting independently and that they “had a conscious commitment to a common scheme designed to achieve an unlawful objective.”<sup>67</sup> Recognizing that, if interpreted as broadly as the language would seem to require, this section would declare most contracts to constitute a restraint of trade,<sup>68</sup> the Supreme

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63. *Id.* at 10, 17.

64. “Dewey Ranch Decisions” refers to the motion filed on June 15, 2009, *Dewey Ranch I*, and the opinion filed on September 30, 2009, *Dewey Ranch II*.

65. 15 U.S.C. § 1 (2006).

66. See Michael D. Paley, *Prosecuting Failed Attempts to Fix Prices as Violations of the Mail and Wire Fraud Statutes: Elliot Ness Is Back!*, 73 WASH. U. L. QUARTERLY 333, 362 (1995).

67. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (1980)).

68. See Jonathan C. Latimer, *The NBA Salary Cap: Controlling Labor Costs Through Collective Bargaining*, 44 CATH. U. L. REV. 205, 221 n.120 (1994) (noting that the language in section 1 is “broad enough to render most types of business agreements illegal . . .”).

Court adopted a “Rule of Reason” analysis.<sup>69</sup> Under the Rule of Reason approach, a court balances “the procompetitive effects of restraint against the anticompetitive effects”<sup>70</sup> and, in doing so, considers “the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, [and] the nature of the restraint and its effect, actual or probable.”<sup>71</sup> Once the court weighs the factors, only restraints that are deemed to be unreasonable violate section 1.<sup>72</sup>

### *B. Professional Sports Leagues and the Single Entity Defense*

With the exception of MLB,<sup>73</sup> professional sports leagues repeatedly have been faced with antitrust challenges under section 1. In the early days of professional sports, it was easy for teams to enter the leagues and yet it was very difficult for teams to be profitable.<sup>74</sup> To minimize the threat of competition between teams, the leagues implemented territorial restrictions that guaranteed each team an exclusive territory to compete in.<sup>75</sup> Today, the costs associated with starting a new team have substantially increased and existing teams are extremely profitable.<sup>76</sup> In light of this development, some argue that the anticompetitive territory restrictions should be prohibited as a section 1 violation.<sup>77</sup> To defeat such allegations, the leagues

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69. *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911).

70. Thomas R. Hurst & Jeffery M. McFarland, *The Effect of Repeal of the Baseball Antitrust Exemption on Franchise Relocation*, 8 DEPAUL-LCA J. ART & ENT. L. 263, 273 (1998).

71. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

72. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

73. Major League Baseball was afforded an antitrust exemption by the Supreme Court in 1922. *See generally* *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). The Supreme Court has reaffirmed this exemption twice. *See generally* *Flood v. Kuhn*, 407 U.S. 258 (1972) (holding that there is a longstanding exemption of professional baseball's reserve system from federal antitrust laws); *see also generally* *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953) (holding that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws).

74. Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 940–41 (1999).

75. *Id.*

76. *Id.*

77. *Id.*

have attempted to characterize themselves as single entities.<sup>78</sup> As single entities, sports leagues would fall outside the purview of section 1 because the necessary concerted conduct that is essential to any section 1 claim would not be present.<sup>79</sup>

Courts have struggled to articulate a definite single entity test and to define how the Rule of Reason analysis applies to professional sports leagues when the single entity status comes under scrutiny. It was not until the decision in *American Needle* that the Supreme Court finally rejected a sports league's single entity defense.<sup>80</sup> Although this decision has brought clarity to the single entity issue surrounding major league sports, the Court avoided clarifying the Rule of Reason analysis as it applies to sports franchises and leagues by remanding the case to the lower court for application.<sup>81</sup> In doing so, it left the issue open for debate.

Before *American Needle*, federal courts were split in approach and outcome when applying the antitrust analysis to professional sports leagues. Inconsistent case law resulted from the courts' inability to differentiate between the cooperative and competitive factors in the leagues.<sup>82</sup> Some courts have deemed the cooperative operations of a league to be pervasive and worthy of single entity status.<sup>83</sup> Other courts, however, have focused on the economic competition between teams in a league and have viewed teams as independent entities within the league.<sup>84</sup>

Initially, professional sports leagues were successful in raising the single entity defense. In *San Francisco Seals v. National Hockey League*, the United States District Court for the Central District of California determined that the NHL was a single entity and, therefore, held that its actions did not violate section 1.<sup>85</sup> The court based its holding on its finding

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78. See Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 27–28 (1991) (analyzing the treatment of professional sports leagues as single entities).

79. *Id.*

80. See generally *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010).

81. See *id.* at 2217.

82. Piraino, *supra* note 74, at 893.

83. See, e.g., *S.F. Seals, Ltd. v. Nat'l Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974).

84. See, e.g., *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984).

85. *S.F. Seals*, 379 F. Supp. at 968–71. The owner of the Seals franchise claimed that the NHL's refusal to approve the team's request to move to Vancouver constituted

that NHL teams are not competitors but, rather, “all members of a single unit.”<sup>86</sup> Similarly, *Levin v. National Basketball Association*<sup>87</sup> also “flirted” with the single entity defense.<sup>88</sup> In *Levin*, the court relied on the *San Francisco Seals* decision and its analysis regarding single entity status to hold that section 1 was inapplicable in light of the asserted antitrust allegations because the plaintiffs merely wanted to join other member teams in the league, not compete with them.<sup>89</sup>

By contrast, other federal courts have simply refused to grant professional sports leagues single entity status.<sup>90</sup> These courts have concluded that, despite a league’s numerous cooperative aspects, the teams within a league compete against each other economically and, therefore, the league as a whole cannot be considered a single entity.<sup>91</sup> In *North American Soccer League v. National Football League*, the Second Circuit refused to regard the NFL as a single entity and, instead, distinguished the league as a joint venture.<sup>92</sup> While the court noted that basic cooperation and some shared revenues are integral to the league, the court concluded that NFL teams are independent both structurally and economically and, therefore, cannot capitalize on a single entity defense.<sup>93</sup> The Ninth Circuit reached a similar decision in *Los Angeles Memorial Coliseum Commission v. National Football League (“Raiders I”)*.<sup>94</sup> The court rejected the NFL’s

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a violation of section 1. *Id.* at 967.

86. *Id.* at 970.

87. *Levin v. Nat’l Basketball Ass’n*, 385 F. Supp. 149 (S.D.N.Y. 1974). Two businessmen had an agreement to purchase the Boston Celtics, but they were denied transfer of membership. *Id.* at 150. Shortly thereafter, the businessmen filed suit, alleging antitrust violations. *Id.* at 151.

88. Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157, 170 (1984).

89. *Levin*, 385 F. Supp. at 152 n.6.

90. See Lazaroff, *supra* note 88, at 171–73.

91. See *id.* at 184.

92. *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1251 (2d Cir. 1982). North American Soccer League and its members brought a section 1 claim against the NFL in response to the NFL’s cross-ownership ban that prohibited its members from owning interests in other professional sports leagues. *Id.*

93. *Id.* at 1252.

94. *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984). In 1980, the Los Angeles Rams chose to play their home games in Anaheim and, in doing so, left their former stadium, the Los Angeles Coliseum, without a team. *Id.* at 1385. To fill this void, the Coliseum negotiated with Oakland Raiders owner Al Davis to move the team to Los Angeles. *Id.* The NFL, however, voted 22-0 against the

single entity defense and found, instead, that “NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.”<sup>95</sup> As a result, the court determined that the NFL’s attempt to prevent the relocation of the Raiders could not be analyzed outside the scope of section 1.<sup>96</sup>

Once a court resolves the single entity issue and determines that professional sports teams are separate entities for antitrust purposes, the question remains whether section 1 has been violated by the franchise restriction.<sup>97</sup> In making this determination, a court must decide whether to apply a per se approach or, alternatively, the Rule of Reason analysis in determining a violation of section 1.<sup>98</sup> In most section 1 cases involving restraints imposed by professional sports leagues, courts have repeatedly adopted the Rule of Reason analysis.<sup>99</sup> In *Raiders I*, for example, the court turned to the Rule of Reason and found that NFL Rule 4.3 restricting franchise movement violated section 1.<sup>100</sup> The court, however, noted that the “reasonableness of restraint is a ‘paradigm fact question,’”<sup>101</sup> thereby implying that similar restraint could be reasonable under different factual circumstances. The Ninth Circuit expanded on this factual analysis approach in *National Basketball Association v. SDC Basketball Club, Inc.* (“*Clippers*”).<sup>102</sup> In reference to the holding in *Raiders I*, the court in *Clippers* stated that the franchise relocation

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relocation under the authority of NFL Rule 4.3, which required unanimous approval by all NFL teams when a team sought to relocate in the home territory of a member team. *Id.* at 1384. Following the NFL’s rejection of the relocation, the Coliseum filed suit claiming that NFL Rule 4.3 violated antitrust laws. *Id.* at 1386.

95. *Id.* at 1389.

96. *Id.* at 1401.

97. Lazaroff, *supra* note 88, at 175.

98. *Id.*

99. Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 737 (2010) (citing Glen O. Robinson, *Explaining Vertical Agreements: The Colgate Puzzle and Antitrust Method*, 80 VA. L. REV. 577, 605 (1994)).

100. *L.A. Mem’l Coliseum*, 726 F.2d at 1392–98.

101. *Id.* at 1401 (quoting *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982)).

102. *Nat’l Basketball Ass’n v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987). The San Diego Clippers attempted to move their franchise to Los Angeles, but the NBA contested the relocation under Article 9 of its Constitution, which states that no team can move into another team’s home territory without written approval from the member franchise. *Id.* at 564. Rather than risk antitrust liability by forbidding the move, the NBA sought a declaratory judgment. *Id.* at 563.

restriction should not be construed as invalid under antitrust law as a matter of law.<sup>103</sup> In rejecting the per se approach, the court reiterated that the issue of whether a franchise movement rule violates antitrust laws is a question of fact regarding the reasonableness of the restraint.<sup>104</sup> The court ultimately determined that the NBA did not violate section 1 because the league did not absolutely forbid relocation of the team.<sup>105</sup> Although different in their results, *Raiders I* and *Clippers* are significant cases because their holdings reveal the Ninth Circuit's rejection of per se violations of antitrust law and underscore the circuit's loyalty to a factual analysis under the Rule of Reason.

In the wake of the Ninth Circuit's rulings, the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.* rekindled issues surrounding the single entity defense.<sup>106</sup> In *Copperweld*, the Court held that a parent and its wholly-owned subsidiary are legally incapable of conspiracy for antitrust purposes and, consequently, that the corresponding activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of section 1.<sup>107</sup> Although the decision was narrowly framed, lower courts have interpreted the case more broadly as applicable to professional sports leagues and the single entity defense. In the various rulings citing and distinguishing *Copperweld*, only the Seventh Circuit has found the single entity defense to be persuasive.<sup>108</sup> By contrast, the First<sup>109</sup> and Eighth<sup>110</sup> Circuits have refused to extend single entity status to professional sports leagues, and

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103. *Id.* at 568.

104. *Id.*

105. *Id.*

106. *See generally* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

107. *Id.* at 771.

108. *See, e.g.*, *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) (finding that the NBA functions as a single entity by producing a single product, namely "NBA Basketball," that competes with other forms of entertainment). The court noted, however, that such a determination is case-sensitive and must be analyzed "one facet of a league at a time." *Id.* at 600.

109. *See generally* *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002); *see also generally* *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994).

110. *See generally* *St. Louis Convention & Visitors Comm'n v. Nat'l Football League*, 154 F.3d 851 (8th Cir. 1998); *see also generally* *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992).

the D.C.,<sup>111</sup> Second,<sup>112</sup> and Ninth<sup>113</sup> Circuits have not reevaluated the issue of single entity defense since *Copperweld* and, therefore, their precedents rejecting this defense have not been overturned.<sup>114</sup>

Despite the conflicting case law on the single entity issue, the possibility for unified precedent materialized in 2006 when the Supreme Court ruled in *Dagher* that a joint venture<sup>115</sup> operates as a single entity for antitrust purposes.<sup>116</sup> Typically, joint ventures and single entities are not identical or even similar concepts, and a single entity is considered immune from Sherman Act liability while a joint venture between independently owned teams is subject to section 1 review.<sup>117</sup> In *Dagher*, however, Justice Thomas intermingled the two concepts by noting that the price fixing at issue in the case “amount[ed] to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities.”<sup>118</sup> The Court concluded that the joint action did not violate the Sherman Act because the Texaco and Shell oil companies shared profits as investors, not competitors.<sup>119</sup> This case reinvigorated the

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111. See generally *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

112. See generally *North Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d cir. 1982).

113. See generally *L. A. Memorial Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984).

114. See Nathaniel Grow, *There's No "T" in "League": Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183, 187 (2006).

115. Thomas A. Piraino describes joint ventures as “a unique form of business organization, which require their own antitrust approach.” See Piraino, *supra* note 74, at 921. The uniqueness, Piraino says, comes from the way in which joint ventures blend competition and cooperation. *Id.* As such, Piraino believes that professional sports leagues “possess all the relevant characteristics of joint ventures.” *Id.* at 922.

116. See *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 (2006). The Texaco and Shell oil companies collaborated together and set a fixed price for both gasoline brands. *Id.* at 1. In response, Texaco and Shell service station owners alleged that this price fixing violated antitrust law. *Id.*

117. See *Tulane University School of Law Moot Court Mardi Gras Invitational: 2009 Competition Problem and Winning Brief*, 17 SPORTS LAW J. 317, 329 (2010) (noting that a single entity is immune from antitrust scrutiny while a joint venture is subject to section 1 review); see also Timothy R. Deckert, *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in Chicago Professional Sports Limited Partnership v. National Basketball Association*, 5 VILL. SPORTS & ENT. L.J. 73, 86 (1998) (characterizing a professional sports league as either a single entity subject only to section 2 of the Sherman Act or a joint venture subject to section 1's Rule of Reason analysis).

118. *Dagher*, 547 U.S. at 6.

119. *Id.* at 5–6.

single entity defense, and, to address the antitrust debate surrounding sports leagues, the Court recently granted certiorari in and decided another Seventh Circuit case, *American Needle*.<sup>120</sup>

*American Needle* arose after the NFL granted exclusive headwear rights to Reebok International Ltd.<sup>121</sup> American Needle and other vendors previously had benefited from headwear licensing agreements with the NFL and, as a result, American Needle alleged that the NFL's exclusive licensing deal with Reebok violated section 1.<sup>122</sup> The NFL responded by asserting that the league was incapable of conspiring within the meaning of section 1 because the NFL, its member teams, and the National Football League Properties (NFLP)<sup>123</sup> must be considered a single entity.<sup>124</sup> The Seventh Circuit agreed with the league and held that the NFL and its teams operate as a single entity for antitrust purposes.<sup>125</sup> Interestingly, the NFL supported American Needle's petition for certiorari even though the league had prevailed in the lower court, presumably to broaden the application of the single entity determination to the league's other activities.<sup>126</sup> In light of *Dagher*, it appears that the NFL believed the Court was moving in the direction of finding professional sports leagues exempt from section 1 challenges, and the NFL was willing to risk an unfavorable result in order to have the opportunity to settle the matter in its favor once and for all. The Court specifically chose to review *American Needle* to determine whether the NFL is immune from antitrust scrutiny under section 1.<sup>127</sup> The oral arguments in *American Needle* were heard on January 13, 2010, and on May 24, 2010, the Court handed down a decision.<sup>128</sup>

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120. See *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008), cert. granted, 129 S. Ct. 2859 (2009) (No. 08-661), *aff'd*, 130 S. Ct. 2201 (2010).

121. See *Am. Needle*, 538 F.3d at 738.

122. *Id.*

123. The NFLP is a separate corporation formed by the NFL to develop, license, and market the intellectual property of the NFL's thirty-two member teams. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010).

124. *Am. Needle*, 538 F.3d at 738.

125. *Id.* at 743-44.

126. See generally Amicus Brief of the National Football League Coaches Association in Support of Petitioner, *Am. Needle*, 130 S. Ct. 2201 (No. 08-661).

127. See *Am. Needle*, 538 F.3d 736, cert. granted, 129 S. Ct. 2859 (2009) (No. 08-661).

128. See *Am. Needle*, 130 S. Ct. 2201.

The narrow question presented in *American Needle* was whether the licensing operations of NFL teams' intellectual property, carried out through the NFLP, constitute concerted action in violation of section 1.<sup>129</sup> In its analysis, the Court reviewed action by the NFL and NFLP separately. The Court established that NFL teams have independent economic interests that inevitably lead to competition within the marketplace.<sup>130</sup> This competition ranges from rivalry on the playing field to competition for intellectual property.<sup>131</sup> Writing for a unanimous Court, Justice John Paul Stevens noted that, "each of the [NFL] teams is a substantial, independently owned, independently managed business"<sup>132</sup> and "when each NFL team licenses its intellectual property, it is not pursuing the 'common interests of the whole' league but is instead pursuing interests of each 'corporation itself' . . . ."<sup>133</sup> In reference to the NFLP, the Court determined that, although the NFLP is separate from the NFL, each team is still an independent decision-making entity that shares "jointly" in the NFLP's managed assets.<sup>134</sup> Consequently, each team has the capability of manipulating its share of assets by acting on interests that are separate from the corporation as a whole.<sup>135</sup> Simply put, the Court viewed the NFLP as merely "an instrumentality" of the teams and, for antitrust purposes, the Court determined that decisions by both the NFL and NFLP regarding teams' intellectual property amounted to concerted action within the meaning of section 1.<sup>136</sup>

Based on these findings, the Court remanded the case to the district court with instruction to apply the Rule of Reason analysis.<sup>137</sup> In doing so, the Court's unanimous decision has established a precedent that will deter sports leagues in the future from asserting the single entity defense in the federal courts. Jeffrey Kessler, outside counsel for the National

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129. *Id.* at 2206–07.

130. *Id.* at 2212.

131. *Id.*

132. *Id.*

133. *Id.* at 2213 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984)).

134. *See Am. Needle*, 130 S. Ct. at 2201, 2214.

135. *Id.* at 2215. These decisions range from "purchases of apparel and headwear . . . to the granting of licenses to use its trademarks." *Id.*

136. *Id.*

137. *Id.* at 2216–17.

Football League Players Association (NFLPA), stated that, “the fact that [the decision] is unanimous means the single entity argument for sports leagues is basically dead. It means that the option to decertify and assert anti-trust rights is as strong as it has ever been.”<sup>138</sup> Although the single entity argument is “basically dead,” the Rule of Reason still must be applied to an antitrust challenge, and litigants likely will continue to bring their claims through the federal court system in the hope that a judge will apply a Rule of Reason analysis that is favorable to their interests.

#### IV. JUDGE BAUM’S FACEOFF: A CASE OF FIRST IMPRESSION FOR PROFESSIONAL SPORTS TEAMS UTILIZING THE BANKRUPTCY COURT TO FORCE FRANCHISE SALE AND RELOCATION

##### A. Dewey Ranch I—*The Hearing*

On June 15, 2009, a hearing was held before Judge Redfield T. Baum in the United States Bankruptcy Court for the District of Arizona on the motion of the Debtors seeking authority to sell the Coyotes to PSE and to allow Balsillie to relocate the team to Canada.<sup>139</sup> The Debtors and PSE asserted that the bankruptcy court could permit the sale of the Coyotes to PSE and authorize the relocation of the team from Phoenix to Canada under sections 363 and 365 of the Code.<sup>140</sup> The NHL objected to the Debtors’ claims because the league had not consented to the change of ownership or the relocation.<sup>141</sup> Specifically, the NHL asserted that: 1) league member agreements and documents pertaining to, but not limited to, change of ownership and relocation must be “assumed and assigned in their entirety”; 2) the pleadings failed to establish “adequate protection of the league’s interests”; and 3) there was no evidence of a bona fide dispute between the parties founded on antitrust claims.<sup>142</sup> In addition, the league warned the court that granting the Debtors’ motion would “wreak havoc in the professional sports

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138. *U.S. Supreme Court Overturns Ruling in American Needle Case*, SPORT’S BUSINESS DAILY (May 24, 2010), <http://www.sportsbusinessdaily.com/article/139547>.

139. *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 32 (Bankr. D. Ariz. 2009).

140. *Id.* at 35.

141. *Id.* at 34.

142. *Id.*

industry.”<sup>143</sup>

Judge Baum considered two key issues during this hearing. The first issue was whether the court, pursuant to its power under section 365 of the Code, could authorize the assumption and assignment of the Debtors’ executory contract with the NHL by “excising” a non-transferability provision from the contract.<sup>144</sup> Such authorization would bar the NHL from enforcing its consent requirements for a team’s change of ownership and relocation.<sup>145</sup> Second, the court considered whether it had the power under section 363 of the Code to sell the Coyotes to PSE and authorize the relocation of the Coyotes to Canada free and clear of any creditor’s claims, including the NHL’s claims and objections, if such claims or interests were either not enforceable under nonbankruptcy law or in “bona fide” dispute.<sup>146</sup> Judge Baum considered the issues presented in the motion especially “novel and unique” because this was the first time a professional sports team had sought to invoke bankruptcy law to force a sale and relocation of a team.<sup>147</sup> Judge Baum’s analysis also was unique and must be considered carefully within the context of both bankruptcy and antitrust law.

### 1. Section 365: Assumption and Assignment

Section 365(f)(1) of the Code authorizes the assumption and assignment of an executory contract<sup>148</sup> “notwithstanding language in the executory contract . . . that prohibits, restricts or conditions the assignment of such contract . . . .”<sup>149</sup> In other words, during bankruptcy proceedings, the judge may strike an anti-assignment clause from an executory contract if it

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143. *Id.* The NFL, the NBA, and MLB submitted an amici curiae brief in support of the NHL’s objection to the Debtors’ request to sell and relocate the team. Brief of Amici Curiae at 1–2, *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (2009) (No. 277). The brief urged the court to refrain from allowing franchises “to enlist in the aid of the bankruptcy courts in an effort to circumvent established league rules that govern such league decisions” because such action would potentially “undermine the business of professional hockey and other major league sports.” *Id.* at 6.

144. *In re Dewey Ranch*, 406 B.R. at 36.

145. *Id.*

146. *Id.* at 38.

147. *Id.* at 35.

148. Executory contracts include contracts that have not been completely performed. 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1:19 (4th ed. 2007).

149. 11 U.S.C. § 365 (2006).

harms creditors by preventing a debtor from realizing the full value of assets.<sup>150</sup> Generally speaking, section 365 allows a debtor to effectively undergo reorganization without regard to contract provisions that could otherwise inhibit the debtor from rehabilitation.<sup>151</sup>

In *Dewey Ranch I*, the Debtors argued that the assumption and assignment of the contract to PSE was permissible under section 365 because the requirement to play in Glendale was an unlawful anti-assignment provision that could be ignored.<sup>152</sup> The Debtors seemingly invoked this section of the Code in the hope that the bankruptcy court would authorize the sale and relocation of the team notwithstanding absence of the NHL's consent. Bankruptcy law, however, does not allow the assumption and assignment of only the benefits of the contract.<sup>153</sup> Rather, the assuming party must undertake both the benefits and the burdens of the entire agreement.<sup>154</sup>

The NHL stressed this concept of assumption in a pleading filed with the court on June 5, 2009, stating that the “assumption of executory contracts such as the Constitution and Bylaws . . . requires assumption in entirety ‘cum onere,’ or subject to all burdens.”<sup>155</sup> The NHL argued that the Coyotes were simply using the bankruptcy court to select which contract provisions the team was willing to honor and, therefore, “side door” its way into the league.<sup>156</sup> In addition, the NHL noted that the league's Constitution and Bylaws grant member franchises the right to participate in the league and, by forcing a sale conditioned on the rejection of these documents, the proposed transaction would, at most, “transfer a collection of used hockey equipment—none of which could

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150. See 3-365 COLLIER ON BANKRUPTCY ¶ 365.08[2] (15th ed. rev. 2007); see also Nicholas Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 53 (2002).

151. See Timothy D. Cedrone, *A Critical Analysis of Sport Organization Bankruptcies in the United States and England: Does Bankruptcy Law Explain the Disparity in Number of Cases?*, 18 SETON HALL J. SPORTS & ENT. L. 297, 311 (2008).

152. *In re Dewey Ranch*, 406 B.R. at 36.

153. COLLIER ON BANKRUPTCY, *supra* note 150, ¶ 365.03 (“[T]he trustee must either assume the entire contract, cum onere, or reject the entire contract, shedding obligations as well as benefits.”).

154. *Id.*

155. National Hockey League's Objection to the Debtor's Request to Sell the Phoenix Coyotes Under Sections 365 and 363 of the Bankruptcy Code at 8, *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (Bankr. D. Ariz. 2009) (No. 293) [hereinafter NHL's Objection].

156. *Id.* at 8.

bear the NHL logo.”<sup>157</sup> In his analysis of section 365, Judge Baum considered the APA’s ownership terms and relocation provision separately.

*i. Ownership Terms*

The controlling precedent in *In re Crow Winthrop*<sup>158</sup> weighed heavily in Judge Baum’s analysis of ownership terms. In *Crow Winthrop*, the Ninth Circuit invalidated a contract ownership provision under section 365(f) by looking beyond the wording of the provision to decide if it was a de facto anti-assignment clause.<sup>159</sup> While Judge Baum recognized that many courts rely on section 365(f) to prevent the enforcement of contract terms that bar assignment, he considered the Coyotes case to be different because the NHL had previously approved PSE as a member of the NHL in 2006.<sup>160</sup> The court felt that, absent the relocation provision, the NHL would not object based on ownership, and the court specifically cited the lack of evidence of any material changes to PSE’s circumstances since being previously approved by the league.<sup>161</sup> Accordingly, the court concluded that the NHL could not object or withhold its consent to PSE becoming the controlling owner of the Coyotes and, therefore, could not declare a default of the terms of the APA based solely on the ownership terms.<sup>162</sup> The court had “the firm sense that if the only issue here was PSE purchasing the Phoenix Coyotes [no relocation term] there would be no objection from the NHL” and, as a result, Judge Baum found that the ownership provision was not an unenforceable de facto anti-assignment under section 365.<sup>163</sup>

*ii. Relocation Provision*

Next, Judge Baum considered whether the APA’s relocation provision was unenforceable as a de facto anti-

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157. *Id.* at 2.

158. *In re Crow Winthrop Operating P’ship*, 241 F.3d 1121 (9th Cir. 2001).

159. *Id.* at 1124.

160. *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 36 (Bankr. D. Ariz. 2009)

161. *Id.*

162. *Id.*

163. *Id.* at 36–37.

assignment under section 365.<sup>164</sup> In his analysis, Judge Baum invoked section 365(b)(1)(C) requiring adequate assurance of future performance.<sup>165</sup> Under this section of the Code, the Chapter 11 debtor must provide adequate protection of future performance, which may include “sufficient financial backing . . . or other similar forms of security or guaranty, or even promises.”<sup>166</sup> In interpreting this requirement, Judge Baum suggested that the Debtors’ agreement with the NHL, requiring the Coyotes to play all home games in Glendale, fell within this section.<sup>167</sup> Judge Baum pointed out that fundamental bankruptcy law requires an assuming party to assume both the benefits and burdens of the entire agreement, thereby precluding the party from picking and choosing what aspects of the contract will be adopted.<sup>168</sup> Although the Debtors and PSE claimed that the location requirement could be excised from the contract under 365(f)(1) because it restrained the assignment, Judge Baum rejected their arguments in the absence of bankruptcy court decisions ordering relocation of the geographic magnitude proposed in the Coyotes’s case.<sup>169</sup> As a result, the court could not find the relocation provision to be a term prohibiting, restricting or conditioning the assignment of the agreement in violation of 365(f)(1) and ruled that relocation conditional on league approval could not be excised from the contract under section 365.<sup>170</sup>

## 2. Section 363: A Sale Free and Clear

While Judge Baum also considered whether the court could authorize the sale and relocation of the team under section 363 of the Code, he ultimately declined to rule on the legal merits of this issue. Section 363 allows a bankruptcy court to authorize a sale free and clear of claims<sup>171</sup> and

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164. *Id.*

165. *Id.* at 37; 11 U.S.C. § 365 (2006).

166. *In re Gold Standard at Penn, Inc.*, 75 B.R. 669, 674 (E.D. Pa. 1987).

167. *In re Dewey Ranch*, 406 B.R. at 37.

168. *Id.*

169. *Id.*

170. *Id.*

171. The absence of the word “claims” in Section 363(f) is commonly ignored, so sales free and clear of claims are routine. See George W. Kuney, *Bankruptcy and Recovery of Tort Damages*, 71 TENN. L. REV. 81, 92 (2003).

interests,<sup>172</sup> thereby discharging the rights of creditors that would otherwise exist.<sup>173</sup> The Debtors and PSE claimed that the veto rights of the NHL contained in the NHL Constitution and Bylaws are “interests” under the Code and argued that the bankruptcy court could authorize the sale and relocation of the Coyotes “free and clear of the geographic limitation in the agreements and notwithstanding the objection . . . of the NHL.”<sup>174</sup> In particular, the Debtors and PSE invoked sections 363(f)(1) and 363(f)(4) and claimed that the antitrust allegations asserted in the adversarial proceeding satisfied either or both of the provisions’ requirements.<sup>175</sup> As a result, Judge Baum analyzed these section 363 requirements through an overlay of antitrust case law involving the relocation of professional sports teams.

*i. Section 363(f)(4)*

Section 363(f)(4) allows a sale free and clear where “such interest is in bona fide dispute.”<sup>176</sup> This section allows productive assets subject to prolonged litigation to be transferred to a third party and enables the asset to remain profitable.<sup>177</sup> In essence, it allows title to be cleared when the asset is subject to dispute.<sup>178</sup> Legislative history addressing the underlying considerations for this section of the Code cites concerns that creditors could use involuntary bankruptcy as an instrument to force a debtor to pay certain debts when, in fact, the debtor may be shielded by legitimate defenses.<sup>179</sup> In addition, prolonged litigation involving a valuable asset may interfere with the bankruptcy court’s primary objectives of creating a fund of assets to satisfy creditors in a timely

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172. The term “interest” is not defined in the Code. *Id.*

173. 11 U.S.C. § 363 (2006).

174. *In re Dewey Ranch*, 406 B.R. at 38; Debtors’ Memorandum of Points and Authorities in Support of Motion to Sell Substantially all of Coyotes Hockey’s Assets at 7, *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (Bankr. D. Ariz. 2009) (No. 288) [hereinafter Debtors’ Memorandum of Points].

175. *In re Dewey Ranch*, 406 B.R. at 38.

176. § 363.

177. See Kuney, *supra* note 171, at 95.

178. *Id.* at 96.

179. See Jane C. Fennelly & Scott E. Blakeley, *Current Developments in Involuntary Bankruptcy Filings*, in REAL ESTATE WORKOUTS AND BANKRUPTCIES, at 510–11 (PLI Real Estate Law & Practice Course Handbook Series No. N4-4574, 1993) (citing S. 7618, 98th Cong. 2d Sess., June 1984).

manner or the preservation of going-concern value through reorganization.<sup>180</sup>

In *Dewey Ranch I*, the purported bona fide dispute was founded on antitrust claims. In particular, the Debtors argued that the NHL's veto rights, otherwise construed as "interests" under the Code, were in bona fide dispute on account of the asserted antitrust claims in the pending adversary proceeding.<sup>181</sup> The Debtors alleged that their antitrust claims were "ripe" for adjudication and should be considered by the court in its 363 analysis because section 16 of the Clayton Act grants "[a]ny person, firm, corporation, or association . . . [redress] to sue for and have injunctive relief . . . against *threatened* loss or damage by a violation of the antitrust laws."<sup>182</sup> In response, the NHL argued that it must actually *apply* its consent rights in an unlawful way to provide a basis for an antitrust challenge.<sup>183</sup> At the time of the hearing, the NHL had not applied any ownership or relocation restraints and, therefore, the league claimed that the Debtors' antitrust claims were premature.<sup>184</sup>

Assuming that the adversary proceeding was ripe for adjudication, the Debtors argued that the NHL's "interests" were subject to a bona fide dispute because, as applied, the interests violate section 1 of the Sherman Act.<sup>185</sup> In reaching this conclusion, the Debtors relied on Ninth Circuit authority supporting the proposition that "sports leagues do not constitute a single enterprise but, rather, are separate entities which are capable of conspiring with each other."<sup>186</sup> Citing *Raiders I*, the Debtors noted that "agreement[s] among competitors to fix prices or divide market territories are presumed illegal under section 1 because they give

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180. See John D. Ayer et al., *An Overview of the Automatic Stay*, 22-10 AM. BANKR. INST. J. 16, 16 (2004).

181. Debtors' Memorandum of Points, *supra* note 174, at 5.

182. *Id.* at 17 (emphasis added). The Debtors also cited *Sullivan v. National Football League* and emphasized that a professional sports team may not be denied standing solely because the league has yet to make a determination regarding the team's demand. *Id.*; see also *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1104 (1st Cir. 1994) (noting that "there is certainly no blanket requirement, as the NFL maintains . . . that Sullivan must call for a vote and obtain an official refusal from the NFL").

183. NHL's Objection, *supra* note 155, at 21 (emphasis added).

184. *Id.*

185. Debtors' Memorandum of Points, *supra* note 174, at 22.

186. *Id.* at 23.

competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces.”<sup>187</sup> The Debtors further claimed that the NHL’s ownership and relocation restrictions were unreasonable and unenforceable under the Rule of Reason because, as the only producer of major league ice hockey, the NHL has “significant market power and is able to act like a cartel, dividing territories and charging arbitrary prices completely divorced from free market forces.”<sup>188</sup> The Debtors argued that any procompetitive business rationale was at best *de minimis* and that, therefore, the NHL could not demonstrate sufficient justification for the anticompetitive effects of its ownership and relocation provisions.<sup>189</sup>

In deciding whether the antitrust claims amounted to a bona fide dispute, Judge Baum cited the objective test set out in *In re Vortex Fishing Systems*.<sup>190</sup> This test requires a court to determine whether there is an objective basis for a dispute.<sup>191</sup> Finding that the claims at issue there were subject to a bona fide dispute, the court in *Vortex Fishing Systems* referred to the significant factual and legal history of the dispute.<sup>192</sup> After examining the facts in *Dewey Ranch I*, however, Judge Baum concluded that there was no factual or legal history to establish a bona fide dispute that would permit the sale.<sup>193</sup> The court observed that establishing an antitrust violation in the setting of a sports league is very factually driven and that “more [was] needed” to establish a bona fide dispute on antitrust grounds.<sup>194</sup> The court also was unwilling to put pressure on the NHL to make a decision on

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187. *Id.* at 26 (citing L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1392 (9th Cir. 1984)).

188. *Id.* at 25. The Debtors warned the court that the denial of relocation would consequently increase the Toronto Maple Leaf’s market power and thereby allow the team to continue charging unreasonable ticket fees. *Id.* Alternatively, the Debtors noted that allowing the team to relocate to Hamilton would likely increase live game attendance and increase television viewership and ratings. *Id.* at 27–28.

189. *Id.* at 30.

190. *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 39 (Bankr. D. Ariz. 2009) (citing Liberty Tool & Mfg v. Vortex Fishing Sys., Inc. (*In re Vortex Fishing Sys.*), 277 F.3d 1057 (9th Cir. 2002)).

191. *Id.*

192. *See generally In re Vortex*, 277 F.3d 1057.

193. *In re Dewey Ranch*, 406 B.R. at 39.

194. *Id.* at 40. Judge Baum did not specify what would have been enough to establish a bona fide dispute. *Id.*

the relocation request and force a bona fide dispute.<sup>195</sup> In taking this approach, Judge Baum seemed implicitly to hold that it is not a violation of antitrust law for professional sports leagues to impose terms and conditions relating to the relocation of member teams.<sup>196</sup>

*ii. Section 363(f)(1)*

Section 363(f)(1) also allows a sale free and clear of other's interest where "applicable nonbankruptcy law permits sale of such property free and clear of such interest."<sup>197</sup> While the Debtors and PSE argued that the applicable nonbankruptcy law—antitrust law—justified the Coyotes's sale and relocation, Judge Baum remained uncertain.<sup>198</sup> The court gave great weight to the fact that the Debtors and PSE had failed to assert the antitrust claims before the filing of the antitrust action on May 7, 2009.<sup>199</sup> Judge Baum relied on *Sullivan v. National Football League*, where the court remanded the case for a new trial because the plaintiff had failed to request a vote by the NFL that was critically important to the case.<sup>200</sup> Judge Baum similarly refused to construe any action by the NHL as a violation of antitrust law because, at the time of the hearing, the league had not made a decision about the relocation of the Coyotes.<sup>201</sup> Consistent with these findings, the court held that the applicable nonbankruptcy law—antitrust law—did not permit a sale of the franchise assets as a matter of law and denied the Debtors' motion to authorize the assumption and assignment of the executory contract.<sup>202</sup>

### 3. Judge Baum's Faulty Section 363 Analysis

A close examination of Judge Baum's reasoning under section 363 reveals a faulty analysis. The determination of applicable nonbankruptcy law—antitrust law—under section

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195. *Id.*

196. *Id.* at 39.

197. 11 U.S.C. § 363 (2006).

198. *In re Dewey Ranch*, 406 B.R. at 39.

199. *Id.*

200. *Sullivan v. Nat'l Football League*, 34 F. 3d 1091, 1091 (1st Cir. 1994).

201. *In re Dewey Ranch*, 406 B.R. at 40.

202. *Id.*

363(f)(1) requires a separate analysis from the determination of a bona fide dispute under section 363(f)(4). Section 363(f) reads as follows:

The trustee may sell . . . free and clear of an interest . . . [including a lien] of an entity other than the estate only if—

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; *or*
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.”<sup>203</sup>

According to the wording in this section of the Code, a sale is permitted if any one of the five circumstances exists.<sup>204</sup>

In the context of the *Dewey Ranch* decisions, a court should allow a sale if applicable nonbankruptcy law permits it *or* if there is a bona fide dispute.<sup>205</sup> Although Judge Baum addressed both sections 363(f)(1) and 363(f)(4) as tightly sealed compartments without any interdependence, he relied on the same actions of the Debtors in failing to assert an antitrust action in what the court considered to be a timely manner and the same actions of the NHL in failing to make a decision on the relocation in arriving at his conclusions regarding both sections of 363.<sup>206</sup> In so doing, Judge Baum failed to assess the applicability of nonbankruptcy law—antitrust law—through a legal analysis. Although the question of whether there is a bona fide dispute between the parties may be appropriate for a factual analysis based upon the actions of the parties as evidence of a controversy, the question of whether there is applicable nonbankruptcy law to permit the sale of the team should not depend upon when or how the parties asserted their allegations. Nonbankruptcy law is either applicable under a legal analysis or it is not. In analyzing both sections 363(f)(1) and 363(f)(4) in this factual

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203. 11 U.S.C. § 363(f) (2006) (emphasis added).

204. *See id.*

205. *See* § 363(f)(1), (4).

206. *In re Dewey Ranch*, 406 B.R. at 39–40.

rather than legal manner, Judge Baum effectively diminished the importance of applicable nonbankruptcy law and circumvented the antitrust issues.

### *B. The Bidding War*

At a hearing on June 22, 2009, the court scheduled two auctions.<sup>207</sup> The first, scheduled for August 5 and continued to September 10, was a Glendale-only auction where the court would consider only bids from parties who were committed to keeping the team in Glendale.<sup>208</sup> The second auction, also scheduled for September 10, was open to all bidders.<sup>209</sup>

On July 6, 2009, the court set forth the bidding procedures.<sup>210</sup> One procedure required all bidders to file change of ownership/relocation applications with the NHL for assessment by an ordered deadline.<sup>211</sup> After PSE submitted its change of ownership/relocation application, the NHL Board of Directors voted unanimously to reject it because Balsillie lacked the “character and integrity” of a model NHL owner that is requisite under NHL By-Law 35.<sup>212</sup> The Board later provided the court with a memorandum specifying why it denied PSE’s application.<sup>213</sup> In particular, the Board expressed concern with Balsillie’s “integrity and willingness to be a good partner,” and the memorandum listed issues such as Balsillie’s conduct in prior dealings with the Penguins and Predators and in his current attempt to purchase the Coyotes.<sup>214</sup>

After the only other potential bidders announced that they would not submit bids to keep the Coyotes in Glendale, the

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207. *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 582 (Bankr. D. Ariz. 2009).

208. *Id.* at 582–85.

209. *Id.* at 582.

210. *Id.*

211. *Id.*

212. *Id.* at 583.

213. *In re Dewey Ranch*, 414 B.R. at 583.

214. *Id.* at 582–84. According to the Board, during the Penguins transactions, Balsillie pledged that he would keep the team in Pittsburgh and that the NHL would have the right to buy back the team at the selling price if he attempted to relocate the team. *Id.* at 583. Regarding the Predators transactions, the Board alleged that Balsillie tried to devalue the Predators, negotiated in bad faith, and made threats regarding the Canadian Bureau of Competition (“CBC”). *Id.* at 583–84. In 2007, the CBC performed an investigation of the NHL’s rules and procedures and, in reference to the dealings with the Penguins and Predators, the CBC determined that the NHL’s guidelines were lawful. *Id.* at 582.

NHL stepped in and submitted a bid on the last day of the court-ordered procedures.<sup>215</sup> The NHL “reluctantly concluded that it should make its bid because doing so was in the best interests of the NHL, the Coyotes, Glendale, and the creditors.”<sup>216</sup> Prior to the September 10 auction, the NHL and PSE submitted their final bids.<sup>217</sup> The NHL’s bid was \$140,000,000, which included \$11,600,000 paid to “specific cure costs and trade creditors.”<sup>218</sup> PSE’s final bid was \$212,500,000, and the bid would have increased to \$242,500,000 if Glendale had accepted PSE’s offer of \$50,000,000 to withdraw the city’s objection to the sale to PSE.<sup>219</sup> As a practical matter, bankruptcy judges utilize the auction process to bring parties together in order to effectuate sales.<sup>220</sup> In this case, however, Judge Baum appears to have been “overly optimistic” in thinking that a bid could satisfy both the Debtors’ “economic needs” and the NHL’s “operating concerns.”<sup>221</sup>

### C. Dewey Ranch II—*Disposition of the Team Sale/Relocation*

PSE’s effort to buy and relocate the Coyotes to Canada was officially put to rest in the hearing before Judge Baum on September 30, 2009.<sup>222</sup> Prior to the hearing, the parties submitted documents articulating their positions regarding the sale and relocation of the Coyotes.<sup>223</sup> PSE and the Debtors argued that it was unfair to allow the NHL to bid on the team since the league’s “insider status” would favor the NHL’s bid over PSE’s bid.<sup>224</sup> The parties also referenced the NHL’s

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215. *Id.* at 585. The prospective bidders, The Reinsdorf Group and Ice Edge, previously had announced that they would keep the Coyotes in Glendale, but both groups later retracted their intention to bid on the team. *Id.*

216. *Id.* at 585.

217. *Id.* at 587.

218. *Id.* at 588. This amount also covered all unsecured creditors with the exclusion of Moyes and Wayne Gretzky. *Id.* at 585–86.

219. *In re Dewey Ranch*, 414 B.R. at 587.

220. See Andrew P. DeNatale, *Bankruptcy Guide 2010*, in NUTS AND BOLTS OF CORPORATE BANKRUPTCY 2010, at 166 (PLI Comm. Law & Practicing Course Handbook Series No. 23359, 2010).

221. Alan S. Glover & Ian J. Silverbrand, *Phoenix Coyotes Bankruptcy Can Still Be Model for Troubled Sports Franchises*, 27 ENT. & SPORTS LAW 4, 4 (2009).

222. *In re Dewey Ranch*, 414 B.R. at 577.

223. *Id.*

224. *Id.* at 588 n.1. PSE and the Debtors argued that the NHL was an “insider”

“conflict of interest” in deciding whether Balsillie was an acceptable applicant when the NHL planned to submit its own bid for the team.<sup>225</sup> Furthermore, PSE and the Debtors asserted that the NHL acted in bad faith by rejecting PSE’s bid without proper consideration, by making its own bid for the team and by trying to protect the veto rights of the Toronto Maple Leafs.<sup>226</sup> Consistent with their arguments at the June 15 hearing, however, the crux of PSE and the Debtors’ claims was that the bankruptcy court should order the sale of the Coyotes to PSE and authorize the team’s relocation to Hamilton based on sections 363 and 365 of the Code.<sup>227</sup>

The NHL opposed these claims and argued, among other things, that sections 363 and 365 did not authorize the sale and relocation of the Coyotes.<sup>228</sup> The NHL contended that the court had no basis to relocate the team under section 365 because the provision in the executory contract requiring the Coyotes to play all home games in Glendale could not be ignored and excised from the agreement.<sup>229</sup> The NHL also asserted that it did not act in bad faith and, rather, justifiably denied PSE’s application.<sup>230</sup> In addition, the NHL claimed that the team could not be sold free and clear under section 363 because PSE’s bid could not adequately protect the NHL’s interests as mandated by section 363(e).<sup>231</sup> Section 363(e) states that, when selling property under section 363, a court “shall prohibit or condition such . . . sale . . . as is necessary to provide adequate protection [to the interests of the parties].”<sup>232</sup> Judge Baum addressed some of these claims and the bids of both PSE and the NHL to purchase the Coyotes.<sup>233</sup>

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because the NHL (1) had been approved by the court as a lender to the debtors based on the team’s operating losses, (2) was given joint control by the court over the debtors’ operation due to the NHL’s loans to the debtors, and (3) assumed the role as a bidder of the Coyotes. *Id.*

225. *Id.*, at 588.

226. *Id.* PSE and the Debtors presented a letter by Bettman stating, in part, that “the Maple Leafs reserve all rights to take whatever actions are necessary to protect their exclusive rights to their home territory.” *Id.* at 589.

227. *Id.* at 589.

228. *In re Dewey Ranch*, 414 B.R. at 589.

229. *Id.*

230. *Id.*

231. *Id.*

232. 11 U.S.C. § 363 (2006).

233. *In re Dewey Ranch*, 414 B.R. at 587–93.

Ultimately, the court denied PSE's bid with prejudice and denied the NHL's bid without prejudice.<sup>234</sup> In making those determinations, Judge Baum addressed concepts of antitrust law but avoided making legal determinations on those issues.

Although the court analyzed section 365 of the Code prohibiting de facto anti-assignment clauses at length in *Dewey Ranch I*, Judge Baum avoided this issue in *Dewey Ranch II* and focused his analysis on section 363. Judge Baum refused to decide the merits of the many factual and legal issues raised by the parties and, instead, assumed that, for the purposes of his analysis, the interests of the NHL were subject to a bona fide dispute.<sup>235</sup> In reaching these findings, it was unnecessary for the court to indulge in a specific legal analysis of the antitrust issues. The court, however, chose to address the antitrust issues at some length within the context of section 363, and that discussion raises issues about the court's decision and its implications for similar bankruptcy proceedings in the future.

In particular, Judge Baum placed significant weight on section 363(e) of the Code.<sup>236</sup> Although section 363(f) does not mention in its text the adequate protection of interests afforded under section 363(e), section 363(f) is nonetheless subject to its requirements.<sup>237</sup> In essence, section 363(e) is a "safety net" that guarantees adequate protection of the interests involved.<sup>238</sup> After discussing the language of section 363(e) and noting that the bankruptcy court has the discretion to prohibit or control a proposed sale if the interests at issue are not adequately protected, the court went on to compare the relative ease in protecting economic interests with the difficulty of protecting the NHL's other interests; the court concluded that the latter was "exceedingly more challenging."<sup>239</sup> Although the Debtors and PSE argued that the NHL could be adequately protected through payment of a suitable relocation fee that was required by the NHL Constitution and applicable precedent,<sup>240</sup> Judge Baum firmly

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234. *Id.* at 593.

235. *Id.* at 590.

236. *Id.* at 590–91.

237. See Daniel J. Ferretti, *Eviction Without Rejection*, 39 CUMB. L. REV. 707, 712 (2009).

238. *Id.*

239. *In re Dewey Ranch*, 414 B.R. at 591.

240. See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1356

disagreed.<sup>241</sup>

Judge Baum was especially concerned that a decision permitting the team's sale and relocation would negatively impact the NHL in the future if, after the Coyotes moved to Canada, the NHL ultimately prevailed in litigation.<sup>242</sup> He stated that, by that point, the team would already have been moved and the NHL would be denied the ability to prohibit the relocation.<sup>243</sup> Lastly, Judge Baum noted the absence of case law pertaining to the "shall prohibit . . . such sale language of section 363(e)."<sup>244</sup> Based on his "firm sense" that the case was subject to section 363(e), however, Judge Baum ultimately exercised his discretion and denied PSE's bid with prejudice.<sup>245</sup>

The effect of Judge Baum's analysis is essentially to allow section 363(e), which requires adequate protection of interests, to trump other provisions that would allow for a sale free and clear of claims and interests. Section 363(e), however, states that the court shall "prohibit" or "condition" a sale in order to adequately protect the interests of the parties.<sup>246</sup> Therefore, under the language of section 363(e), Judge Baum could have allowed the sale under section 363(f)(1) or 363(f)(4) with the requirement that it be conditioned on terms that would protect the parties' best interests. If section 363(e) were applied in this manner, it would not have acted as a trump to the other section 363 provisions and, in turn, it would have allowed for the flexibility that the Code seems to anticipate by the language "prohibit" or "condition."

The court concluded its opinion by analyzing the NHL's bid. The court found the bid to be defective because it allowed the NHL to choose which unsecured creditors would be paid with the sale proceeds.<sup>247</sup> As a result, the court denied the

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(9th Cir. 1986) (requiring antitrust damages after a football stadium suffered from economic loss following the NFL's efforts to prevent the Oakland Raiders from relocating to Los Angeles).

241. *In re Dewey Ranch*, 414 B.R. at 591.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 591–93.

246. 11 U.S.C. § 363 (2006).

247. *In re Dewey Ranch*, 414 B.R. at 593. The bid was structured to pay all secured creditors and most unsecured creditors in full, excluding any claims by Jerry Moyes or Wayne Gretzky, who had the largest stake in the ownership group. *Id.* at 585–86.

NHL's bid without prejudice and invited the NHL to come back with a follow-up bid.<sup>248</sup> The NHL amended its bid and, on November 2, 2009, Judge Baum signed an order approving the sale to the NHL.<sup>249</sup>

## V. A NEW GAME IN TOWN?

### A. Judge Baum's *De Facto* Antitrust Ruling

Judge Baum stated in the September 30 hearing that “the court need not and will not make any decision on the merits of the many factual and legal issues raised by all of the parties.”<sup>250</sup> By including an extensive discussion of antitrust issues and relevant expert testimony in his opinion, however, Judge Baum appears to have reached a *de facto* antitrust decision. After *Dewey Ranch I*, when the court had disposed of PSE's motion and had scheduled the auction, all that Judge Baum had to do in *Dewey Ranch II* was to deny PSE's bid based upon all the reasons articulated in *Dewey Ranch I* and to follow that by examining the NHL's bid and deciding whether that bid was acceptable.

The court did not follow that simple route that would have been predicated on considerations of judicial economy. Instead, the court went into a lengthy discussion regarding how the NHL's interests would not be adequately protected if the court accepted PSE's bid.<sup>251</sup> In particular, Judge Baum agreed with the NHL that the league has “the right to control where its members play their home hockey games,” and that such an interest requires adequate protection.<sup>252</sup> Judge Baum's discussion also positively described the NHL's interests in terms of “control” and “restrictions.”<sup>253</sup> For example, he said that the league's interest in *controlling* where members play their home games is essential because “the very nature of professional sports requires some territorial *restrictions* in order both to encourage participation in the venture and to secure to each venturer the legitimate

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248. *Id.* at 593.

249. Hearing in Re: Objection to Sale to NHL, *In re Dewey Ranch*, 414 B.R. 577 (No. 1080).

250. *In re Dewey Ranch*, 414 B.R. at 590.

251. *Id.* at 590–92.

252. *Id.* at 591.

253. *Id.*

fruits of that participation.”<sup>254</sup> Judge Baum’s use of these terms is strikingly similar to the descriptions that are lodged by parties in antitrust actions.<sup>255</sup> Although Judge Baum appears to have used such terms for his own purposes under section 363 of the Code, the effect is that he weighed in heavily on the antitrust issues.

More evidence of this approach is the lengthy recitation by Judge Baum concerning the conflicting expert witness testimony.<sup>256</sup> That testimony included expert opinions on the antitrust issue, particularly “their positions on the appropriate relocation fee due the NHL if the court approved PSE’s bid and the appropriateness of Hamilton as an NHL site for the Coyotes.”<sup>257</sup> Judge Baum briefly listed the opinions of several experts who, when their testimony is considered collectively, presented sound arguments that the relocation of the Coyotes was reasonable.<sup>258</sup> One of these experts, Andy Baziliauskas, was experienced in antitrust law and stated that the NHL’s Bylaws and the veto power of the Toronto Maple Leafs were inherently anticompetitive.<sup>259</sup> Baziliauskas also noted that the NHL’s restrictions on relocation were unjustified and that a demand for a relocation fee would also be anticompetitive.<sup>260</sup> Although Judge Baum recognized this testimony, his ruling clearly supports the view posed by expert Franklin M. Fisher, whose expert testimony was the most heavily cited in his opinion.<sup>261</sup> Fisher, a specialist in the area of antitrust law, testified that the NHL must be considered a single entity for antitrust purposes.<sup>262</sup> He also stated that the NHL has no anticompetitive interest when it comes to evaluating the ownership changes of certain franchises within the league.<sup>263</sup> Rather, Fisher contended that the NHL’s rules act “to safeguard the quality of NHL

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254. *Id.*

255. *See generally* L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381 (9th Cir. 1984) (noting that “the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation . . .”).

256. *In re Dewey Ranch*, 414 B.R. at 586–87.

257. *Id.* at 586.

258. *Id.* at 586–87.

259. *Id.* at 586.

260. *Id.*

261. *Id.* at 586–87.

262. *In re Dewey Ranch*, 414 B.R. at 586.

263. *Id.* at 587.

hockey and promote the league's competitive success."<sup>264</sup> It appears that Judge Baum weighed this expert testimony heavily in favor of a finding that antitrust provisions do not apply to professional sports leagues.<sup>265</sup>

Judge Baum's motive in deciding the Coyotes case in this manner is uncertain. Why would Judge Baum weigh in on the antitrust issues when doing so was not necessary for his ruling? His decision could simply have relied on his findings in the prior motion without an expanded discussion of the antitrust implications. One explanation may be that he felt that the bankruptcy court was being used as part of an end run by PSE and the Debtors to avoid the more risky federal district court option for redress of sports league sale and relocation issues. By including the extensive discussion of antitrust issues and relevant expert opinion but then disposing of the controversy by simply stating that the NHL's interests were compelling without expanded discussion of the antitrust implications, Judge Baum effectively issued a de facto antitrust decision and signaled to future petitioners that utilization of the bankruptcy court for the purposes of sale and relocation issues will not be tolerated. Interestingly, Judge Baum may have signaled his methodology and this result by his statement in *Dewey Ranch I* that the court is not concerned with issuing a decision that would "wreak havoc" on professional sports.<sup>266</sup> If this was truly Judge Baum's intention, it may answer the question why the court seemed to be going to such lengths to find in favor of the NHL and to disregard the legal implications of antitrust law in this setting. One possibility is that the court was less concerned with the impact on the parties than with the perceived misuse of the bankruptcy court.

### *B. Could Different Facts Yield a Different Result?*

Notwithstanding the possibility that Judge Baum may have been sending a signal to future sports franchise petitioners, it is important to consider the relevant facts of the case and how different facts may yield a different result. If the facts in *Dewey Ranch I* had been more compelling in favor

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264. *Id.*

265. *Id.* at 591.

266. *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 42 (Bankr. D. Ariz. 2009).

of PSE and the Debtors, would Judge Baum have exercised his discretion in favor of these parties and allowed them redress in the bankruptcy court? More specifically, what facts, if any, would justify a bankruptcy court allowing the sale and transfer of a professional sports league franchise because either the non-transferability provisions of the league-franchise agreement could be excised from the agreement under section 365 or there is a bona fide antitrust dispute and/or applicable nonbankruptcy law pursuant to sections 363(f)(1) and 363(f)(4).

There are several different factual scenarios to consider that possibly could lead a bankruptcy court to reach a different result. In the *Dewey Ranch* decisions, the NHL was considered a secured creditor because it funded the Coyotes operating losses when Moyes could no longer fund the team.<sup>267</sup> If, however, the NHL had not funded the Coyotes during its time of financial distress, the NHL would not have been considered a secured creditor and the bankruptcy court may not have been so inclined to find in the NHL's favor.

A bankruptcy court also might reach a different conclusion if the party seeking to relocate a team meets league written requirements and presents positive integrity and character attributes. Judge Baum included an extensive section in his *Dewey Ranch II* analysis detailing the NHL's decision to reject PSE's application to buy the Coyotes and to move the team to Canada.<sup>268</sup> All of the league's reasons for rejecting Balsillie's bid related to Balsillie's "integrity and willingness to be a good partner," as articulated in the memorandum presented to the court by the NHL following its July 29 meeting and rejection of Balsillie as an owner.<sup>269</sup> Balsillie's conduct during his prior dealings with the Predators and the Penguins was perceived by the NHL to be in bad faith, and the league was worried that he would be unwilling to abide by league rules if he were to acquire the team and move it to Hamilton.<sup>270</sup> The NHL also was concerned that Balsillie's objective to acquire an NHL team was not in the league's best interests.<sup>271</sup> For example, the memorandum stated that Balsillie's approach

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267. *Id.* at 33–34.

268. *In re Dewey Ranch*, 414 B.R. at 583–85.

269. *Id.* at 583.

270. *Id.* at 584.

271. *Id.* at 585.

involved “attempting to hold the league and Commissioner Bettman up to public ridicule as allegedly anti-Canadian and harming the league’s goodwill with fans . . . throughout North America.”<sup>272</sup> These statements negatively depict Balsillie as manipulative and spiteful, and this memorandum certainly may have influenced the court’s decision to reject PSE’s bid with prejudice. A court may be persuaded otherwise if a party refrains from making statements that clearly demonstrate a strategy to undermine the sports league and its representatives.

In addition, the court may have been persuaded to find in favor of relocation if the proposed site was located further from other member franchises. In the *Dewey Ranch* decisions, one of the major issues was that Hamilton is located within the home territory of the Toronto Maple Leafs.<sup>273</sup> The NHL Constitution prohibits a team from moving into another team’s home territory without the consent of the league.<sup>274</sup> If, however, Hamilton was not located within the home territory of the Toronto Maple Leafs and, instead, was located in unclaimed territory, the court may have been more willing to find in favor of relocation because granting approval would not have directly harmed another franchise. This relocation solution alone, however, would not have cured the NHL’s objection to Balsillie’s application—which was not filed according to the deadline set forth in section 363.<sup>275</sup>

Lastly, the court may have reached a different conclusion if the antitrust allegations were filed in a timely manner, creating a history of a bona fide dispute. Although Judge Baum assumed that the parties were subject to a bona fide dispute in *Dewey Ranch II* and, in turn, based his decision on the adequate protection requirement of 363(e),<sup>276</sup> he was unwilling to find or assume a bona fide dispute in *Dewey Ranch I* because the parties had failed to file their antitrust claims when the petition for bankruptcy was first filed.<sup>277</sup>

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272. *Id.*

273. *Id.* at 588–89.

274. Amended Complaint, *supra* note 27, at 8.

275. *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30, 39 (Bankr. D. Ariz. 2009). PSE’s relocation application was filed after the May 19 hearing. *Id.*

276. *In re Dewey Ranch*, 414 B.R. at 590.

277. *In re Dewey Ranch*, 406 B.R. at 40. The antitrust action was not filed until May 7, 2009, which was two days after the Debtors had filed the Chapter 11 petition. *Id.* at 35.

Citing *Vortex Fishing Systems*, Judge Baum noted that the “mere existence of pending litigation or the filing of an answer is insufficient to establish the existence of a bona fide dispute.”<sup>278</sup> If the parties had timely filed their antitrust claims and, therefore, established a history of dispute regarding the antitrust issue, Judge Baum may have been willing to establish a bona fide dispute. Additionally, now that the Supreme Court has determined that a sports league cannot be considered a single entity, an argument can be made that there is now applicable nonbankruptcy law—antitrust law—under section 363(f)(1) that prohibits the unilateral control of leagues over issues of franchise ownership and relocation.

These factual issues are interesting to ponder, but it is doubtful that they would make much difference in the outcome in bankruptcy court. Unlike trial courts where evidence is meticulously presented and facts carefully discerned, the underlying mission of the bankruptcy court may preclude such a process and may create a gravitational pull away from this kind of analysis. The bankruptcy court’s role is to resolve issues of insolvency and to protect the interests of the parties, including claimants that likely will see the value of their claims significantly reduced during the proceedings.<sup>279</sup> Accordingly, *Dewey Ranch II* ultimately turned on the issues of adequate protection for the sports league and the application of section 363(e). As a result, it is likely that even if there was greater factual evidence of a bona fide dispute or a more compelling argument to establish applicable nonbankruptcy law to support a sale of the assets, the bankruptcy court still has the discretion under section 363(e) to find that the rights of the NHL or other sports league are not adequately protected by a sale of the assets in a bankruptcy proceeding.

There is an interesting Catch-22 to this decision as it relates to the single entity issue. In adopting the controlling line of reasoning related to protection of the interests of the NHL, the court made an assumption that the league actually has paramount compelling interests that require protection. The interests of the NHL have been identified as: 1) the right to admit only new members who meet the league’s written

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278. *Id.* at 39.

279. Conveny, *supra* note 11, at 434.

requirements; 2) the right to control where its members play their home hockey games; and 3) the right to a relocation fee, if appropriate under the circumstances of the case.<sup>280</sup> By making these assumptions and allowing the NHL to control in such a manner, the court effectively determined a single entity status for the league. In the alternative, even if Judge Baum did not intend to characterize the NHL as a single entity and, instead, viewed the league as a joint venture or even an independent entity, he failed to lawfully apply the Rule of Reason analysis. With such a result, the Rule of Reason effectively functions as a de facto legality rule and has been described as “in practice . . . no more than a euphemism for nonliability.”<sup>281</sup> In fact, Judge Douglas Ginsburg of the D.C. Circuit Court of Appeals conducted a review of restraint cases between 1977 and 1991 and found that plaintiffs lost over ninety percent of the time.<sup>282</sup> This reality may explain Judge Baum’s reluctance to apply the defendant-friendly Rule of Reason analysis and, instead, assume for purposes of judicial economy that the NHL’s interests are, indeed, both reasonable and paramount.

Ironically, the NHL took advantage of Judge Baum’s assumptions about the compelling nature of the league’s interests and, in arguing that the Debtors did not have a legitimate antitrust claim against the NHL in *Dewey Ranch II*, the NHL used the district court decision in *American Needle* as persuasive authority.<sup>283</sup> For example, in the NHL’s Motion to Dismiss, the league stressed *American Needle* in stating that “the Seventh Circuit recently applied this ‘single entity’ doctrine to the National Football League . . . finding that when thirty-two NFL teams get together to make decisions . . . they are acting as a single economic unit; the same principle applies to the NHL.”<sup>284</sup> Because the Supreme Court now has overruled the Seventh Circuit’s holding, a league can no longer hide behind such case law when its

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280. *In re Dewey Ranch*, 414 B.R. at 591.

281. Marina Lao, *Resale Price Maintenance: The Internet Phenomenon and Free Rider Issues*, 55 ANTITRUST BULLETIN 2, 507 (2010) (quoting Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1997)).

282. *Id.* at 508 (citing Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 71 (1990)).

283. McCann, *supra* note 99, at 775.

284. NHL’s Motion to Dismiss, *supra* note 53, at 3.

autonomy is challenged.

### C. *The Implications of American Needle*

Issues involving control by sports leagues over the sale and relocation of teams based on issues of antitrust law will depend not only on the predisposition of the bankruptcy courts to avoid such an end-run around federal district courts but also on the Supreme Court's decision in *American Needle*. Although the Court resolved the inconsistencies of the single entity analysis among the circuits, it failed to clarify the Rule of Reason analysis. As a result, even though there now may be a more predictable avenue of redress for franchises in the federal district and appellate courts, the specific application of the Rule of Reason still is uncertain. It can be expected, that in the future, litigants will continue to file cases relating to league control of sales agreements and franchise relocations in the federal courts in the hope that a judge will deem such control to be unreasonable under the Rule of Reason analysis.

As litigants continue to pursue issues involving antitrust prohibitions within the context of sports leagues in the federal district courts, opportunities for petitioners in bankruptcy court with grievances related to antitrust law may have been strengthened by the decision in *American Needle*. Following *American Needle*, bankruptcy courts may take a different approach in the future by treating teams as individual businesses.<sup>285</sup> In doing so, a bankruptcy judge may even confirm a reorganization plan that permits the sale and relocation of a sports team to the highest bidder, despite disapproval by either the league or the team's owner.<sup>286</sup> If this is the case, the bankruptcy court will continue to function as an end-run. If, however, the issue is whether the relocation restriction is anticompetitive, under section 363 the bankruptcy court still would have to apply antitrust precedents to determine the legality of the relocation restriction under the Rule of Reason just as the federal district court is obligated to do. In that case, there would be no advantage to the bankruptcy court forum over the district

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285. Mark Donnel, *What Role Can a Professional Sports League Play When One of Its Teams Enters Bankruptcy?*, JETLAWBLOG (June 8, 2010, 1:00 AM), <http://jetl.wordpress.com/2010/06/08/3097/>.

286. *Id.*

court, and there would be no end run.

Additionally, if the economy continues to suffer, professional sports teams will struggle financially and, like the Coyotes, a team may find itself insolvent and in need of bankruptcy relief. The recent situation with the Texas Rangers provides an example. In May 2010, the Rangers filed for bankruptcy protection after its owner, Tom Hicks, failed to sell the team in an effort to relieve its debt.<sup>287</sup> Unlike the Coyotes, however, the Rangers do not appear to have filed for bankruptcy to circumvent league rules. In fact, MLB supported the Rangers's effort to sell the team to its preferred applicant, the Greenberg-Ryan Group.<sup>288</sup> The creditors, however, blocked the sale, leaving MLB Commissioner Bud Selig anxious and ready to intervene "in the best interests of baseball."<sup>289</sup> The auction for the team ended on August 5, 2010, and, to the satisfaction of the team and MLB, the Greenberg-Ryan Group "emerged victorious."<sup>290</sup> In confirming the team's reorganization plan, however, the Greenberg-Ryan Group gained ownership of the team without MLB's direct intervention.<sup>291</sup> United States Bankruptcy Judge D. Michael Lynn presided over the Rangers case and stated early on that, "[MLB] is not in charge of this case."<sup>292</sup> In the words of Associate Press writer Angela K. Brown, "the case may have been a wake-up call for owners and sports executives across the country because it made one thing clear: [w]hen teams file for bankruptcy, teams are no longer in charge."<sup>293</sup> The fact that the Rangers's plan was confirmed without the consent of MLB raises the question as to "[what a] professional sports league [can] do to stop a sale in bankruptcy of one of its teams."<sup>294</sup>

In light of the Coyotes case and the recent Rangers decision, it is clear that the bankruptcy court does not have to

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287. Stephen Hawkins, *Rangers Seek Bankruptcy Protection to Spur Sale of Team*, FOX SPORTS (May 24, 2010), <http://msn.foxsports.com/mlb/story/Rangers-seek-bankruptcy-protection-for-sale-052410?GT1=39002>.

288. Donnel, *supra* note 285.

289. *Id.*

290. Angela K. Brown, *Experts Say Unpredictable Texas Rangers Bankruptcy Case Is Wakeup Call to Leagues, Teams, Fans*, ABC NEWS (Aug 14, 2010), <http://abcnews.go.com/Sports/wireStory?id=11399871>.

291. *Id.*

292. *Id.*

293. *Id.*

294. Donnel, *supra* note 285.

rule on the merits of established law in reaching a decision. Rather, there is an auction in bankruptcy court that is often unpredictable. Perhaps this is what concerned Judge Baum and explains the signal that he may have been sending to future litigants. It also may explain the judge's emphasis on balancing the interests of the parties to the exclusion of other analyses. In effect, it is possible that Judge Baum was saying to future litigants, "You can come this way again, but it will not be easy for you." In light of the recent bankruptcy filing by the Rangers, however, it appears that this "face off" will continue.

#### CONCLUSION

The permissible control of national sports leagues over individual franchise owners in the leagues in the context of antitrust law has evolved over the last century. The federal circuits have been split on whether antitrust law applies in this setting, and the future for litigants has been very uncertain. Most recently, the Coyotes pushed the envelope by seeking redress in bankruptcy court, presumably to take advantage of underlying protections of creditor's rights and what it perceived as advantageous language in the Code to achieve a result that may not have been possible in federal district court. Although this approach was unsuccessful in the *Dewey Ranch* case, different and more compelling facts may change the result in the future. The Supreme Court's decision in *American Needle* resolved the single entity issue as it relates to sports franchises and will affect the future of litigants in the federal district courts and most likely in the federal bankruptcy courts as well.