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**MLS SCORES AGAINST ITS PLAYERS:
*FRASER V. MAJOR LEAGUE SOCCER, LLC***

Matt Link

INTRODUCTION

Major League Soccer, LLC (MLS) claimed victory when the U.S. Court of Appeals for the First Circuit refused to reinstate players' antitrust claims against the league. In *Fraser v. Major League Soccer*, [EN 1] the court upheld the district court's ruling in favor of MLS based mainly upon the fact that the plaintiffs failed to prove a relevant market. However, the real significance of the court's decision is that it refused to reverse the District Court's ruling that MLS constitutes a single entity.

This note argues that although the court reached the proper decision by relying on the jury's finding that a relevant market was not proven, the court's failure to classify MLS as a single entity for § 1 purposes is inconsistent with the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.* [EN 2] and cases interpreting *Copperweld*. Part II of this note describes the structure of MLS and the players' claims against the league. Part III describes the *Copperweld* decision and its rationale. Part IV also describes *Sullivan v. National Football League*, which applied the single entity theory discussed in *Copperweld* to the NFL. Finally, Part V argues that MLS should have been labeled a single entity under both *Copperweld* and the expansion of *Copperweld* in *Sullivan*.

II. BACKGROUND

In 1988, the Federation Internationale de Football Association ("FIFA") awarded the USSF, the national governing body of soccer in the United States, the right to host the 1994 World Cup soccer tournament in the U.S. [EN 3] In consideration of this honor, the USSF promised to establish a Division I professional soccer league in the U.S.

In 1995, MLS was officially formed as a limited liability company ("LLC") under Delaware law. [EN 4] MLS's structure is unique for a sports league in several ways. First, MLS owns all of the teams that play in the league. Secondly, MLS owns and controls all intellectual property rights that relate to the league or any of its teams. [EN 5] Thirdly, The league also owns all tickets, owns all broadcast rights, supplies equipment and pays the salaries of referees and other league personnel. Additionally, MLS negotiates all stadium leases, sets teams schedules and assumes all related liabilities. [EN 6]

The MLS features a Management Committee that is composed of each of its investors. Several of the investors have also entered into Operating Agreements with MLS, which, subject to certain conditions and obligations, give them the right to operate specific MLS teams. [EN 7] Operator-investors run nine out of the twelve teams in the league. Operators are given some leeway in running their local teams. They negotiate local sponsorship and broadcast agreements, but do so as agents of MLS. [EN 8] Team operators are also responsible for hiring general managers and coaches at their own discretion. They pay local staff and office expenses, local promotional costs for home games, and one-half of the stadium rent. [EN 9]

Under the Operating Agreement, MLS pays each operator a management fee. [EN 10] At the time *Fraser* was litigated, team operators received:

- (a) 100% of the first \$1.24 million, and 30% of the excess over the \$1.24 million, of local television broadcast and sponsorship revenues, the latter percentage subject to some specified annual increase;
- (b) 50% of ticket revenues from home games, increasing to 55% in year six of the league's operation; and
- (c) 50% of stadium revenues from concessions and other sources. [EN 11]

All other revenues generated by operation belong to MLS and profits are distributed in a manner consistent with its charter as a LLC. [EN 12]

The players specifically took issue with MLS's control over player employment. Operator-investors do not directly hire players for their respective teams. Rather MLS has the "sole responsibility for negotiating and entering into agreements with, and for compensating players." [EN 13] Players sign contracts with MLS and not with their respective teams. "MLS centrally establishes and administers rules for the acquisition, assignment, and drafting of players, and all player assignments are subject to guidelines set by the Management Committee." [EN 14] As a result, the league as a whole determines who plays where and how much they get paid.

Consequently, the players charged the MLS and its operator-investors with three antitrust violations: (1) MLS and its operators violated Sherman Act §1 by agreeing not to compete for player services; (2) MLS monopolized or attempted to monopolize, or combined or conspired with the USSF to monopolize, the market for the services of Division I professional soccer players in the U.S. in violation of Sherman Act §2; and (3) the combination of MLS's operators' assets substantially lessened competition and tended to create a monopoly in violation of Clayton Act §7 [EN 15].

The district court resolved the § 1 and § 7 claims on summary judgment. The court ruled that MLS and its operators constituted a single entity incapable of conspiring for § 1 purposes. [EN 16] The court also concluded that there was no § 7 liability because the formation of MLS did not involve the acquisition or merger of existing business enterprises, but rather the formation of an entirely new entity which itself represented the creation of an entirely new market. [EN 17]

A jury decided the fate of the § 2 claims. The court entered judgment for MLS and USSF because the jury concluded that the players failed to prove that the relevant geographic market is the United States and that the relevant product market is limited to Division I professional soccer players. [EN 18] The players then appealed the district court's ruling on the §1, §2, and §7 claims.

The First Circuit first ruled that any error in determining that MLS and the operators constituted a single entity was harmless in light of the jury's finding that the players failed to prove a relevant market. [EN 19] The court reasoned that even if §1 did apply to MLS and its operators, the per se rule would not apply. The court stressed that the arrangement was a risky venture formed against a background of failure, and that the league yielded pro-competitive effects. [EN 20] As a result, like other rule of reason cases, the players had to show that "MLS exercised significant market power in a properly defined market, that the practices in question adversely affected competition in that market, and that on balance the adverse effects on competition outweighed the competitive benefits." [EN 21] Therefore, the jury's conclusion on the market issue precluded this claim.

The court next ruled that the § 2 claims were also doomed by the jury's findings. Regarding the monopolization and attempted monopolization claims, the court stressed that both require a showing that a market has been or may well be subject to monopoly power. [EN 22] Since the jury rejected the players' proposed market, the players' § 2 claims could not succeed. The court proceeded to overrule the players' evidentiary objections relating to the jury verdict. Regarding the conspiracy to monopolize claim, the players argued that proof of a relevant market is not required. While the court recognized that proof of a relevant market and market power are not required in some conspiracy to monopolize claims, this case was not one of them. “The exclusivity agreement sought by MLS might be unlawful if it threatened adverse competitive effects but not otherwise.” [EN 23] This required proof that MLS was the only purchaser of Division I soccer player services in the United States and that it would control prices in a relevant economic market. Therefore, the jury's findings precluded such a result.

The First Circuit lastly upheld the district court's dismissal of the § 7 claim. The players argued that the fact that MLS entered a new market should not immunize it from liability. According to the players, § 7 should be used to “prevent a merger that itself increases competition where it can be confidently predicted the prevention will increase competition even more.” [EN 24] The court acknowledged that those types of situations might arise. However, the court concluded that this is not that type of case. There is no way to predict what would happen if MLS were prohibited; investors might have abandoned the idea completely. Even if the court accepted the players' broad reading of § 7, they would have needed to prove that “MLS operates within a relevant economic market that is presently concentrated.” [EN 25] Again, this result is precluded by the jury's findings. As a result of the court's ruling, the players' antitrust claims were all defeated.

III. ANALYSIS

While the court was ultimately correct in deciding that the players' antitrust claims should fail, the court should have unambiguously classified MLS as a single entity for § 1 purposes.

A. The Copperweld Decision

The Supreme Court's decision in *Copperweld* [EN 26] led some to believe that sports leagues should be treated as single entities for § 1 purposes. In *Copperweld*, the Court found a corporation and its wholly owned subsidiary to be a single enterprise for § 1 purposes. [EN 27] Independence Tube Corporation claimed that *Copperweld* and its wholly owned subsidiary, *Regal*, conspired to harm Independence's business in violation of §1 of the Sherman Act. The jury determined that *Copperweld* and *Regal* had conspired to violate § 1. The Seventh Circuit Court of Appeals affirmed the judgment, [EN 28] and the Supreme Court granted certiorari. The issue before the Court was “whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under section 1 or the Sherman Act.” [EN 29]

The Supreme Court stressed that, “an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police.” [EN 30] The court reasoned that officers within a single firm do not have separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. [EN 31] Similarly, the Court reasoned that a “parent and its wholly owned subsidiary have a complete unity of interest.” [EN 32] Consequently, the Court held that

a parent and its wholly owned subsidiary are incapable of conspiring with each other for § 1 purposes. [EN 33]

It is important to note that the court did not consider “under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.” [EN 34] This clarifies the point the Court's analysis focused entirely on financial ownership and control in determining whether single entity status should be granted. [EN 35]

B. The Extension of Copperweld

Following the Supreme Court's decision in Copperweld, professional sports leagues attempted to avail themselves single entity protection for § 1 purposes. In Sullivan, [EN 36] the NFL raised the defense that under Copperweld, the league is a single enterprise unable to conspire under § 1 of the Sherman Act. [EN 37] The First Circuit Court of Appeals determined that Copperweld did not apply to the facts of the case or affect prior precedent concerning the NFL. Copperweld did not directly control because the NFL is not comprised of a parent and a wholly owned subsidiary. The court's analysis focused on whether “the alleged antitrust conspirators have a ‘unity of interest’ or whether, instead, ‘any of the defendants has pursued interests diverse from those of the cooperative itself.’” [EN 38] This slightly modifies the reasoning of Copperweld where the Court strictly focused on issues of financial ownership and control. [EN 39]

The court concluded that NFL teams compete with one another in several ways off the field. This tended to prove the teams pursue diverse interests and thus are not a single enterprise. [EN 40] The court based its conclusion on the fact that teams compete “for things like fan support, players, coaches, ticket sales, local broadcast revenues, and the sale of team paraphernalia.” [EN 41] Furthermore, most relevant to the court's decision was the jury's finding that the individual teams compete for the sale of ownership interest. [EN 42]

C. Application to Fraser v. MLS

In Fraser, The First Circuit Court of Appeals mistakenly refused to classify MLS as a single entity for § 1 purposes. Both the rationale applied in Copperweld and the test applied in Sullivan support this conclusion.

As discussed above, the Court in Copperweld focused on the fact that the parent financially owned and fully controlled its subsidiary. Based on this rationale, MLS is the same type of single entity. MLS is a LLC organized under Delaware Law. [EN 43] MLS has full ownership of its teams. Therefore, the court reasoned that MLS should be treated no differently than a corporation. [EN 44] As the district court explained, “MLS is what it is. As a single entity, it cannot conspire with its investors in violation of § 1, and its investors do not combine or conspire with each other in pursuing the economic interests of the entity.” [EN 45] This is plainly consistent with the conclusion in Copperweld that “officers or employers of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.” [EN 46]

The Court in Copperweld also stressed that concerted behavior was singled out by antitrust law, because it “deprived the marketplace of the independent centers of decision making that competition assumes and demands.” [EN 47] Treating MLS as a single entity would not have this effect. The league's founders formed MLS as a highly centralized business organization, because they concluded it was the most efficient way to resurrect premiere

professional soccer in the United States. It is fair to assume that without MLS none of the individual teams would be able to survive. Without MLS, there would be no “independent centers of decision making,” which antitrust law strives to protect. Therefore, single entity status for MLS is consistent with Copperweld.

Furthermore, cases like *Sullivan*, which expanded the *Copperweld* rationale, do not preclude labeling MLS a single entity for § 1 purposes. The ruling in *Sullivan*, that the NFL is not a single entity under *Copperweld*, because its teams lack unity of interest, does not weigh against MLS. Assuming it is appropriate for the court to ignore MLS's formal corporate structure and evaluate its internal entrepreneurial interests, MLS is still a single entity. In *Sullivan*, the court concluded that NFL teams have “pursued interests diverse from the cooperative itself” when they competed with one another off the field. [EN 48] *Sullivan* stressed that teams compete for things like players, coaches, ticket sales, and local broadcast revenues. [EN 49]

MLS, however, does not compete for such things in the same manner. MLS, and not the individual teams, determines where players will play. Similarly, MLS owns all the tickets and broadcast rights. Individual teams negotiate local sponsoring agreements and receive a cut of ticket sales, but all is done under the watchful eye of MLS. Similar to the parent company in *Copperweld*, MLS could assert full control at any moment if an individual team fails to act in the league's best interest. [EN 50] As a result, the argument that MLS lacks of unity of interest is not as strong as the case against the NFL.

However, the First Circuit Court of Appeals believed that MLS lacks complete unity of interest when it failed to uphold the district court's single entity determination. The court focused on the fact that MLS's operators have rights that take them “part way along the path to ordinary sports team owners.” [EN 51] The court stressed that operators do independent hiring and make out of pocket expenses. It noted that operators retain a portion of their revenues from the activities of their teams. Finally, the court pointed out that each operation “has limited sale rights in its own team that relate to specific assets and not just shares in the common enterprise.” [EN 52]

First, it must be noted that the management fees paid to operators, which are based largely on the success of their independent teams, are paid in addition to, not in place of the overall revenue sharing. [EN 53] Similarly, as the district court pointed out, “the fact that there are passive investors in MLS is strong evidence that the management fees and assessment of local expenses do not account for all economic risks and benefits associated with the league's operation.” [EN 54] This shows that the operator position does not take investors down the path to ordinary team owners. Operators have very limited rights under the operating agreement. Their rights are limited to local marketing, promotional and general team administration issues. These rights may properly be viewed as an opportunity for each investor to concentrate on promoting MLS to a distinct geographic region. The ultimate goal of their efforts is to promote MLS as a whole, thereby increasing each investor's revenue share.

Second, the operators' interests are not truly divergent, because success at the local level directly benefits revenues shared by MLS as a whole. Each local operator has a strong incentive to help other operators achieve success. “Each operator-investor's personal stake is not independent of the success of MLS as a whole enterprise.” [EN 55] Therefore, it is incorrect to conclude that the operators' local interests are truly divergent. Operators receive some freedom to act at the local level. However, operators' rights derive directly from MLS, and these rights are conditioned upon acting in the best interest of the league as a whole. MLS may terminate

operators' rights if they fail to act in the best interest of the league. [EN 56] All this suggests that operators share a unity of interests; interest in the overall success of MLS.

Finally, even if it is true that operators do not share complete unity of interests, it should not preclude MLS from being a single entity relative to §1. The language “complete unity of interest” was used in *Copperweld*, but it was offered as “a statement of fact about the parent-subsidary relation, not as a proposition about the limits of permissible cooperation.” [EN 57] In *Chicago Prof'l Sports v. National Basketball Association*, [EN 58] the court determined that “*Copperweld* does not hold that only conflict free enterprises may be treated as single entities.” [EN 59] Rather, *Copperweld* determined that parent-subsidary combinations are treated like unilateral actors, because they cooperate internally to increase efficiency. [EN 60] *Chicago Prof'l Sports* went on to hold that a sports league may be treated as a single firm by following this analysis. [EN 61]

As a result, MLS should be a single entity under *Chicago Prof'l Sports* even if the court refuses to recognize MLS's corporate structure or unity of interests. This conclusion is supported by the fact that cooperation within MLS is necessary for the league to exist at all. Investors formed MLS against the backdrop of failure for professional soccer leagues in the U.S. The cooperation within MLS is necessary for the league's survival. Considering that without MLS, professional soccer may not exist in the U.S. at all, the cooperation within MLS has the effect of increasing efficiency.

IV. CONCLUSION

Under the current state of law, MLS should have been labeled a single entity for § 1 purposes. The result of single-entity status would mean that MLS could not be subject to § 1 claims. However, the single entity determination may be unnecessary in cases like this. Sports leagues that are not given single entity immunity from § 1 claims still are afforded the opportunity to defend themselves by offering pro-competitive justifications for their actions. The single entity issue will significantly affect the formation of future sports leagues. MLS's structure has been copied by virtually every new league including the WNBA, WUSA, and the now defunct-XFL. [EN 62] Therefore, future court decisions regarding the single entity application to sports leagues will have a significant impact on labor relations throughout sports.

[EN 1] *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002).

[EN 2] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

[EN 3] *Fraser*, 284 F.3d at 52-53.

[EN 4] *Id.* at 53.

[EN 5] *Fraser v. Major League Soccer, L.L.C.*, 97 F.Supp.2d 130, 133 (D. Mass, 2000).

[EN 6] *Fraser*, 284 F.3d at 53.

[EN 7] *Fraser*, 97 F.Supp.2d at 132.

[EN 8] *Id.* at 133.

[EN 9] *Fraser*, 284 F.3d at 53.

- [EN 10] *Fraser*, 97 F.Supp.2d at 132.
- [EN 11] *Id.* at 133.
- [EN 12] *Id.*
- [EN 13] *Fraser*, 284 F.3d at 53.
- [EN 14] *Fraser*, 97 F.Supp.2d at 132.
- [EN 15] *Fraser*, 284 F.3d at 54-55.
- [EN 16] *Fraser*, 97 F.Supp.2d at 139.
- [EN 17] *Id.* at 140.
- [EN 18] *Fraser*, 284 F.3d at 55.
- [EN 19] *Id.* at 59.
- [EN 20] *Id.*
- [EN 21] *Id.*
- [EN 22] *Id.* at 61.
- [EN 23] *Id.* at 69.
- [EN 24] *Fraser*, 284 F.3d at 70.
- [EN 25] *Id.*
- [EN 26] *Copperweld*, 467 U.S. 752.
- [EN 27] *Id.* at 771.
- [EN 28] *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982).
- [EN 29] *Copperweld*, 467 U.S. at 755.
- [EN 30] *Id.* at 769.
- [EN 31] *Id.*
- [EN 32] *Id.* at 771.
- [EN 33] *Id.* at 777.
- [EN 34] *Id.* at 767.
- [EN 35] Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 *IND. L.J.*, 25, 37 (1991).
- [EN 36] *Sullivan v. National Football League*, 34 F.3d 1091(1st Cir. 1994).

[EN 37] *Sullivan*, 34 F.3d at 1099.

[EN 38] *Id.* (quoting *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268 (8th Cir. 1998)).

[EN 39] *Jacobs*, *supra* note at 39.

[EN 40] *Sullivan*, 34 F.3d at 1099.

[EN 41] *Id.* at 1098.

[EN 42] *Id.*

[EN 43] *Fraser*, 97 F.Supp.2d at 134.

[EN 44] *Id.* at 135.

[EN 45] *Id.* at 139.

[EN 46] *Copperweld*, 467 U.S. at 769.

[EN 47] *Id.*

[EN 48] *Sullivan*, 34 F.3d at 1099.

[EN 49] *Id.* at 1098.

[EN 50] *Copperweld*, 467 U.S. at 771-72.

[EN 51] *Fraser*, 284 F.3d at 57.

[EN 52] *Id.*

[EN 53] *Fraser*, 97 F.Supp.2d at 136.

[EN 54] *Id.*

[EN 55] *Id.* at 136.

[EN 56] *Id.* at 133.

[EN 57] *Chicago Prof'l Sports v. National Basketball Association*, 95 F.3d 593, 598 (7th Cir. 1996).

[EN 58] *Id.*

[EN 59] *Id.*

[EN 60] *Id.*

[EN 61] *Id.*

[EN 62] *Grahame L. Jones, Jury Rules in Favor of League and Players Sue*, L.A. TIMES, December 12, 2000, at D3.