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OWNERSHIP CONTROL OVER PROFESSIONAL SPORTS TEAMS' PAYROLLS: COULD ANYONE HAVE STOPPED TOM WERNER FROM DISMANTLING THE SAN DIEGO PADRES?

L. PATRICK AULD*

I. INTRODUCTION

This Note examines the rights and responsibilities of major league sports franchise ownership groups, focusing specifically upon events during recent years involving the San Diego Padres major league baseball club. In addition, it compares and contrasts these events to other professional sports contexts. The Note concentrates on player personnel and payroll, the major issues of the controversy in San Diego, while offering parallels to ownership control over other matters in the world of sports. The Note is organized in the following fashion: first, a brief description of the perceived problems posed by absolute ownership autonomy; second, a discussion of the arguments depicting the perceived problem as unmanageable or non-existent; and third, analyses of the various options available to those parties aggrieved by certain ownership decisions.

II. THE PERCEIVED PROBLEM

Most observers would concede that an owner of a major league sports team should have a great deal of autonomy to determine how the business of the franchise ought to be conducted.¹ However, certain forms of ownership action draw intense negative public reaction. This phenomena is perhaps most pronounced when

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1. See, e.g. John Harris, *Fiduciary Duties of Professional Team Sports Franchise Owners*, 2 SETON HALL J. SPORT L. 255, 266 (1991). Even Harris, who is intensely critical of unchecked ownership autonomy, acknowledges that "[a]ll professional sports teams are business enterprises. Ownership's retention of profits from operations of teams is the main objective of the business side of professional sports." *Id.*

the owner's actions appear directed toward improving the owner's financial "bottom line" at the fans' expense.² The exercise of ownership prerogatives in pursuit of increased profits has perhaps been most carefully considered in the context of franchise relocations.³ However, allegations of ownership "profiteering" arise in other situations as well.

During the 1992 season, the ownership group of the San Diego Padres, led by Tom Werner,⁴ determined that it should engage in cost-cutting measures. The absence of a full public disclosure of the team's budget figures and accounting practices makes it unclear whether the team was losing money, whether it was projected to lose money or whether the team was simply not as profitable as the owners desired.⁵ Determining a team's financial health is further complicated, since year-to-year profitability, as illustrated by balance sheets and year-end reports, may not accurately reflect the owners' return on their investment. The Werner Group purchased the Padres from Joan Kroc in 1990 for \$75 million.⁶ Recent studies of major professional sports franchises valued the Padres franchise between \$85 and \$100 million.⁷ Ultimately, the Werner Group sold 80 percent of the team to John Moores for \$80 million. Thus, in

2. See, e.g., *id.* at 266 ("retention of what the public sees as 'too much' of the profits and not enough reinvestment back into the team is often seen by the public as disloyal."); Mortimer Zuckerman, *It's Only a Game - Or Was*, U.S. NEWS AND WORLD REP., Aug. 23, 1993, at 68 (discussing impact of perceived ownership greed on professional sports).

3. See, e.g., Kenneth Shropshire, *Opportunistic Sports Franchise Relocations: Can Punitive Damages in Actions Based Upon Contract Strike a Balance?*, 22 LOY. L.A. L. REV. 569 (1989).

4. Werner, a television executive who made millions producing *The Cosby Show* and *Roseanne*, owned a controlling 40% block of the Padres. See John Steinbreder, *The Owners*, SPORTS ILLUSTRATED, Sept. 13, 1993, at 64.

5. The discussion which follows provides some insights into the Padres' financial situation; however, for the purposes of this Note, evaluating the club's actual financial condition, while perhaps informative and interesting, is not critical. Ultimately, this Note is not designed to determine definitively if the Werner Group acted in "bad faith," but rather to evaluate how those parties aggrieved by a professional sports franchise owner's decisions might take recourse. The Padres scenario is simply employed as a plausible factual background to enrich the analysis. Today, the Montreal Expos situation could just as easily be substituted. See, e.g., Gordon Edes, *Rich Get Richer, Poor Get Poorer, and Baseball Suffers*, FORT LAUDERDALE SUN-SENTINEL, April 9, 1995 at 9C (analogizing Expos recent personnel moves to 1993-1994 Padres situation).

6. Michael S. Jacobs, *Professional Sports Leagues, Antitrust and the Single Entity Theory*, 67 IND. L.J. 25 (1991).

7. See Michael Ozanian, et. al., *The \$11 Billion Pastime*, FINANCIAL WORLD, May 10, 1994 at 52; Steinbreder, *supra* note 4. But see Steve Halvonik, *Pirates Slip to Last in Baseball Franchise Value*, PITTSBURGH POST-GAZETTE, April 19, 1995, at C7 (noting that FINANCIAL WORLD lowered estimated values for most baseball franchises, including the Padres in 1995, in large part due to the strike).

four years, the Werner Group earned five million dollars on its investment, while still retaining a sizeable minority interest.⁸

In order to achieve the desired savings, the club's front office engineered a massive payroll cut. By mid-summer 1993, the Padres had eliminated \$25-30 million in salaries from their annual budget.⁹ In the process, the Padres either traded or released at least six starting position players and four top pitchers. At times, the Padres' revamped starting lineup featured nine players with less than five years combined major league experience and a combined salary less than the single lowest paid player on the field for the opposing team.¹⁰ As a result of the moves, the team went from contending for the National League's West Division crown in 1992 to losing over one hundred games in 1993.¹¹

The apparent dismantling of the team angered many of the Padres' season ticketholders, fans, and players. Additionally, damage to the game's competitive balance disturbed others, including major league players' union officials and fans at large. The following section examines whether the various interested parties have legitimate reasons for feeling aggrieved by such drastic unilateral ownership action. The final section considers the types of recourse available to critics of ownership action.

III. IS THE PERCEIVED PROBLEM REALLY A PROBLEM AT ALL?

Many observers do not perceive the Werner Groups' player personnel moves as a problem at all. Some turnover among players is standard in "rebuilding processes" or "youth movements."¹² Arguably, the emergence of talented, new players on the 1993 club is evidence that the owners did not gut the franchise, but rather that the front office made shrewd deals.¹³

Such claims are questionable, particularly because the Padres moved not only older players, but also young superstars, like Gary Sheffield. As one sportswriter noted, "[i]t's hard to support an ar-

8. See *Houston's Moores Purchases 80 Percent of San Diego Padres*, *HOUSTON CHRON.*, Dec. 22, 1994, at 4.

9. Dave Sheinin, *Fire Sale in San Diego Leaves Players, Fans Steaming*, *WASHINGTON POST*, July 5, 1993, at C1.

10. *Id.*

11. When the 1994 season was interrupted by the player's strike, the Padres held the worst record in the National League and were on a pace to lose close to 100 games again.

12. Indeed, the Padres' front office at times denied that the personnel moves were primarily motivated by budgetary concerns. These claims have been, at best, skeptically received. See, e.g., Sheinin, *supra* note 9.

13. Ricky Gutierrez, Derek Bell, and Phil Plantier, all acquisitions from this period, performed well for the Padres during the 1993 season. See *id.*

gument for rebuilding by dealing away a 24-year-old third baseman who narrowly missed the Triple Crown last season."¹⁴ In addition, the Padres spent the 1993-94 offseason shopping some of their young players, such as Derek Bell, who arrived as unproven talent, but later emerged as budding stars in 1993.¹⁵ Finally, throughout the period, the Padres reportedly solicited offers for the team's remaining young star pitcher, Andy Benes, whom the front office previously described as "untouchable."¹⁶ These factors suggest that under Werner, the Padres were fielding teams composed of considerably less talented players in order to achieve lower payroll costs and higher ownership profits.

Other observers contend that the Padres endured criticism simply because they were ahead of a wave of much-needed cost-cutting in the major leagues. These defenders of the Werner Group point to the lower expected network television revenues and mounting complaints of financial difficulties in so-called "small market" cities.¹⁷ Only time will allow for a satisfactory evaluation of these claims. For the purposes of this Note, these claims are significant in that they illustrate two key problems with policing ownership actions in the personnel and payroll area: it is difficult to determine when and by whom an owner should be second-guessed. Given that an owner and his or her front office would likely have the best information about how to structure the team, many observers feel that an owner's decisions should be challenged only in the court of public opinion, and not in a court of law.¹⁸

The argument that regulation of ownership action is too difficult is only one justification for a laissez-faire approach in this area. Another similar, but conceptually distinct, argument might

14. *Id.* In order to win the "Triple Crown" a player must lead his respective league in batting average, home runs, and "runs batted in" (RBIs).

15. Peter Pascarelli, *Baseball Report*, THE SPORTING NEWS, November 1, 1993, at 19.

16. *Id.* Benes was ultimately traded.

17. See Edes, *supra* note 5; Mark Maske, *Six Division Plan for Baseball Passes*, WASHINGTON POST, Sept. 10, 1993, at C1 (discussing the financial future of major league baseball). Whether San Diego, one of the nation's largest cities, is truly a "small market" is a separate question beyond the scope of this Note. See generally Kevin E. Martens, *Fair or Foul? The Survival of Small Market Teams in Major League Baseball*, 4 MARQ. SPORTS L. J. 323 n. 17 (1994) (defining San Diego as a large market).

18. See generally Stephen Ross, *Monopoly Sports League*, 73 MINN. L. REV. 643, 702-03, 714 (1989) (attacking judicial regulation of professional sports teams as ineffective and onerous). See also Robert Baade and Carolyn Tuttle, *Owner Collusion or Sound Fiscal Management: An Analysis of Recent Events in Baseball's Labor Market*, 1 SETON HALL J. SPORT L. 41 (1991). The rationale behind this position can be understood as theoretically similar to the rationale for the business judgment rule in the general corporate context. See Robert Clark, *CORPORATE LAW* (1986) at 123-40.

be that sports franchise owners have the right to do whatever they wish as a function of their property right in their team.¹⁹ Under this rationale, Werner would be privileged to field a losing team in the interest of making money, if he so desired. However, this argument fails to recognize the monopolistic characteristics of major league sport organization and the distinctive connection fans have to sports teams. Both of these factors should arguably temper an owner's autonomy. In addition, owners have enmeshed themselves in a complex web of contractual relationships involving players, municipalities, other owners, and even fans. These entanglements limit the owner's right to act unilaterally in many contexts and could even compromise an owner's right to exclusive oversight of personnel and payroll. The section which follows catalogs the specific legal challenges owners might face given the cartel-like organization of their business, the unique relationship between fans and sports, and existing contractual arrangements.

IV. POTENTIAL RESPONSES OF PARTIES AGGRIEVED BY OWNERSHIP ACTION

The exercise of decision-making authority by an individual owner affects a wide range of parties, including players, fans, and other owners. Not surprisingly, conflict has often arisen between these various parties. Historically, each of the different constituencies has sought to vindicate its claims in different ways. The subsections which follow discuss the various responses available to the different parties affected by an owner's management of payroll and personnel.

A. Fan Boycotts and Direct Pressure: The Market Solution

Market discipline is perhaps the most basic constraint upon ownership action. Under the market rationale, those persons who do not approve of ownership action can "vote with their feet" by not attending games or more likely in today's world, vote with their remote controls by not watching games. The free market theory posits that lower fan attendance and viewership will lead to lower revenues for the owner. Ultimately, this trend would force ownership to change its approach to structuring the club. From this perspective, fans could indirectly regulate the amount of

19. This position is seldom explicitly articulated, but it has historically informed baseball owners' responses to challenges to their autonomy. See generally MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL (1991).

money an owner would invest in the club's payroll.

In order to effectuate the market sanction more rapidly, fans must organize. The financial pressure must be complemented by protests, media campaigns and other forms of direct pressure. In San Diego, such efforts included a letter-writing campaign to the *San Diego Union-Tribune*, calls to local radio talk shows, and protests both inside and outside of the Padres' stadium.²⁰ Protesters displaying banners, such as "TRADE WERNER" and "BLUE LIGHT SPECIAL! 75% OFF!," were ejected from the stadium.²¹ These actions drew protests from the American Civil Liberties Union. Faced with the threat of a First Amendment lawsuit, the Padres agreed not to remove banners criticizing the team.²² Similar threats had produced mixed results in previous conflicts.²³ The effectiveness of such suits will generally turn upon whether the stadium is controlled at least in part by a governmental or quasi-governmental body.²⁴

Because the market sanctions, even when supplemented by direct pressure, seem insufficient to constrain ownership action, interest in other forms of action remains. Indeed, in San Diego, despite the organized efforts cited above and the concurrent precipitous drop in attendance to a league-low 20,000 per game,²⁵ the Werner payroll reductions continued. The chief problem with applying the market rationale to major league baseball is that the presupposed elements of the free market are simply not present. Because of the major league sports owner's guarantee of revenue through the existing systems of league-wide revenue sharing and his insulation from competition through the cartel arrangement, the fans' ability to create financial pressure is severely curtailed.

Contrary to the market hypothesis, the Padres do not earn revenue in direct proportion to the number of fans who come to watch the Padres or who choose to watch the Padres on local television. Because certain revenues, such as network television con-

20. See Sheinin, *supra* note 9.

21. *Id.*

22. *ACLU and Padres Reach Agreement Over Sign Confiscation*, October 27, 1993, available on LEXIS, Nexis UPI Library, UPI file.

23. See Lawrence Israeloff, *The Sports Fan v. The Sports Team Owner: Does a Franchise's Prohibition of Spectators' Banners Violate the First Amendment*, 24 COLUM. J.L. & SOC. PROB. 419, 420-23 (1991) (discussing the complaints raised by the ACLU during a similar conflict involving George Steinbrenner and the New York Yankees).

24. *Id.* at 423-28.

25. See Sheinin, *supra* note 9. The Padres finished last in attendance in the National League in the strike-shortened 1994 season. See Tom Friend, *No Need to Show Pity for the Padres*, N.Y. TIMES, Apr. 11, 1995, at B14.

tracts, expansion fees and product licensing revenue are shared in some league-wide fashion,²⁶ the Werner Group can take home a large block of revenue, and perhaps, more importantly, enjoy rising franchise value,²⁷ without substantial support in San Diego.²⁸ Werner thus becomes a classic free rider. He contributes little to the value of the team or the league as a whole, but he profits from the investments and efforts of others. This free rider problem could, in fact, serve as the basis for fiduciary duty actions.²⁹

Finally, the Padres virtually guaranteed position as the only major league baseball team in San Diego also undermines the effectiveness of the market solution.³⁰ Since there are no close substitutes for major league baseball, fans in San Diego must pay a severe price for boycotting the team. This problem is magnified by the unique connection between fans and their local sports teams:

If you reside in or near a city with a professional sports franchise, it is likely that you are one of the faithful who follow your team, swell with pride when they win the big game, or take it a little personally when they lose. Your team is the "home" team When standings are published in your newspaper's sports section, teams are not listed as "Eagles," "Redskins," "Cardinals," etc., but rather "Philadelphia," "Washington," "Phoenix," etc. It is your city's integrity at stake every time your team takes the field. This is the way it has been since ancient Greek cities vied for Olympic championships.³¹

The Werner Group can never mismanage the Padres out of the majors (and thus lose its share of league-wide revenues), nor can another club enter the league to compete against Werner in San Diego. As a result, the Padres are quite literally the only game in town when it comes to major league baseball and thus, the existing market may not afford fans a legitimate mechanism for responding to ownership actions.

26. See generally PAUL WEILER & GARY ROBERTS, *SPORTS AND THE LAW* 414-41 (1993).

27. See discussion *supra* notes 5-9 and related text.

28. In fact, according to one recent study the Padres had Major League Baseball's lowest total gate receipts during the 1993 season (\$14.1 mil.), and yet were the fourth most profitable team. Ozanian, *supra* note 7.

29. See subsection IV.-F. below.

30. Only New York, Los Angeles and Chicago have multiple major league baseball franchises. Hypothetically, another team could be placed or move to San Diego, but such a development is extremely unlikely. Expansion and relocation are limited by the owners and the appearance of financial difficulty in San Diego with one team effectively eliminates any possibility for the emergence of a competing franchise in the city.

31. Harris, *supra* note 1 at 255.

B. *The Commissioner's Office: Internal Regulation*

The commissioner's office has traditionally served as the key complement to the market check on ownership action. The position of commissioner emerged in major league baseball following the alleged World Series fix of 1919.³² The major league owners agreed that they needed a strong system of internal regulation headed by a respected leader to restore and to preserve the integrity of the sport.³³ The notion of the noble commissioner empowered to protect the "best interests of the game"³⁴ arose out of this controversy. Because of the commissioner's broad mandate, it is not surprising that many parties seeking to restrain individual owners appealed to the office.

The confrontation between Bowie Kuhn and Charlie Finley highlighted the role of the commissioner in policing the very type of controversy which now exists in San Diego. Faced with the prospect of losing his many star players as free agency emerged in major league baseball, Finley, the colorful owner of the World Champion Oakland Athletics sold the rights to several of Oakland's superstars to other clubs for cash.³⁵ Finley claimed that his actions were in the long-term best interests of the club and that the cash he received would allow him to build a team in the future.³⁶ Commissioner Kuhn blocked the sales pursuant to his authority to act in the "best interests" of the game.³⁷ A federal court affirmed Kuhn's authority to police Finley's deals.³⁸

Today the commissioner's office no longer offers an avenue for fans or others concerned about major league baseball's competitive balance to contest ownership action. The baseball commissioner's office experienced a continual ebbing of authority throughout the last decade. The last person to hold the position, Fay Vincent, was driven from office by disgruntled owners in 1992. Vincent, and the office itself, collapsed under the weight of the central paradox embedded in the system of internal regulation: what happens when the commissioner's duty to regulate the sport conflicts with his or her responsibility to serve the owners? Even prior to Vincent's ouster, observers questioned whether a commissioner could ever

32. See, e.g., Ron Fimrite, *His Own Biggest Fan*, Sports Illustrated, July 19, 1993, at 76.

33. *Id.*

34. *Id.*

35. See *Finley v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

36. *Id.*

37. *Id.*

38. *Id.*

adequately protect interested third parties because of the office's ties to ownership:

Accordingly, even though commissioners are intended to be the guardians of their sports and often do have very broad powers to act (and often do act) 'in the best interests' of those sports, it can be argued that the public's interests are really secondary to those of ownership in the appointment and regulation of commissioners.³⁹ The recent developments in major league baseball appear to confirm these concerns.

Bud Selig, owner of the Milwaukee Brewers, has assumed the administrative duties of the commissioner's office and the owners have pushed him to remain in the post.⁴⁰ Not surprisingly, Selig has refused to intervene in any manner in San Diego.⁴¹ The hands-off approach to the controversy in San Diego will likely continue if and when a new commissioner is selected. The owners appear committed to formally limiting the office's powers.⁴² As a result, the commissioner will have very little leverage to constrain ownership excesses; indeed, that is the very point of the changes.

Despite its current demise in baseball and its inherent ownership-bent, the commissioner's office may ultimately return as one of the key mechanisms for policing the actions of individual owners. The commissioner can take informal action, negotiate settlements and mediate disputes. These approaches allow more refined responses to conflicts arising among owners and between owners and third parties than do the blunt instruments of litigation or legislation. The owners would clearly prefer self-regulation to ad hoc supervision by courts or legislatures. If faced with a credible threat from one of the sources discussed below, the owners might opt to re-invigorate the commissioner's office in the hopes of diffusing the movement for external regulation.

C. Antitrust Suits: Leveling the Playing Field Between Owners and Fans

If fans cannot securely protect their interests through the current market for major league baseball or through existing forms of internal regulation, such as the commissioner's office, what alternatives might be available? This subsection and the next consider how fans might challenge owners through the legal system, as other

39. Harris, *supra* note 1, at 260.

40. See Pascarelli, *supra* note 15.

41. See Sheinin, *supra* note 9.

42. See Verducci, *Have You Seen This Man?*, Sports Illustrated, July 5, 1993, at 38.

interested parties, such as players, have in other contexts. Given the cartel-like characteristics of major league baseball organization, an antitrust action represents perhaps the most obvious resolution for fans aggrieved by the actions of the Werner Group. Such a suit would likely involve a challenge to the league's restrictions on market entry and forms of revenue sharing. As previously noted⁴³, these horizontal restraints limit the San Diego fans' ability to secure their preferences in the market. Fans could seek to employ the antitrust laws to create a marketplace in which fans' voices could be heard.

The first difficulty fans would face in litigating an antitrust claim against the Padres and the major leagues is, of course, baseball's so-called antitrust exemption. The exemption emerged in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, Inc.*,⁴⁴ and was based on the Supreme Court's narrow view of interstate commerce. The Court refused to extend this immunity to other professional sports.⁴⁵ However, the Court has declined to withdraw baseball's protection from antitrust scrutiny. The exemption was most recently reaffirmed in an opinion by Justice Blackmun in the case of *Flood v. Kuhn*.⁴⁶

The case law, from *Federal Baseball* through *Flood*, may not present an absolute bar to an antitrust suit in the Padres scenario. *Flood* and many of the previous antitrust challenges against baseball (and other professional team sports for that matter) involved a challenge to the reserve system which indefinitely bound players to one team.⁴⁷ A federal judge recently ruled, in *Piazza v. Major League Baseball* that the *Federal Baseball* exemption may only apply to issues involving the reserve system.⁴⁸ In *Piazza*, members of the Tampa Bay-St. Petersburg investment group, which sought to purchase the San Francisco Giants in 1992, had alleged that Ma-

43. See subsection IV.-A. above

44. 259 U.S. 200 (1922).

45. See, e.g., *United States v. International Boxing Club*, 348 U.S. 236 (1955); *Radovich v. National Football League*, 352 U.S. 445 (1957); *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971).

46. 407 U.S. 258 (1972).

47. See *id.*

48. *Piazza v. Major League Baseball*, No. 92-7173 (E.D. Pa. Aug. 4, 1993). The judge's ruling came in response to a motion for dismissal at the pleading stage. The judge tempered the ruling by positing alternative grounds for denying Major League Baseball, Inc.'s motion and by acknowledging the conflicting authority over the breadth of the exemption. Despite the precedential conflict, the judge refused the defendant's request to certify an interlocutory appeal to the Third Circuit on the issue. *Piazza v. Major League Baseball*, No. 92-7173 (E.D. Pa. Oct. 14, 1993).

jor League Baseball, Inc.'s monopolization of the market for major league professional baseball teams and its restraints upon the transfer and movement of franchises violated antitrust laws.⁴⁹

Piazza may represent the first sign of a new judicial attitude toward baseball's antitrust status. This development results from a lack of satisfaction with the *Flood* rationale and a recognition that baseball's organization has flaws in need of regulation. This potentially new judicial attitude toward antitrust claims over major league baseball should also be viewed against a backdrop of threatened congressional revocation of the *Federal Baseball* exemption.⁵⁰ Grumbling in Congress over baseball's specialized protection from antitrust liability may well signal the federal courts to rein in the owners' autonomy. Thus, even without the passage of new legislation, antitrust challenges to major league baseball's structure, such as those that might arise from the conflict in San Diego, might be viable.⁵¹

Padres' fans would likely face other difficulties should they pursue an antitrust suit. First, Congress specifically waived antitrust liability in connection with professional sports league's negotiation of league-wide television contracts.⁵² This exemption may undermine any claims based upon the sharing of revenue from network contracts.⁵³ Second, fans would likely face a challenge to their standing to sue. It may be difficult for Padres' fans to demonstrate, in tangible terms, how the horizontal restrictions damage them. One possibility is to bring the suit through a prospective alternative ownership group who could claim that the league's cartel arrangement unjustly excluded it. Finally, parties challenging the organization of professional sports leagues face difficult issues of

49. *Id.*

50. In March of 1993, Senator Howard Metzenbaum (D-Ohio), chair of the Senate Judiciary Committee's Antitrust, Monopolies, and Business Rights Subcommittee, introduced *The Professional Baseball Antitrust Reform Act* of 1993. S. 500, 103d Cong., 2nd Sess. (1993). A similar measure was introduced in the House. 1993 U.S. House Bill 108. The Senate Bill has attracted significant support, but action has been deferred pending further study at the subcommittee level. See *Senate Committee Defers Action on Baseball Bill*, 65 Antitrust & Trade Reg. Rep. 442 (September 30, 1993).

51. Of course, fans of teams in other professional sports need not concern themselves with this preliminary hurdle.

52. See Sports Broadcasting Act, 15 U.S.C. §§1291-95. Some of the bills introduced into Congress would also eliminate this exemption. See, e.g., 1993 U.S. House Bill 1549.

53. In addition, in professional sports leagues, such as the National Basketball Association, which have revenue sharing arrangements between owners and players, certain of the horizontal restraints may be immune from antitrust liability because they are part of collective bargaining agreements. See, e.g., *Wood v. National Basketball Association*, 809 F.2d 954 (2d Cir. 1987) (discussing the conflict between antitrust and labor law).

proof, particularly given the courts' typical application of rule of reason, rather than per se analysis, in such cases.⁵⁴ Despite its limitations, an antitrust suit by fans in San Diego would likely spark a more careful examination of the situation by the league.

D. Suits by Fans and Season Ticketholders: Private Enforcement of Public Trust Fiduciary Duties and Money Damage Actions

Antitrust represents only one avenue through which aggrieved fans in San Diego might attack the actions of the Werner Group. One author, John Harris, has suggested that professional sports franchises should be conceived of as public trusts, where fans are beneficiaries and owners are trustees.⁵⁵ Harris derives this relationship from two sources: fans' perceptions of ownership⁵⁶ and public investment in franchises.⁵⁷ Harris argues that this relationship imposes responsibilities analogous to trustee-beneficiary fiduciary duties upon franchise owners.⁵⁸ These duties include the duty to reinvest in the team, the duty to furnish information to the public and the duty to manage the team's resources carefully.⁵⁹ Harris perceived that these duties would be implicated in a scenario such as the one which has developed in San Diego. In Harris' view "[i]t might be a violation of a trust, if, for example, team ownership, following a title-winning season, traded its valuable players only to reduce salaries in order to make more profit for management."⁶⁰

Harris fails to outline how these duties might be enforced in practice. One possibility is that any fan who could demonstrate the requisite attachment to the team could claim standing to sue based on Harris' concept of beneficial ownership. Such a scheme of private enforcement raises a host of questions about potential overburdening of the court system. Such concerns could be mitigated

54. This discussion offers only a cursory survey of the issues involved in an antitrust suit of this sort. Outlining the exact contours of the suit is beyond the scope of this note. See generally Myron Dale and John Hunt, *Antitrust Law and Baseball Franchises: Leaving Your Heart (and the Giants) in San Francisco*, 20 N. Ky. L. Rev. 337 (1993).

55. Harris, *supra* note 1.

56. "Fans' feelings of 'ownership' of their home teams are deeply rooted in the phenomenon of pride in one's hometown. The rights of ownership are not actual; there is no document or deed transferring title from owner to public. Rather, the feelings are more of a 'beneficial' ownership, where the owner of record acts for the ultimate benefit of the beneficiaries—much like in a trust." *Id.* at 255.

57. *Id.* at 256-58.

58. *Id.* at 256.

59. *Id.* at 264-75.

60. *Id.* at 272.

by restricting enforcement actions to public representatives, such as governmental bodies. Even under this system, questions could properly be raised about the capability of courts to evaluate strategic sports personnel decisions.

Harris' scheme also requires significant modifications and/or expansions of traditional trust doctrines. The Restatement (Second) of the Law of Trusts imposes upon trustees a duty "to administer the trust *solely* in the interest of the beneficiary."⁶¹ Arguably, any owner who earns a profit, either through the operation of the team or through resale, breaches this duty. The returns earned by the owner/trustee's management of the franchise should either be reinvested in the team or disbursed to fans in forms such as lower ticket prices. Courts deciding a fiduciary duty suit against a professional sport franchise owner would be hard-pressed to invalidate some, but not all, forms of profit-taking by owners without mutilating existing trust doctrine.

Further, in order for a public trust to arise, the holder of the property must make a "manifestation of an intention to create the [public trust]."⁶² A court could conceivably create an implied or constructive trust, but such action would require some finding of fraud or an inequitable result.⁶³ At an analytical level, the theory behind the judicial creation of a constructive public trust intersects with the argument for an eminent domain action by a municipality.⁶⁴ Given the doctrinal inconsistencies likely to arise through the modification and expansion of trust law into the sports franchise context, eminent domain actions may represent a preferable course. Indeed, such actions appear more likely to vindicate the public investment interest Harris' discussed in drawing the trust analogy.⁶⁵

Even if the public trust theory proves unworkable, individual fans should not be left without legal recourse. Season ticketholders should be able to protect their personal financial investment in the team (as distinguished from public investment in the team through stadium deals) by maintaining money damage actions based on modified theories of misrepresentation (false advertising) or breach of warranty, if an owner makes drastic changes to the franchise. In

61. Restatement (Second) of the Law of Trusts §170(1) (1959).

62. Restatement (Second) of the Law of Trusts §348 (1959).

63. See *Price v. State*, 79 Ill. App. 3d 143, 398 N.E. 2d 365 (1979).

64. See subsection IV.-G. below.

65. See *supra* note 57 and related text. See also subsection IV.-F. for a discussion suggesting that some forms of public investment may create a joint venture arrangement between municipalities and professional sports franchise owners and trigger fiduciary duties.

essence fans were promised a certain product (in the Padres' case—"major league" baseball) and attracted by promises of performances by Fred McGriff, Gary Sheffield and Benito Santiago. Instead, they received an arguably inadequate substitute.

The Werner Group responded to the threat of such suits by offering season ticketholders a sell-back option during the 1993 season. The management acknowledged that its offseason promotional material which promised that the "nucleus of the club" would remain in San Diego may have misled fans. Hundreds of fans accepted the refund offer within the first few weeks after the club made it.⁶⁶ With the rise of more complex ticket arrangements, such as the lifetime seat licensing agreements used by the National Football League's expansion Carolina Panthers,⁶⁷ the grounds for these suits should be even further strengthened. The economic impact of such suits upon the team's management would also rise significantly.

E. Labor Negotiation: Bargaining for Minimum Team Payrolls

Fans are not the only parties who feel aggrieved by the developments in San Diego. Players also have raised complaints of harm, ranging from the psychological damage associated with playing on a poor team and losing long-time teammates, to more subtle forms of financial damage. Tony Gwynn and Andy Benes, the Padres' only remaining superstars, have both voiced their anger over the Werner Group's payroll cuts.⁶⁸ Players who have been dealt away or who simply play in the league might also have a grievance with the Padres. By effectively withdrawing from the market for high-caliber (or arguably, even moderately talented) players, the Padres have cut the overall demand for such players by 3-4%.⁶⁹ This constriction of demand for playing talent will likely have a negative overall effect on players' salaries. The recent comments of Major League Baseball Players' Union representative, Don Fehr, suggest that this development has not gone unnoticed.⁷⁰

Previously, players who were disgruntled about management's

66. Sheinin, *supra* note 9.

67. See Larry Weisman, *Starting from Scratch Taxes Both Groups*, USA Today, June 24, 1994 at 10C.

68. *Id.*

69. As one of 28 major league teams, the Padres are responsible for approximately 1/28th (or 3-4%) of the demand for major league baseball playing talent.

70. Fehr cited the rise of owners who are "not interested in fielding competitive teams" as one of the union's top concerns. Maske, *supra* note 17.

decisions had only one option: to stage an individual holdout. Now, with the emergence of collective bargaining, new avenues of action are available. Gone are the days of ownership domination over players. The cost of strikes and the owners' desire to secure anti-trust exemption through the collective bargaining agreement (for sports other than major league baseball),⁷¹ have combined to level the playing field between owners and players.

In major league baseball, players concerned about developments in San Diego can make the creation of floors on team expenditures part of the collective bargaining agreement.⁷² Fehr's comments, noted above, and the union's growing interest in a broad range of issues beyond the staple concerns of free agency and pension protection,⁷³ suggest that the player's union may be prepared to make these types of demands. Not only might these demands be made, but also, they might succeed as part of a larger player-owner revenue sharing/salary cap arrangement.⁷⁴ The owners' chief negotiator, Richard Ravitch, has expressed an interest in combatting the perceived "small-market" team problem and increasing revenue sharing between the owners.⁷⁵ In addition, a floor on team's player payrolls would protect the owners from the free-riding owner problem.⁷⁶ Players have successfully bargained to limit ownership autonomy in many areas,⁷⁷ there is little reason to believe that they would be less able to secure protection from owners seeking to profit by fielding underfinanced teams.

71. See *supra* note 53.

72. The players' union has essentially bargained for a floor on team salaries by demanding minimum individual salaries. The union would now have to bargain for team spending floors above the aggregate of the individual minimums.

73. See Mark Maske, *Notebook*, Washington Post, August 8, 1993, at D10 (discussing the union's decision to make expansion an issue for the next collective bargaining agreement).

74. Currently the owners and players remain deadlocked over whether the league should adopt any form of salary cap. Until the parties negotiate this impasse, the arguments for a team-wide salary floor are unlikely to receive serious attention. See generally Claire Smith, *On Baseball*, New York Times, September 5, 1994 § 1 at 26; Tom Verducci, *In the Strike Zone*, Sports Illustrated, August 1, 1994 at 26.

75. See Mark Maske, *National Pastime Faces Lineup of Troubles*, Washington Post, July 11, 1993, at D1.

76. Under the free rider theory, an owner could drastically cut the payroll, contribute nothing to the value of the league, but earn profits from his or her share of the league-wide revenue. The problem was introduced above in subsection IV.-A. and is discussed in further detail below in subsection IV.-F.

77. See generally Miller, *supra* note 19.

F. Fiduciary Duties and Free Riders: Enforcement by Owners, Players and Municipalities

As the introduction noted, professional sports franchise owners have entered into complex contractual relationships with their fellow owners, players, and governmental entities. These arrangements are often difficult to label, but may in fact create fiduciary duties between the parties. The law surrounding fiduciary obligations is complex and often ambiguous. As two experts on the subject noted, "[l]egal theorists and practitioners have failed to define precisely when a [fiduciary] relationship exists, exactly what constitutes a violation of this relationship, and the legal consequences generated by such a violation."⁷⁸ This uncertainty may complicate the issues of fiduciary liability in the professional sports context, but it need not undermine the availability of this potential cause of action.

These experts also note that partnership and joint venture arrangements are among business relationship paradigms which trigger mutual fiduciary obligations.⁷⁹ Commentators have suggested that while professional sports leagues do not identically match any business organizational form, they most closely parallel partnerships.⁸⁰ Courts have generally taken a functional, rather than a formalistic, approach in determining if the parties to an agreement have created a fiduciary relationship:

It is the subject, and not the name of the arrangement between (the parties) which determines their legal relationship toward each other, and if, from a consideration of all the facts and circumstances, it appears that the parties intended, between themselves, that there should be a *community of interest of both the property and profits of a common business or venture*, the law treats it as their intention to become partners, in the absence of other controlling facts.⁸¹

Owners would appear to meet this definition, at least as to most elements of the venture of putting on professional sports events.

In addition, courts have recognized that because of the interdependence between franchises, individual owners owe each other fiduciary duties.⁸² Such liability makes sense in the Padres scena-

78. Robert Cooter and Bradley Friedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1045-46 (1991).

79. *Id.* at 1046.

80. See, e.g., Shropshire, *supra* note 3, at 588.

81. Vohland v. Sweet, 433 N.E. 2d 860, 864 (Ind. App. 1982)(emphasis added).

82. See Professional Hockey Corp. v. World Hockey Ass'n, 143 Cal. App. 3d 410, 415-

rio. The Werner Group's actions affect road attendance, television ratings, and sales of merchandise, all of which affect the other owners' pocketbooks. Further, the Padres' decisions clearly affect the competitive balance of the league and thus jeopardize the success of the entire enterprise.

Establishing a business relationship possessing the fiduciary duties of loyalty and care between the parties does not end the investigation. As noted above, the boundaries of these duties are unclear and difficult issues of proof would remain for an owner claiming breach (particularly regarding the effect of uncompetitive teams on overall league revenues). It is clear, however, that pursuit of individual profit by one partner or joint venturer at the expense of another will often run afoul of fiduciary principles. In a classic statement on the subject of fiduciary duties, Judge (later Justice) Cardozo stated:

Joint venturers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.⁸³

Thus, an owner who slashed his or her payroll in the interest of higher individual profits, but at the expense of lower league-wide revenues, might well violate his or her duties to the other league owners. Whether these interests would spark action or cause owners to avoid acting against each other for fear of undermining their own autonomy is questionable.

Individual owners may also hold fiduciary ties to the league's players. [I HAVE NOT SEEN THIS ASSERTION ARGUED ANYWHERE ELSE.] The sharing of revenue between players and owners creates a type of joint venture arrangement in which players have a direct contractual stake in seeing the league's overall revenues rise. Given the legal emphasis upon "the community of interests" regarding profits and property,⁸⁴ and the well-established principle that such fiduciary business relationships may be formed by parties who supply skill, labor, and capital,⁸⁵ the players would have a strong claim of partner or co-venturer status. Again, such liability makes sense;

16, 191 Cal. Rptr. 773, 776-77 (1983).

83. *Meinhard v. Salmon*, 249 N.Y. 458, 459, 164 N.E. 545, 546 (1928).

84. See *supra* note 81 and related text.

85. See, e.g., *Vohland*, *supra* note 81.

when an individual owner fails to contribute to, or damages, the value of league by fielding an uncompetitive team, the owner directly damages the players who receive a set percentage of league-wide revenues. Players in leagues which are already involved in player/owner revenue sharing arrangements, perhaps without a sufficient floor on individual team payrolls, might bring fiduciary duty suits against owners, such as Werner, who are building low-budget teams.

Players would face the same difficult issues of proof as owners. In addition, because the players' union is a party to the collective bargaining agreement with the owners, the union would likely have to bring an action to enforce the fiduciary duties. Should the union be unamenable to the requests of players from under-financed clubs, these players might lodge duty of fair representation claims against the union. Given the union's concern for the impact of uncompetitive teams on league-wide salaries,⁸⁶ such player-union conflicts seem unlikely.

Governmental bodies might also file fiduciary duty suits against individual owners who slash payrolls. Municipalities, in particular, frequently provide substantial subsidies, often in the form of friendly stadium deals, to professional sports franchises.⁸⁷ Governmental officials might argue that such arrangements create joint ventures which carry some mutual fiduciary duties. Because the interdependence and revenue sharing elements of the owner-owner and owner-player contexts are less apparent in the owner-government context, courts may be unreceptive to fiduciary suits brought by governmental bodies.

G. Eminent Domain Actions by Municipalities: From Joint Ventures to Hostile Takeovers

While governmental entities would likely have a difficult time winning a fiduciary duty suit against a sports franchise owner, they may have a much more powerful form of legal recourse, an eminent domain action.⁸⁸ If fans, angry over ownership decisions, created pressure on their representatives, a municipality might opt to seize

86. See *supra* notes 69-70 and related text.

87. The city of San Diego provided perhaps the most direct subsidy on record in the late 1970s when its city council advanced the Padres cash to make salary payments to players. See Lionel Sobel, *Professional Sports and the Law* (1977) at 531-32.

88. Eminent domain proceedings allow governmental units to take private property for public use upon the payment of just compensation. See generally Jesse Dukeminier and James Krier, *Property*, 3d ed. (1993) at 1142-64.

the local team. Such action would in effect accomplish the goals of Harris' public trust theory.⁸⁹

Two municipalities, Oakland and Baltimore, have attempted to utilize eminent domain authority to block relocations of their local professional football franchises. The California Supreme Court upheld Oakland's authority to take intangible property such as a sports franchise under the eminent domain statute,⁹⁰ but subsequently, a lower court ruled that the taking violated the dormant commerce clause.⁹¹ The court in the Baltimore case did not reach either of the above issues, but instead rejected the city's claim on somewhat narrow jurisdictional grounds.⁹²

While the decision in *Raiders II* would appear to bar action by the city of San Diego in this case, other jurisdictions might not follow the California state court's interpretation of the Commerce Clause.⁹³ A recent Supreme Court decision, which arguably narrowed the dormant commerce clause, might increase this possibility.⁹⁴ Regardless of its ultimate success, the mere threat of an eminent domain action may cause an owner to reconsider his or her tactics.

V. CONCLUSION

A familiar sports cliché states that "the game belongs to the fans." While this claim may be true on some metaphysical level, it seldom resolves the specific controversies which arise in the world of professional sports. Franchise owners' pretensions of absolute autonomy are equally inapposite. Another somewhat metaphysical concept, the notion that property should be construed as a bundle of rights,⁹⁵ provides a more helpful framework for analyzing these conflicts. The Padres are a complex entity created by the capital of the Werner Group and the other league owners, the labor of the league's players, the facilities and services of the city of San Diego, and the support of fans. Thus, one should not be surprised that all of the above parties can assert a variety of colorable legal rights

89. See *supra* notes 56-65 and related text.

90. *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 183 Cal. Rptr. 673 (1982) (*Raiders I*).

91. *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 673 (1982) (*Raiders II*).

92. *City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278 (D. Md. 1985).

93. See *Raiders II*, *supra* note 91.

94. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

95. See Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

regarding how the “property” in question should be handled. The legal system serves the world of sports, not because it will resolve each of these claims, but rather because it may. The shadow cast by the law encourages the various constituencies to cooperate with each other and thereby preserve the enterprise they combined to create.