Sports Law Handout #6: NOTE ON SOLUTIONS TO ENTRY AND EXPANSION PROBLEMS IN MONOPOLY SPORTS LEAGUES

Effective lease arrangements of the sort discussed on 635-40 can limit the ability of clubs to exploit taxpayers in some instances, but in many cases owners and leagues -- who face the desirable situation of demand for franchises exceeding supply – will simply refuse to agree to such terms, and forced public ownership through the eminent domain power seems limited (see unassigned reading of the *Oakland Raiders* cases in this regard). What other solutions might be effective? This note considers four alternatives to protect taxpayers and communities:

- Direct ban on public subsidies for stadiums or other aid for clubs to relocate or remain
- Antitrust review
- Separate functions of league from clubs
- Require Promotion and Relegation

Ban on State Aids

When the European Common Market was formed, it created Community-wide legal institutions with the authority to limit distortions of trade among member states. Although the principal form of distortion were trade barriers, from the outset Europeans recognized that member states can distort trade by providing public subsidies to retain businesses who would otherwise move to another member state, or to attract businesses. For this reason, Article 107(1) of the EU Treaty provides:

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Thus, stadium subsidies are only permitted under limited conditions:

> Some general principles were laid down in a letter from the European Commission's Directorate-General for Competition to Germany regarding State funding for the Hanover football stadium. Aid for the construction of stadiums or other sports infrastructure could be argued not to constitute aid, provided it fulfills the following criteria: (1) the type of infrastructure involved is generally unlikely to be provided by the market because it is not economically viable; (2) it is not apt to selectively favour a specific undertaking: in other words, the site provides facilities for different types of activities and users and is rented out to undertakings at adequate market based compensation; (3) it is a facility needed to provide a service that is considered as being part of the typical responsibility of the public authority to the general public.

As a European White Paper explained:

> Since professional sport clubs are engaged in economic activities, there is no compelling argument why they should be exempted from the State aid rules.
> The need to ensure competitive equality between players, clubs and competitions as well as the necessity to ensure uncertainty of results can in fact be guaranteed most effectively by the application of State aid rules, which are meant to establish a level playing field and ensure that

States or municipalities that are most willing or able to grant subsidies to their clubs will not disrupt fair competition.

EU Commission staff working document, *The EU and Sport: Background and Context*, *available at* http://ec.europa.eu/sport/white-paper/doc/doc163_en.pdf (2007).

Congress has even broader power to regulate trade among American states, and it would be appear to be constitutional for Congress to prohibit businesses operating in interstate commerce to accept subsidies from state and local governments. However, Congress has not done so. Nor has the Supreme Court found that state subsidies sufficiently interfere with interstate commerce to violate the "dormant commerce clause." Although the majority in *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 199 n.15 (1994) stated that the Court had "never squarely confronted the constitutionality of subsidies, and we need not do so now," the focus of Supreme Court jurisprudence is not on the economics of the internal market (Congress is free to deal with that) but rather on whether there is an anti-democratic effort by a single state to enrich local voters at the expense of out-of-state non-voters. *See* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* (8th ed. Thomson/West 2010) at 336. Nowak & Rotunda acknowledge that subsidies distort the national economy, and constitute discrimination against out-of-state persons, "but it is not the type of discrimination that is in the nature of a tariff or trade barrier that would be prohibited by the dormant commerce clause." *Id.* at 348-49: "Although interstate commerce is burdened when the state's subsidy creates market inefficiency, the primary people who bear the burden are the people of the state that is giving the subsidy."

In sum, current US law does not limit the ability of state and local governments to subsidize sports teams in return for a league's expansion or relocation into their community.

Direct Antitrust Review: *State of Wisconsin v. Milwaukee Braves*

In the wake of the decision by the Braves to relocate from Milwaukee to Atlanta in 1966, the state of Wisconsin launched an antitrust suit against Major League Baseball to obtain redress. The complaint described generally the agreements and relationships involved in the organization of professional baseball and alleged that as a result defendants and persons acting in concert with them have monopoly power over major league baseball; that defendants had agreed to an illegal plan to terminate playing of major league baseball in Milwaukee; and that they intended to and would restrain and prevent various types of trade and commerce involved in major league baseball in Milwaukee. The complaint sought recovery of forfeitures, as prescribed by statute, and preliminary and permanent injunctions requiring defendants to facilitate the organization and operation of a major league professional baseball team with Milwaukee as its home, and restraining the Braves from playing home games outside Milwaukee until such required steps had been taken.

The trial judge found for the State. 1966 Trade Cas. (CCH) ¶71,738, at 82,411 (Cir. Ct. Milwaukee Cty.). It agreed that the other baseball owners had conspired to prevent major league baseball from being played in Milwaukee. The trial judge noted that a group called Milwaukee Brewers Baseball Club, Inc., had applied for membership in both the National and American Leagues and were rejected. Noting the economic monopoly possessed by owners, the trial court also noted that the National League Constitution provided no objective guidelines for determining when to approve a franchise relocation.

The trial court's opinion next turned to the viability of Milwaukee as a market for major league baseball:

"42. The Braves' net receipts from the sale of radio and television broadcasting rights compare favorably with the net receipts of the defendant clubs that submitted figures to this court.

"43. During the period from 1953 through 1965, the Milwaukee Braves, Inc. and its corporate predecessors had a total home paid attendance of 19,551,163. This was greater than any club in either Major League with the exception of the defendant, Los Angeles (Brooklyn) Dodgers. The average annual attendance for this period in Milwaukee was [***15] over 1.5 million. This average was the second highest of any club in either league. The attendance level was 31% more than the average of teams in the defendant National League and 52% higher than the average for teams in the American League. Milwaukee home attendance increased from 773,818 in 1962 to 910,911 in 1964, despite the rumored relocation of the franchise to Atlanta, Georgia. The level of Attendance in 1965 was not representative, due to the fact that the franchise was to be relocated in Atlanta, Georgia for the 1966 season.

"44. The Braves were financially successful during the time it operated a National league baseball club in Milwaukee. Milwaukee has the demographic economic and population characteristics necessary to support a Major League baseball club. Milwaukee has the ability to reasonably support a Major League team.

"45. That expansion of the National League is feasible."

The trial court's conclusions of law included the following:

"1a. Having agreed among themselves to control and allocate professional baseball players, to assign to the respective corporate defendants exclusive territorial rights and privileges respecting the exhibition of professional Major League baseball games, and to limit the number of members in the National League of Professional Baseball Clubs of which the defendants are all the constituent members, they have now agreed to transfer the site of Major League baseball exhibitions from Milwaukee, Wisconsin, to Atlanta, Georgia, with the result that trade and commerce within the State of Wisconsin have been substantially restrained.

"3. [The National League owners] and their counterpart members of the American League of Professional Baseball Clubs have acquired monopolistic control of all available ball players

of Major League caliber with the result that the granting of permission from one of the said leagues in the form of a franchise to operate a Major League baseball team is necessary for any person to engage in the business of Professional Major League baseball.

"4. The corporate defendants' monopolistic control of Major League professional baseball requires the defendants to exercise reasonable control and to follow reasonable procedures in the issuance of memberships in the National League of Professional Baseball Clubs and in the definition of sites for baseball exhibitions and as respects the transfer of memberships.

"5. The transfer by the corporate defendants of the franchise in the National League of Professional Baseball Clubs from Milwaukee, Wisconsin, and the refusal to issue a replacement franchise allowing the exhibition of Major League baseball in Milwaukee, Wisconsin, was an unreasonable exercise of the monopolistic control of the business of Major League professional baseball and was in violation of Section 133.01, Wisconsin Statutes (1963).

"6. The refusal of the National League and the failure of the American League to issue a franchise to Milwaukee County or the Milwaukee Brewers Baseball Club, Inc., was a concerted refusal to deal in restraint of trade and commerce within the State of Wisconsin in violation of Section 133.01, Wisconsin Statutes (1963)."

As a result, the trial judge enjoined the owners from refusing to grant the Brewers' application to join the National League, they were required to take action to facilitate the organization and operation of a major league baseball team with Milwaukee as its home beginning in 1967, including the granting of a franchise and the execution of an equitable plan for providing a supply of major league professional players for such team, and, unless and until such franchise were to be granted, defendants were enjoined from playing the Braves' home schedule elsewhere than in Milwaukee county stadium, but this requirement was stayed until May 18, 1966, provided the defendants submit a satisfactory plan for expansion in 1967 to the court by May 16, 1966.

The Supreme Court of Wisconsin reversed the judgment. Without reviewing the merits of the decision, the Court concluded that it would unduly burden interstate commerce for a state court to impose, notwithstanding the antitrust immunity granted to baseball by the Supreme Court, it own state antitrust laws to constrain the conduct of a national business. 141 N.W.2d 1(1966).

Putting aside the applicability of state antitrust law, do you agree with the merits approach of the trial court? If it is an antitrust violation to refuse to add an expansion team in Milwaukee is an antitrust violation, what about in other cities? Is open admission to sports leagues desirable?

Agreements to Contract or Expand as Antitrust Violations: *South Sydney Rugby League Football Club Ltd v News Ltd*

Beginning in 1908, the New South Wales Rugby League (NSWRL) conducted a rugby league competition in that State. A leading club from the inception of the competition was the appellant South Sydney District Rugby League Football Club Ltd (Souths). Souths' teams won more premierships than any other club in the competition's history. To its supporters, Souths was a much loved institution inspiring great loyalty.

By 1995, the competition had expanded nationally, under the auspices of the Australian Rugby Football League (ARL), to include 20 clubs throughout Australia and New Zealand.[1] Media magnate Rupert Murdoch wanted broadcast rights for ARL matches for his new Fox Sports satellite channel. A rival media magnate, Kerry Packer, owned exclusive rights to the ARL for his free-to-air Channel 9 network. When Packer refused to license rights to Murdoch, News Ltd (Murdoch's holding company) sponsored a rival competition, called Super League, consisting of some clubs who broke away from the ARL/NSWRL competition together with some new entrants.[2] Other clubs, including Souths, continued to play in the ARL/NSWRL competition. Heavy litigation followed. The ARL was initially successful in blocking the Super League, *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447, but Murdoch won on appeal: *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410. The Super League competition commenced in 1997 with ten clubs. The ARL/NSWRL competition continued with twelve clubs.

As early as May 1997 the existence of two rival competitions was proving to be financially disastrous and damaging to the game of rugby league.[3] Extensive negotiations between ARL and News resulted in an agreement for a unified competition, to be called the National Rugby League (NRL) Competition. Although formal documentation was not completed until 14 May 1998, a critical step occurred on 19 December 1997 when ARL and News each publicly announced details of an agreement in

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1 **Error! Main Document Only.** The expanded league included 12 original Sydney-based clubs (Balmain Tigers, Canterbury Bulldogs, Cronulla Sharks, Eastern Suburbs Roosters, Illawarra Steelers, Manly Sea Eagles, North Sydney Bears, Parramatta Eels, Penrith Panthers, South Sydney Rabbitohs, St. George Dragons, and Western Suburbs Magpies). The ARL also included the Auckland Warriors (New Zealand), Brisbane Broncos (Queensland), Canberra Raiders, Gold Coast Seagulls (up the coast from Sydney), Newcastle Knights (city 1 hour north of Sydney), North Queensland Cowboys, South Queensland Crushers, and Western Reds (Perth).

2 **Error! Main Document Only.** The inability to learn from history is sometimes stunning. In 1979, the very same Kerry Packer wanted broadcast rights to cricket, which were held by the Australian Broadcasting Company. When the Australian Cricket Board's old-boy ties precluded Packer's bid, he formed a rival cricket league, causing great havoc in that sport for two years until a deal was reached giving Packer the rights he sought. When News' Super League competition commenced in 1997, the league succeeded in luring 8 ARL teams into the new competition (Brisbane, North Queensland, Cronulla, Penrith, Canberra, Canterbury, Auckland, Western Reds) and adding two new clubs, Hunter[inland, northwest of Sydney] and Adelaide [capital of South Australia, in the south-centre of the country].

3 **Error! Main Document Only. Error! Main Document Only.** For an analysis of why the rival competitions were not inherently destructive to rugby, but only so because of predatory practices of the parties, see Stephen F. Ross, *Anti-competitive Aspects of Sports*, 7 Comp. & Consumer L.J. 125, 135-38 (1999) (noting that Murdoch was never really interested in creating an ongoing rival league but merely starting a war anticipating a merger where he could secure television rights).

principle, referred to as "the Understanding". All ARL/NSWRL clubs approved the terms of the Understanding, with the exception of Souths and Balmain, another club from the inner suburbs of Sydney. For present purposes, the essential elements of the Understanding were (i) a merger of the rival leagues into one competition jointly owned by the ARL and News Corporation; (ii) a winnowing down of the number of clubs in the competition through a licensing process that included encouraging traditional clubs to merge (and guaranteeing 3 Superleague franchises a 5 year licence); (iii) by 2000 a requirement limiting the competition to 14 teams, with lowest priority given to stand-alone Sydney clubs.

Two Super League clubs, Perth and Hunter, had ceased to exist at the end of 1997 and one ARL club, South Queensland, did not participate in the merged competition in 1998. The nineteen remaining clubs and a new club, Melbourne, each fielded a team in the merged NRL competition, which commenced in March 1998. After the 1998 season, Gold Coast and Adelaide withdrew from the NRL competition and the St George and Illawarra clubs merged. Consequently, the 1999 NRL season commenced in March 1999 with seventeen clubs (treating St George/Illawarra as one club). In late July 1999 the NRL approved the formation of a joint venture between Balmain and Wests for the 2000 NRL competition.

Under the fourteen team term, additional mergers or contraction was required. Norths failed for solvency reasons to meet the Basic Criteria for eligibility to compete in the 2000 NRL competition. Five five year licences had been granted under the priority system for regional or merged clubs: Brisbane, Auckland, Newcastle, St George/Illawarra and Wests/Balmain. Thus, the ten remaining clubs were applying for the nine remaining licences. The selection criteria governed eligibility for the nine licences, although it appears that Melbourne, as a regional club, was to enjoy some priority under the criteria. Souths was notified on 15 October 1999 that it failed to secure admission to the 2000 NRL competition. The remaining clubs received three year licences on the same day. On 27 October 1999 NRL approved a joint venture of Manly and Norths.

The Court found that it was “plain that Souths was excluded from the NRL competition by reason of the “14 team term.” It was eligible, and ready, willing and able, to compete as it met the "Basic Criteria" but was not admitted into the competition as it received the lowest number of points under the selection criteria.” Souths then filed this lawsuit under the Australian Trade Practices Act. Under the Act, Souths could have prevailed by showing that the effect of the agreement was to substantially lessen competition. This would be a costly and difficult thing to prove. Seeking a quicker victory, Souths sought to prevail under section 45(2) of that statute, which imposes liability without having to make a full economic analysis of competitive effects (i.e. a full “rule of reason” under U.S. law). Section 45(2) prohibits a corporation from agreeing to an “exclusionary provision.” This is defined in s.4D of the Act as an agreement between two or more competitors with the “purpose of preventing, restricting or limiting” the “the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons.”

Here, Souths’ complaint was based on the per se theory that the agreement to limit the merged NRL competition to 14 teams was a per se illegal exclusionary practice. Souths claimed that the fourteen team term:

-- had the purpose of preventing, restricting or limiting the supply of competition organising services by News (through its subsidiary, National Rugby League Investments Pty Ltd ("NRLI")) and ARL to, and the

acquisition of team services from, particular persons or classes of persons within the meaning of s4D(1)(b) of the Act;
-- was therefore an exclusionary provision that had been included in a contract, arrangement or understanding in breach of s45(2) of the Act.

The "competition organising services" of the NRL partners were pleaded as:

"the supply of the services of organising and running top level rugby league competitions to Souths, the clubs and franchisees which had participat[ed] in 1997 in the ARL Optus Cup and the Super League competition including the Clubs, and to any other rugby league club willing and able to provide a team to participate competitively in a top level rugby league competition;"

200 A.L.R. 157, 182 (HCA 2003). The "team services" were pleaded as:

"the acquisition of services, being the provision of rugby league teams to play in the top level rugby league competitions organised and run by the ARL on the one hand, and News and [Super League] on the other hand, from Souths, the clubs and franchisees which had participat[ed] in 1997 in the ARL [season competition] and the Super League competition including certain of the Clubs and any other rugby league club willing and able to provide a team to participate competitively in a top level rugby league competition."

The trial judge, however, had found for the defendants, because in his view the purpose of the agreement was not to boycott any "particular persons or classes of persons." Rather, the purpose of the agreement was to merge the competitions, for three reasons identified by witnesses: First, positively, there was the perceived need to establish a financially viable and sustainable competition. Secondly, negatively, there was the wish to avert continuing damage to the game. And thirdly, there was the need both to satisfy and to respond to the pressures and demands of the media companies on whose financial support both the several and the proposed competitions had relied or would rely for their survival. Significantly, he credited testimony by the merger's architects that they believed that the number of teams would be reduced to 14 without exclusion.

The appellate court reversed. The appellate court read the phrase "particular persons" in s4D to include situations when rivals agreed to refuse to deal or not deal with "identified or identifiable persons." The court rejected the defendant's argument that s4D only applied when the provision was specifically designed to target identifiable persons.

Concurring, Merkle J emphasized that, at the time of the agreement, the ARL and Super League were actively competing against each other to provide league-organizing services [Super League, for example, having won a bidding war to secure the entry of the ARL's Brisbane Broncos into its rival competition]. He noted that "it would be sufficient for Souths to establish that, at the date of that Understanding, the fourteen team term had the purpose of preventing, restricting or limiting the supply or acquisition of the relevant services by News and ARL."

Although the trial judge had reasoned that the 14-team term was simply the "stick" to ensure that the voluntary reduction to 14-teams could be achieved so that the remaining parties could enjoy the benefits of the merged competition (the "carrot"), Merkle J observed that the lower court had "failed to distinguish between the purpose of the club merger, joint venture and regional participation

provisions on the one hand and the purpose of the fourteen team term on the other." He emphasized that it was the Super League side, rather than the ARL (to which Souths belonged) that had insisted on the 14-team term. Specifically, in negotiations the ARL sought a 16-team term in order to reduce or eliminate the possibility of involuntary exclusion. However, the Super League negotiators "dogmatically" insisted on a 14-team term, which was "reluctantly" accepted by the ARL. He concluded:

> As set out above in my carrot and stick explanation, a significant effect or result sought to be achieved by the NRL partners by the fourteen team term was to prevent the supply or acquisition of the relevant services to or from such of the still existing ARL and Super League clubs, merged clubs (being new legal entities) or the regional clubs (including the new clubs that were intended to be established, Central Coast and Melbourne) as were eligible, and ready, willing and able, to participate in the NRL competition, other than the fourteen clubs or entities which best satisfied the selection criteria. The prevention of supply or acquisition was intended to be achieved by restricting or limiting the supply or acquisition of the relevant services to the fourteen clubs or entities which were eligible, and ready, willing and able, to participate in the competition and best satisfied the criteria for participation. The characteristic that identified and distinguished the class intended to be excluded from participation, and makes it particular, was that its members, the top level rugby league clubs eligible to participate (for example, by meeting the "Basic Criteria") but not achieving the requisite level in the selection criteria achieved by fourteen other clubs or entities, would not be supplied with team organisation services and team services would not be acquired from them. Accordingly, the particular class the subject of the NRL partners' exclusionary purpose has a distinguishing or identifying characteristic in addition to the mere fact of exclusion. As explained above, the evaluation of particularity in the context of s4D(1) involves questions of fact and degree. Although the matter is not free of doubt, I have concluded that the objects of the NRL partners exclusionary purpose are sufficiently distinguishable and specific to constitute a particular class.

As to relief, the court ordered an injunction re-instating South Sydney into the NRL. Merkle J noted that damages were inadequate. "The raison d' etre of Souths is to compete in the top level rugby league competition, rather than to reap an award of damages for being wrongfully excluded from competing in that competition."

Dissenting, Heerey J reasoned that the per se prohibition against boycotts contained in the Trade Practices Act was because they are objectionable on non-economic grounds as well as economic ones, principally the unfair use of economic power targeted against a weaker firm. This sort of targeted boycott was not what the NRL had in mind. He reasoned that the ARL-News agreement was not directed at a "particular class of persons" because the agreement was not what the statute's drafters contemplated in prohibiting boycotts:

> The word comes from the name of Captain Hugh Boycott whose activities made him obnoxious in the eyes of tenant farmers in County

Mayo in the 1880s. The whole point of a boycott is that the conduct or interests of some person or class of persons is seen as being inimical to the interests of the boycotters. The boycott is adopted as a means of inflicting some adverse consequences on that person or class. A boycott necessarily involves a target, a person or persons "aimed at specifically": News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410 at 577. It is hard to see how this notion can apply to a class not defined in advance but only defined in an essential respect by the fact of exclusion, if and when it happens.

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If Souths' argument is correct, competitors who enter into a partnership and agree to provide a lesser range of goods or services (or deal with a narrower range of customers) will have contravened s45(2). Nothing in the stated object of the Act ("to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection": s2) would suggest such a startling result.

After this decision, the NRL agreed to re-admit South Sydney to the competition. At the same time, the NRL appealed the Full Court decision to the High Court of Australia, while agreeing that regardless of the result, Souths would remain in the league (indeed, and even agreeing to pay Souths' counsel fees as the lower court winner!). On appeal, the High Court reversed and ruled in favor of the league and News, Ltd. Fearing that an unduly reading of s4D would result in per se condemnation of legitimate activities, the Court held that the ARL-News agreement did not constitute an exclusionary practice because its purpose was to create a new competition and not to exclude Souths.

Promotion and Relegation

Stephen F. Ross and Stefan Szymanski, OPEN COMPETITION IN LEAGUE SPORTS, 2002 Wis. L. Rev. 625

As this Article goes to print, Major League Baseball has announced plans to contract from thirty to twenty-eight teams, refusing to permit the relocation of a financially-troubled Montreal franchise to our Nation's capital and strongly hinting that the refusal of Minnesota taxpayers to subsidize a new stadium will result in the demise of the Minnesota Twins. At the same time, Los Angeles has more than enough basketball fans to support two teams, but a wealthy mogul continues to steward the Clippers into new lows of mediocrity. When Tennessee wanted a pro football team, they had to shell out over $ 292 million in taxpayer money to lure the Houston Oilers. The National Hockey League has doled out American expansion franchises so artfully that the Montreal Canadiens pay more than triple the tax bills of all their American rivals combined. Why does this happen?

In 1602, an English judge invalidated a monopoly in playing cards that Queen Elizabeth I had granted to a court crony, finding that the Queen must have been deceived, since monopolies so clearly led to higher prices, lower output, and lower quality. The basic rules of economics recognized almost four hundred years ago remain true today in the world of sports. Facing no real competition, professional sports clubs raise prices, hold down the number of franchises in their leagues, and often fail to put the best possible club on the field or ice. Yet while Major League Baseball is talking about contracting, there are twenty or more cities with populations in excess of one million that could host a major league team in each of the major sports. This amounts to a potential fan market between twenty-five million (for

baseball) and fifty million (for football) people, most of whom are unlikely to see a major league team in their city in their lifetime.

One reason for this is that in North America, sports leagues are closed ventures. Membership in the league is a gift from the existing members, who typically grant the right of entry only in exchange for a substantial fee. (And baseball owners are prepared to pay $ 250 million to each owner of the teams to be eliminated by the proposed contraction, an amount significantly higher than the market value of the teams.) This is fundamentally different than the structure of team sports in the rest of the world. Elsewhere, sports leagues are usually open: membership in the league is contingent on success. Professional sports leagues in soccer, rugby, basketball, and cricket are organized in ascending tiers (generally called divisions), and every year the teams with the worst record are relegated to a lower division and replaced by the most successful teams from that lower division.

This structural difference has significant consequences for the conduct and performance of sports leagues. Because the leagues are almost always the sole providers of the highest quality club play in each sport, and in North America the leagues do not face reasonable substitutes for consumers' patronage, the closed structure also has potentially important antitrust consequences. However, perhaps owing to the ethnocentric American view that sports-related structures not known on these shores must not be relevant here, there has been very little research on the impact of openness on the organization of sports leagues.

This Article argues that the practice of "promotion and relegation" tends to raise consumer welfare by increasing effective competition among the teams in a league. Teams that are relegated to a lower division after an unsuccessful year will play a lower standard of competition and generate less interest among fans, and therefore will reduce the revenue-generating potential for their owners. Because teams seek to avoid relegation as well as to win championships, they have a greater incentive to invest in players than teams participating in closed competitions. For lesser teams in lower divisions, the allure of promotion to the top division enhances the incentive to invest in players and provides fans with new and innovative professional league competition, distinct from and qualitatively superior to the current minor leagues. Moreover, promotion provides a market-based means of permitting new entry, which will check the power of incumbent clubs to exercise market power. These effects involve a direct gain for consumers (sports fans), since the additional efforts of their team enhance the quality of play, while at the same time the excitement of promotion and relegation struggles add an extra dimension to league competition.

The competitive check provided by new entry is particularly significant in the sports industry, because the particular interdependence that sports teams have with other economically separate firms within the same league has led courts to be much more permissive in their antitrust scrutiny of trade restraints among members of sports leagues than in the case of most businesses. ***

However, numerous commentators have expressed concern about the potential for abuse of market power that has been created by the permissive regime applied to sports leagues. Examples of such abuses include escalating ticket prices, indifference to the interests of committed fans, exploitation of players, and racial discrimination. But perhaps the most notable abuse has involved public subsidies for new stadia. Since 1960, almost every major league team has benefited from a public subsidy of some kind. In most cases, these subsidies have been the result of a bidding war between municipal authorities. Noll and Zimbalist characterize the situation thus:

> All major sports are controlled by monopoly leagues. Like monopolists anywhere, these leagues profit from a scarcity of teams. By creating a situation in which several cities that are viable franchise sites do not have teams, the leagues set up competitive bidding for any team that becomes available, whether through expansion or relocation. Cities that lack a team then become credible threats to induce an existing team to move, as well as to provide a hungry pack of suitors when a league decides to expand. This situation bids up the price for franchises and the subsidy that a city must expect to pay in order to capture or to retain a team.

Presently in baseball, the only area prepared to subsidize a stadium is the Washington, D.C. area, although owners are reluctant to approve a relocation because of the objections of the nearby Baltimore Orioles. So, owners propose contraction in hopes of recreating the cycle of bidding for franchises among have-not municipalities.

A system of promotion and relegation places a significant limit on the monopoly power of sports leagues. The system preserves the integrity of the league itself and indeed allows leagues to legitimately expand or contract to most effectively market the product. At the same time, a club's threat to relocate without tax subsidies is diluted by the possibility that the team itself may be relegated and, more importantly, by the creation of alternative entry routes for cities that do not possess a major league team. In other words, both the expected benefit of the subsidy for the municipality and the expected benefit to the team of its other option (relocation) are diminished. As a result, the ability of teams to extract subsidies is either reduced or eliminated altogether.

Given its advantages, would a system of promotion and relegation ever be adopted in North America? We think it unlikely that clubs themselves would voluntarily introduce such a system. Thus, some form of government intervention is probably necessary to achieve this result. Promotion and relegation is in fact an ideal structure for surgical intervention to promote entry, since it involves replacing the least efficient incumbent (in terms of wins) with the most efficient entrant. Moreover, entry is only conditional on continuing success, so that a relegated incumbent has an opportunity to recapture its position the following season. Indeed, in the current controversy over baseball's contraction, government-ordered promotion and relegation seems clearly preferable to either the continued monopolistic exploitation by owners or to some court-supervised freeze on franchises, mandatory relocations, or other highly regulatory approach.