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A LEAGUE OF THEIR OWN: ARE PROFESSIONAL SPORTS LEAGUES IN CONTROL OF THEIR FRANCHISE TEAM'S BANKRUPTCY FILING?

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INTRODUCTION

Owning a professional sports team makes you a member of an exclusive club. Whether it is a team in the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), or the National Hockey League (NHL), it is a highly coveted ownership and membership that only the wealthiest can afford. But even the wealthiest run into financial trouble.

One of the goals of bankruptcy is to provide a debtor with relief from debt while also attempting to pay back as much value as possible to the debtor's creditors. What is one of the most exclusive assets a debtor can possess? A professional sports team. So, when a debtor runs into financial trouble, files for bankruptcy, and then tries to sell his team, how should it be regulated? The Bankruptcy Code provides no specific guidance. But, the bankruptcy court stepped in and regulated in *In re Dewey Ranch I*[1] and *In re Dewey Ranch II*.[2] Those cases arose when the NHL's Phoenix Coyotes filed for Chapter 11 bankruptcy in 2009, hoping to sell the team to the highest bidder.[3] The potential new owner had not gone through the NHL's membership approval process, and wanted to relocate the team to Hamilton, Canada.[4] Finding

[1] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30 (Bankr. D. Ariz. 2009).

[2] *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577 (Bankr. D. Ariz. 2009).

[3] *In re* Dewey Ranch Hockey, LLC, 406 B.R. at 34.

[4] *Id.* at 34.

that the non-monetary interests of the NHL would not be adequately protected, the court prohibited a section 363 sale to the highest bidder.[5] The bankruptcy court then approved a sale to the NHL for a significantly lower bid.[6]

Professional sports leagues are a world unto themselves. Almost no other business is run in the same manner, and therefore the *Dewey Ranch* holding is almost completely inapplicable to any entity outside of a professional sports league. There are two ways to view the problems associated with professional sports leagues or their teams in bankruptcy. One perspective is that it may be up to the drafters of the Bankruptcy Code to provide guidance for these entities. Alternatively, bankruptcy law should take a backseat while the antitrust issues between leagues and member teams are resolved.

This Article first discusses the Phoenix Coyotes bankruptcy and subsequent antitrust case law that may influence future bankruptcy sales of professional sports teams. Then, this Note analyzes how the holding in *In re Dewey Ranch* I & II could potentially affect (1) other professional sports teams filing for bankruptcy, and (2) other business entities outside of professional sports leagues that file for bankruptcy.

I. THE PURCHASE PROCESS OF A PROFESSIONAL SPORTS TEAM

To purchase a sports team, first a team must be for sale.[7] In the four major leagues (NFL, MLB, NBA, NHL) there are 122 teams.[8] Additionally, professional sports teams are generally fixed in number and thus limited in quantity, and do not come up for

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[5] *In re* Dewey Ranch Hockey, LLC, 414 B.R. at 590–592.

[6] *Bankruptcy Approves Sale of Coyotes to NHL*, REUTERS.COM (Nov. 2, 2009), https://www.reuters.com/article/us-nhl-phoenix/bankruptcy-judge-approves-sale-of-coyotes-to-nhl-idUSTRE5A14B720091102.

[7] Jared F. Bartie, Daniel A. Etna & Irwin A. Kischer, *Navigating the Purchase and Sale of Sports Teams*, NEW YORK LAW JOURNAL, (October 26, 2015), http://www.herrick.com/content/uploads/2016/01/4977f9b2485cdedf36c66365f729c36b.pdf.

[8] *Id.*

sale often.[9] These teams are often sold for significant sums of money due to the demand being greater than the supply.[10]

Furthermore, each league has a constitution and bylaws regulating a team's sale and ownership.[11] Generally, a league's commissioner extensively interviews potential buyers and requires the buyers to submit to an in-depth background check; a comprehensive application; and disclosure of personal, professional, and financial information.[12] Each league differs, but many impose restrictions on (1) the number of investors in a buying group, and (2) the minimum investment required for eligibility to obtain either a majority or minority ownership interest. [13] Leagues are extremely careful to ensure that prospective owners have the resources to undertake team ownership and the related financial obligations.[14]

Other major due diligence considerations during this purchasing process are the arena or stadium, associated practice

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[9] *See id.* "The NHL's Chicago Blackhawks haven't changed ownership since 1954, the MLB's Chicago White Sox since 1981, the NBA's Indiana Pacer's since 1983, [and] the NFL's Arizona Cardinals since 1972 . . . ." *Id.*

[10] *Id.* In 2014 the NBA's Los Angeles Clippers sold for $2 billion dollars. Just before the Clippers sold, in 2014 the NBA's Milwaukee Bucks sold for $550 million. In 2012 the MLB's Los Angeles Dodgers sold for $2 billion. In 2008 the NFL's Miami Dolphins sold for $1.1 billion. Matt Haupert, *How Much Were These Sports Teams Sold For?*, BLEACHER REPORT (June 4, 2014), http://bleacherreport.com/articles/2085481-how-much-were-these-sports-teams-sold-for.

[11] Bartie, Etna & Kischer, *supra* note 7.

[12] *Id.*

[13] *Id.* For example, the NBA has a rule that there can be no more than 25 individual owners and each owner's stake must be at least 1%; also known as the "Jay-Z rule." *See* Zach Lowe, *Say Hello to the Jay Z Rule: The New NBA Cap Is on Ownership*, GRANTLAND (Jan. 29, 2015), http://grantland.com/the-triangle/say-hello-to-the-jay-z-rule-the-new-nba-cap-is-on-ownership. The NFL requires a group looking to buy the team to be led by a single individual who owns at least 30% of the team (essentially a single "face" of a team). Gary Davenport, *What Does it Take to Be the Owner of an NFL Franchise?*, BLEACHER REPORT (July 2, 2013), http://bleacherreport.com/articles/1690767-what-does-it-take-to-be-the-owner-of-an-nfl-franchise.

[14] Bartie, Etna & Kischer, *supra* note 7.

facilities, offices, and parking structures.[15] Facilities can be a source of significant revenue streams, and a potential owner needs to be aware of the condition of the team's current facilities.[16] If the government provided assistance for building an arena or stadium, it is likely that the government conditioned the assistance on the team entering into a non-relocation agreement.[17] Other due diligence considerations when buying a team are expenses; media rights; ticket and suite sales; sponsorship sales; concessions; and merchandise and other revenue opportunities.[18]

After the buyer and league complete their due diligence, the buyer and seller then draft the terms of the franchise sale agreement.[19] Even if the buyer and seller agree on the terms, final approval of the agreement rests with the existing owners of the league's other teams.[20] The owners have relatively wide latitude regarding approval or disapproval of prospective team owners.[21] The other teams' owners review the terms of the pending sale and vote on whether to approve the transaction.[22] Before this final vote, a subcommittee of owners works closely with the league on the pending transaction and must first approve the sale.[23] Once the existing owners approve a potential owner, the transaction is completed and the sale of the team is finalized.

The NHL Constitution and By-laws require consent of three-fourths of the league members for the transfer of a team's ownership.[24] The Constitution also provides that:

> (1) the league shall have exclusive control over all hockey games played by the member teams,

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See* Kevin R. Schulz, *Due Diligence in Acquiring a Sports Team*, LAW360 (Feb. 17, 2011), https://www.foley.com/files/Publication/1059d85d-8272-46d6-826e-5a2ac29176be/Presentation/PublicationAttachment/54480ad5-573e-4882-a9ea-5c934ae2d707/DueDiligenceInAcquiringProSportsTeam.pdf.

[19] Bartie, Etna & Kischer, *supra* note 7.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 581 (Bankr. D. Ariz. 2009).

> (2) the home team shall have exclusive control over the hockey games played in its "home territory," and (3) no games and no franchises shall be granted in a home territory without the written consent of the home team.[25]

"Section 35 of the NHL By-Laws regarding transfers of ownership provides . . . that a proposed new owner should have 'sufficient financial resources to provide for the financial stability of the franchise' and have 'good character and integrity.'"[26] Section 36 of the NHL By-laws addresses transfer of location and requires "a detailed written application for a transfer be filed no later than January 1 of the year prior to the proposed transfer."[27] "An applicant 'shall be afforded an opportunity to make a presentation' to the NHL and its members and the members" may ask questions of the applicant regarding the transaction.[28] The By-Laws list twenty-four factors members may consider in voting on the transfer application, and also allow the league to require a transfer fee and an indemnification fee.[29]

Overall, the process of purchasing a NHL hockey team has a number of strict requirements and it can be a very time consuming and research-intensive process.[30] And even after a potential buyer meets those requirements, the league and team owners may still vote against the sale or relocation.

II. CHAPTER 11 BANKRUPTCY AND SECTION 363 OF THE BANKRUPTCY CODE

Section 363 sales in a Chapter 11 bankruptcy allow a trustee or debtor-in-possession (DIP) to use, sell, or lease property of the estate outside the ordinary course of business, as long as

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *See* Tania Kohut, *Sorry, Quebec City: Loonie, geography blamed for NHL team deferral*, GLOBAL NEWS (June 22, 2016, 6:37 PM), https://globalnews.ca/news/2780421/sorry-quebec-city-loonie-geography-blamed-for-nhl-team-deferral/.

there is notice and hearing of the sale.[31] A section 363 sale also provides the debtor the ability to (1) quickly dispose of depreciating assets, and (2) quickly liquidate an estate through a sale without a lengthy Chapter 11 reorganization plan.[32] Overall, the debtor receives significant benefits from the debtor's ability to sell free and clear of liens under section 363(f).[33] Free of these assets, a debtor can work toward paying off creditors and reorganizing successfully.[34] Creditors forego the administrative costs of confirming a plan and ideally a fair return on their claims.[35] Disclosure for a section 363 sale need only contain a description of the property and nothing more, not even the reason for the urgent sale.[36]

Courts generally take a supervisory role in section 363 sale procedures, typically deferring to the debtor's business judgment.[37] Usually the sale authorization process has two stages: (1) the court authorizes the sale and the bidding procedures; and (2) once the auction is complete, the court approves the result of the auction.[38] When there is an auction, many judges believe they should have limited or no involvement because auction results are a more accurate valuation without a judge's intervention.[39] As a result, courts generally defer to the debtor's business judgment and the best offer.[40] The best offer may not always be the highest,

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[31] Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 92 (2012).

[32] *Id.* at 94.

[33] *Id.* at 94 n.4 (citing 11 U.S.C. § 363(f)), ("The section allows such sales provided one of the following: (1) applicable nonbankruptcy law permits; (2) the entity consents; (3) the price of the property to be sold is greater than the aggregate value of all the liens on the property; (4) a bona fide dispute; or (5) the entity could be compelled in a legal or equitable proceeding to accept money satisfaction.").

[34] *Id.* at 95.

[35] *Id.*

[36] *Id.* at 97.

[37] *Id.* at 98.

[38] James H.M. Sprayregen & Jonathan Friedland, *The Legal Considerations of Acquiring Distressed Businesses: A Primer*, 11 J. BANKR. L. & PRAC. 3, 8 (2001).

[39] *Id.* at 9.

[40] Raykin, *supra* note 31, at 99.

but if a DIP chooses to accept a lower offer the DIP must have a compelling reason for why it is superior.[41]

Section 363(f) allows a trustee to sell property free and clear of a third party's interest under certain circumstances.[42] The trustee may sell property when applicable non-bankruptcy law (1) permits such a sale, (2) the third party consents, (3) its interest is a lien and the price of the property exceeds the aggregate value of all liens on the property, (4) the interest is in bona fide dispute, or (5) the entity could be compelled in a legal or equitable proceeding to accept money in satisfaction of its interest.[43] The trustee must provide adequate protection of the entity's interest in the property.[44]

The sale of "any interest" that an entity has in property of the estate has a cloudy scope for the purpose of section 363(f).[45] Some courts have limited the term to *in rem* interests in property,[46] but the trend seems to favor a broader definition that encompasses other obligations that may flow from the ownership of the property.[47] The loosely defined terms of a section 363 sale contrast sharply with the detailed requirements for selling a professional sports team in a non-bankruptcy context.[48] In that context, the requirements on how to sell are clearly outlined and all steps must be fulfilled before the sale is complete.[49] An example of one of the broadest applications of the definition of "interest" was the

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[41] *Id.*

[42] 3 COLLIER ON BANKRUPTCY ¶363.01 (16th ed. 2017).

[43] *Id.*

[44] *Id.*

[45] *Id.* at ¶ 363.06.

[46] *Id*. *See In re* Fairchild Aircraft Corp., 184 B.R. 910 (Bankr. W.D. Tex. 1995).

[47] *Id*. *See In re* Chrysler LLC, 576 F.3d 108, 126 (2d. Cir. 2009) (discussing that any interest in property for the purposes of 363(f) encompasses claims that arise from the property being sold). One court held that the term "interest" is intended to refer to obligations that are connected to, or arise from, the property being sold. *See In re* Leckie Smokeless Coal Co., 99 F.3d 573, 581 (4th Cir. 1996).

[48] *See generally* Bartie, Etna & Kirscher, *supra* note 7.

[49] *Id.*

attempted sale of a professional sports team, the NHL's Phoenix Coyotes, through section 363(f).[50]

III. THE BANKRUPTCY OF THE PHOENIX COYOTES

In January 1996, the NHL granted a change of ownership of the Winnipeg Jets.[51] The team moved to Phoenix, Arizona, and became the Phoenix Coyotes.[52] After originally playing in the Phoenix Suns' arena in downtown Phoenix, the City of Glendale and Arena Management Group, LLC built a new hockey arena in Glendale, Arizona in the early 2000s.[53] The contract to build the arena contained a covenant stating the Coyotes would play all its home games in the Glendale Arena, and would not play home games at any other location for thirty hockey seasons after the arena opened.[54]

The Coyotes have never been a particularly successful team in Arizona.[55] They did not make the playoffs the first six seasons in the new Glendale arena beginning in 2003, and they have lost money every year in Arizona through 2009.[56] In September 2006, Jerry Moyes purchased a controlling interest in the Coyotes.[57]

In August 2008, less than two years after Moyes purchased the Coyotes, he met with the NHL and advised them that he would no longer fund the operating losses of the Coyotes.[58]

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[50] 3 COLLIER ON BANKRUPTCY ¶363.01 (16th ed. 2017). The Phoenix Coyotes bankruptcy case is discussed in-depth in the following pages.

[51] *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577 (Bankr. D. Ariz. 2009).

[52] *Id.*

[53] *See* Angela Gonzalez, *Coyotes Bound For Glendale in $180M Deal,* PHOENIX BUSINESS JOURNAL (April 11, 2001), https://www.bizjournals.com/phoenix/stories/2001/04/09/daily44.html; Emi Komiya, *The Coyotes in Glendale: The Arena Over Time*, Tennessean (June 10, 2015), http://www.tennessean.com/story/opinion/inside-12/2015/06/10/coyotes-glendale-arena-timeline/71017882/.

[54] *In re* Dewey Ranch II, 414 B.R. at 580. Glendale was required to advance $183 million dollars to build the arena. *Id.*

[55] *Id*. at 579

[56] *Id*.

[57] *Id*. at 580.

[58] *Id*.

The NHL then began advancing funds, thus becoming a secured creditor, to pay the Coyotes operating losses.[59] Once the NHL began to fund the operating losses of the team, the NHL and Moyes began to look for a new owner.[60]

In early 2009, Moyes took matters into his own hands and decided to market the team for sale.[61] In spring 2009, PSE Sports and Entertainment LP (PSE) contacted Moyes regarding the purchase of the Coyotes and a subsequent relocation to Hamilton, Ontario.[62] The principal of PSE was Jim Balsillie,[63] the co-CEO of Research in Motion.[64]

PSE and Balsillie had previously attempted to acquire a NHL team.[65] The inquiry about the Coyotes was the third attempt by PSE and Balsillie to purchase a NHL team.[66] In 2006, Balsillie attempted to purchase the Pittsburgh Penguins.[67] Balsillie was approved by the NHL to become an owner but the parties could not agree on a deal, based in large part on relocation issues and the NHL's right to purchase the team from Balsillie if he attempted to relocate the team.[68] Then in 2007, PSE and Balsillie entered into a non-binding term sheet to purchase the Nashville

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[59] Chris Rowe & Jeff Upshaw, *In re Dewey Ranch Hockey, LLC: The Bankruptcy of the Phoenix Coyotes,* TRACE: TENNESSEE RESEARCH AND CREATIVE EXCHANGE, (Spring 2013) http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1008&context=utk_studlawbankruptcy. The NHL gave the Coyotes $31.4 million in cash advances against its share of league-shared revenues in the 2008-09 season as well as a line of credit. *Id*.

[60] *In re* Dewey Ranch II, 414 B.R. at 580.

[61] *Id*.

[62] *Id.*

[63] *See James Balsillie*, FORBES PROFILE https://www.forbes.com/profile/james-balsillie/ (last visited Feb. 24, 2018). Research in Motion launched the briefly popular Blackberry phone. *Id.*

[64] David Friend, *RIM's Rise and Fall: A Short History of Research in Motion*, GLOBAL NEWS (Jan. 28, 2013, 6:25 AM), https://globalnews.ca/news/384832/rims-rise-and-fall-a-short-history-of-research-in-motion/.

[65] *In re* Dewey Ranch II, 414 B.R. at 581.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 581–82.

Predators and relocate them to Hamilton, Ontario. [69] They never completed a binding agreement, and the League never considered whether to approve a change of ownership or relocation.[70]

Initially, Moyes did not seriously consider PSE's inquiry to purchase the Coyotes.[71] But when no other offers came forward, Moyes began negotiations with PSE for the purchase of the Coyotes.[72] NHL Commissioner Gary Bettman advised Moyes not to pursue such a deal because the Coyotes would not be relocating.[73]

A. IN RE DEWEY RANCH I

On May 5, 2009 the Coyotes filed Chapter 11 bankruptcy and executed a purchase and sale agreement with PSE for the sale of the Coyotes conditioned upon the team moving to Hamilton, Ontario.[74] The choice to file for bankruptcy at this time was likely a strategic move for the Coyotes to accomplish a sale to PSE without the NHL's strict approval requirements and instead use the much less exacting requirements of a section 363 sale.

The Asset Purchase Agreement required that (1) PSE would pay the Coyotes $212,500,000 in cash for the team and most of its assets, including the rights as a member team in the NHL; (2) any bankruptcy court order approving the sale would expressly provide that the home games would be played in Southern Ontario, despite the NHL or its members' lack of consent or agreement; and (3) the Asset Purchase Agreement would terminate on June 29, 2009 if the bankruptcy court had not issued the requisite bankruptcy sale order.[75] The Debtors obtained an accelerated hearing on their motion to approve the sale because of the rapidly approaching expiration date of the Asset Purchase Agreement.[76]

On June 15, 2009, the bankruptcy court held a hearing on the Debtors' authority to sell the Coyotes and ability of PSE and

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[69] *Id.* at 582.
[70] *Id.*
[71] *Id.* at 580.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 582.
[76] *Id.*

Balsillie to relocate the team to Canada.[77] The Debtors and PSE argued that the bankruptcy court could allow the sale of the Coyotes to PSE and authorize the relocation of the team from Phoenix to Canada under section 363 and section 365 of the Bankruptcy Code.[78] The NHL argued that (1) league member agreements and documents must be assumed and assigned in their entirety including, but not limited to, the requirement to apply for and obtain the League's consent to any change in ownership or relocation; (2) the motion and related pleadings did not establish adequate protection of the League's interests; and (3) there was not a bona fide dispute of the NHL's interests in the Phoenix Coyotes.[79] Additionally, the NHL asserted that the outcome of granting the motion for the sale could "wreak havoc" in the professional sports industry, and that the Bankruptcy Code was neither intended to nor should be used to cause such devastation to the NHL or other professional sporting leagues.[80]

As such, the court considered two issues. First, under section 365 of the Code, could the court authorize the assumption and assignment of the Debtors' contract by removing a non-transferability provision from the contract?[81] Second, under section 363 of the Code, could the court authorize the sale and relocation of the Coyotes free and clear of any creditor's claim, including the NHL's claims and objections, if such claims or interests were non-enforceable under non-bankruptcy law, or in "bona fide dispute?"[82]

Section 365 allows for the assumption and assignment of executory contracts, and allows judges to strike anti-assignment clauses from an executory contract if the clauses harm creditors by preventing a debtor from realizing the full value of its assets.[83] Here, the Debtors argued that the requirement to play in Glendale

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[77] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30, 30 (Bankr. D. Ariz. 2009).

[78] *Id.* at 35.

[79] *Id.* at 34.

[80] *Id.*

[81] *Id.* at 36.

[82] *Id.* at 38.

[83] 11 U.S.C. § 365 (2012). *See also* 3 COLLIER ON BANKRUPTCY ¶ 365.08 (16th ed. 2017).

was an unlawful anti-assignment provision.[84]The NHL argued that the league grants member franchises the right to participate in the league, and if the court forced a sale based on the rejection of these documents, the NHL would not recognize the sold team in the league.[85] The Judge then considered the section 365 and section 363 sale arguments.[86]

Regarding the ownership terms, the court found that without the relocation issue, there would be no problem proceeding under section 365 for the sale.[87] The NHL had already approved PSE to become a member of the NHL.[88] However, section 365 has other requirements to assume and assign an executory contract. It generally requires (1) curing of enforceable default(s); (2) compensation for any actual pecuniary loss resulting from such default(s); and (3) providing adequate assurance of future performance.[89] The court then considered if these requirements would be met if a relocation were to ensue.[90] The court found the requirement of adequate assurance of future performance could not be met because of the Coyotes' other contract with the City of Glendale to play all home games in Glendale.[91] The Debtors and PSE argued that the requirement to play all home games in the Glendale Arena was an unenforceable provision because it prohibits, restricts, or conditions the assignment under section 365(f), and thus could be excised from the contract under existing case law.[92] While the court acknowledged there had been some short distance relocations of franchises in existing case law, a bankruptcy court had never decided something of this magnitude (Phoenix, Arizona to Hamilton, Ontario).[93] The court then determined it could not excise the requirement to play all games at the Glendale Arena under section 365.[94] The court added that either the requirement (1) of adequate assurance of future performance, or (2) of future

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[84] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30, 37 (Bankr. D. Ariz. 2009).

[85] *Id.*

[86] *Id.* at 36–40.

[87] *Id.* at 36.

[88] *Id.*

[89] 3 COLLIER ON BANKRUPTCY ¶ 365.06 (16th ed. 2017).

[90] *In re* Dewey Ranch I, 406 B.R. at 36.

[91] *Id.* at 37.

[92] *Id.*

[93] *Id.*

[94] *Id.*

compensation for any actual pecuniary loss resulting from default, dictated that this economic right of the NHL must be appropriately resolved for the motion to satisfy the section 365 requirements.[95]

The court then turned to the Debtors' assertion that under section 363 the court could authorize the sale and relocation of the Phoenix Coyotes free and clear of the geographic limitation in the agreements, notwithstanding the objection or lack of consent of the NHL.[96] The Debtors argued that the sale could proceed as described under either section 363(f)(1) or section 363(f)(4).[97] Section 363(f)(1) allows a sale free and clear of other's interests where "applicable non-bankruptcy law permits sale of such property free and clear of such interest."[98] Section 363(f)(4) allows a sale free and clear where "such interest is in bona fide dispute."[99] The Debtors argued that the applicable non-bankruptcy law pertinent to section 363(f)(1) was antitrust law.[100] And since the Debtors had filed an antitrust action two days after filing for bankruptcy, the Debtors claimed that the interest was in bona fide dispute for section 363(f)(4).[101] Based on Ninth Circuit antitrust law,[102] the court was uncertain whether applicable non-bankruptcy law (antitrust law in this case) would permit the sale.[103] Additionally, because it was unclear how a court would rule in the antitrust action, it was unclear whether there actually was a bona fide dispute.[104] Simply having terms and conditions on relocations

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[95] *Id.*

[96] *Id.* at 38.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* For more on the antitrust action *see infra* Section V.

[102] *Id.* at 38–39. *See* Nat'l Basketball Ass'n v. SDC Basketball Club, 815 F.2d 562, 568 (9th Cir. 1987) (holding that professional sports league franchise movement restrictions are not invalid as a matter or law, and question of reasonable restraint is a matter of fact); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1397 (9th Cir. 1984) (holding that the unique nature and structure of the NFL product precludes application of per se antitrust rule and to withstand antitrust scrutiny, restriction on team movement must be closely tailored to the needs inherent in producing the NFL Product).

[103] *In re* Dewey Ranch Hockey, 406 B.R. at 39.

[104] *Id.* at 40.

of member teams was not a clear antitrust violation.[105] Because of lack of clarity and lack of clear precedent on the antitrust claims, the court could not find that the Phoenix Coyotes could be sold free and clear of the NHL's interests.[106]

Additionally, the Debtors argued that the court needed to make a decision by the June 29 deadline outlined in the Asset Purchase Agreement with PSE.[107] But, the court was not convinced that it should order the NHL to decide the relocation application by the deadline due to other circumstances.[108] Other professional sports leagues also filed statements arguing that granting this motion could "wreak havoc" on professional sports.[109]

The Bankruptcy Court then scheduled two auctions.[110] The first was a Glendale only auction, for parties wishing to keep the Coyotes in Glendale, and the second was open to all bidders.[111] There were three potential bidders prior to the auctions closing: PSE, Reinsdorf Group, and Ice Edge.[112] By the deadline to submit a bid (August 25, 2009), the Reinsdorf Group and Ice Edge had publicly announced they would not submit a bid to either of the auctions.[113] Reluctantly, the NHL chose to submit a bid because doing so was in the best interests of the NHL, the Coyotes, Glendale, and the creditors.[114] The NHL's bid was $140,000,000 and would keep the Coyotes in Glendale.[115] PSE's final bid was $212,500,000 to relocate the Coyotes, and would have increased

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[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* It was a particularly busy time of the year for the NHL because of the Stanley Cup playoffs that were ongoing at this time.

[109] *Id.* at 42. Glendale also argued that the harm to Glendale if the Phoenix Coyotes were allowed to leave was far greater than the minor benefit to the creditors. However, the court acknowledged that the proposed sale to PSE might, and probably would, provide significant payment the general creditors. *Id.* at 40–41. *See also* Ryan Gauthier, Case Comment, *In re Dewey Ranch Hockey*, 1 HARV. J. SPORTS & ENT. L. 181, 189 (2010).

[110] *In re* Dewey Ranch Hockey LLC, 414 B.R. at 582.

[111] *Id.* at 582–585.

[112] *Id.* at 585.

[113] *Id.*

[114] *Id.*

[115] *Id.*

to $242,500,00 if Glendale had accepted PSE's offer of $50,000,000 to withdraw the City's objection to the sale to PSE.[116]

B. IN RE DEWEY RANCH II

A hearing on September 30, 2009 ended the dispute between the parties. PSE and the Debtors argued it was unfair for the NHL to bid on the team because the League's "insider status" would make their bid more favorable than PSE's bid.[117] PSE and the Debtors also argued that there was a conflict of interest in the decision to approve Balsillie for ownership of a team, because the NHL had planned to submit its own bid.[118] The main objective of PSE's and the Debtors' arguments was to convince the court to authorize the team's relocation based on section 363 and section 365 of the Code.[119] The NHL obviously opposed these claims, and raised a similar argument as in *In Re Dewey Ranch I*, specifically that the court had no basis to relocate the team under section 365.[120] Additionally, the NHL argued that the Coyotes could not be sold to PSE under section 363 because its interests were not adequately protected under section 363(e).[121] Section 363(e) states that when selling property under section 363, a court "shall prohibit or condition such . . . sale . . . as is necessary to provide adequate protection" of the parties' interests.[122]

The court focused its analysis on section 363 of the Code. [123] For the purpose of the analysis, the court assumed that the interests of the NHL were subject to bona fide dispute satisfying section 363(f)(4) to effectuate a sale free and clear of any liens.[124] The bankruptcy court has the discretion under section 363(e) to prohibit or condition a proposed sale if interests are not adequately

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[116] *Id.* at. 587.
[117] *Id.* at 588 n.1.
[118] *Id.* at 588.
[119] *Id.* at 589.
[120] *Id.*
[121] *Id.*
[122] 11 U.S.C. § 363(e) (2012).
[123] *In re* Dewey Ranch II, 414 B.R. at 590.
[124] *Id.* At this time because of pending litigation in the antitrust claim, it was still undecided whether the interest was in bona fide dispute.

protected.[125] Here, the court found it exceedingly difficult to protect the NHL's non-economic interests.[126] PSE argued that paying the required relocation fee could protect the NHL's interests.[127] The NHL argued its interests were that they have rights to: (1) admit only new members who meet its written requirements; (2) control where its members play their home hockey games; and (3) impose a relocation fee, if appropriate, when a member team relocates.[128] The court struggled with how to adequately protect the first two non-economic rights if the team was sold to PSE and relocated.[129] The court mentioned that section 363(e) had very little case law, and none of that case law was applicable to this case.[130] The court then interpreted section 363(e) to mean the court should prohibit sales where the interests could not be adequately protected.[131] Because the court did not know how to adequately protect all of the NHL's interests, it could not approve the sale and relocation.[132] The NHL was required to amend its bid, and on November 2, 2009, the Court approved the sale to the NHL.[133]

C. THE QUESTIONABLE APPLICATION OF SECTION 363(E) TO THE PHOENIX COYOTES BANKRUPTCY

Section 363(e) of the Code does not necessarily require a court to prohibit a sale if adequate interests are not protected. The language offers a court the ability to "prohibit" or "condition" the sale to protect interests adequately.[134] With very little case law, the Bankruptcy Court could have conditioned a sale based on

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[125] 3 COLLIER ON BANKRUPTCY ¶ 363.05 (16th ed. 2017).

[126] *In re* Dewey Ranch II, 414 B.R. at 591.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 591–92.

[132] *Id*. at 591–92 (citing *In re* Magness*,* 972 F.2d 689, 697 (6th Cir. 1992) ("The interest of the persons presently involved in this orderly succession cannot adequately be protected in any manner except by prohibiting the sale and assignment of the membership")).

[133] Reuters Staff, *Bankruptcy judge approves sale of Coyotes to NHL*, REUTERS (Nov. 2, 2009, 12:03 PM), https://www.reuters.com/article/us-nhl-phoenix/bankruptcy-judge-approves-sale-of-coyotes-to-nhl-idUSTRE5A14B720091102.

[134] 11 U.S.C. § 363(e) (2012).

adequate protection of the NHL's interests, as opposed to completely prohibiting it. This could have left time for the antitrust lawsuit to determine whether the NHL's non-economic interests could be adequately protected. It is interesting that the court in the Phoenix Coyotes' case decided to prohibit the sale altogether under section 363(e), thereby setting a precedent for other sports teams attempting this same route, as well as other industries trying to proceed under section 363 for a sale free and clear of any liens.

Most likely, the outcome here was one of extreme caution. Prohibiting all section 363 sales where every interest, economic or non-economic, is not adequately protected is an extreme response to this issue. Especially because in the Phoenix Coyotes case, there appeared to be a conflict of interest with the secured creditor also being the only other bidder in the auction of team.[135] The results of the *In re Dewey Ranch* cases gave enormous deference to the NHL, an entity that was also a secured creditor and the only bidder in the Glendale-only auction. It also set a strict precedent for any other section 363(e) claims since there is almost no case law on the provision.

This result begs the question of whether the bankruptcy process is meant to protect the debtor, the creditors, or even the integrity of a professional sports league or its potentially arbitrary rules. If the bankruptcy process is meant to protect the debtor, here it is not. By not allowing the debtor to maximize his assets and by selling to the highest bidder, the debtor has less money to repay his debts. If the bankruptcy process is meant to protect the creditors, unless the lower bidder is paying the creditors in full in its bid, it is not protecting the unsecured creditors' interests. In the situation where they are not being paid in full as part of the bid, the unsecured creditors are likely receiving less because of the court's decision to reject the higher bid for the sale of the team, which could have given the unsecured creditors a greater return on their claims. So, in the situation of the bankruptcy of a professional sports team, the bankruptcy process is more lenient to the league than other parties.

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[135] *In re* Dewey Ranch, 414 B.R. at 588.

IV. ANTITRUST ISSUES

In May 2009, the Coyotes filed an adversary proceeding as part of the pending bankruptcy proceeding against the NHL.[136] The Coyotes sought to enjoin the NHL from preventing the sale of the Coyotes in violation of sections 1 and 2 of the Sherman Act.[137] The team sought relief under both federal and state antitrust laws, and claimed impending loss or damages resulting from the NHL's exercise of market power in preventing the Coyotes from moving to Canada.[138]

Article 4.3 of the NHL's Constitution states: "No franchise shall be granted for home territory within the home territory of a member without the written consent of such member."[139] The provision is especially pertinent to the Coyotes dilemma because the proposed relocation to Hamilton would have placed the Coyotes in the "home territory" of the Toronto Maple Leafs, as well as very close to the home territory of the Buffalo Sabres.[140] The Coyotes argued that permitting another franchise to exercise veto power over a competitor's relocation is anticompetitive and detrimental to consumers who benefit from increased competition.[141] The Coyotes also argued that other provisions in the NHL's Constitution and By-Laws pertaining to relocation "are equally exclusionary and anticompetitive and are without pro-competitive justification."[142]

Section 1 of the Sherman Act prohibits any concerted actions that unreasonably restrain trade.[143] To establish concerted action, defendants must not have been acting independently and

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[136] Elizabeth Blakely, Comment, *Dewey Ranch and the Role of the Bankruptcy Court in Decisions Relating to Permissible Control of Nationals Sports Leagues Over Individual Franchise Owners*, 21 SETON HALL J. SPORTS & ENT. L. 105, 113 (2011).

[137] *Id.*

[138] *Id.*

[139] *Id.* at 114.

[140] *Id.*

[141] *Id.* Although there is the league's concern of competitive balance if there are too many teams in one location, in this case all three teams would be operating in different cities.

[142] *Id.* Specifically, Section 4.2 provides: "No member shall transfer its club and franchise to a different city or borough. No additional cities or boroughs shall be added to the League circuit without consent of three-fourths of all the members of the League." *Id.*

[143] 15 U.S.C. § 1 (2012).

in a way that indicated a conscious commitment to a common plan designed to achieve an unlawful objective.[144]

Historically, most professional sports leagues have faced antitrust challenges under section 1.[145] Many leagues have attempted to defend these allegations by characterizing themselves as single entities.[146] As single entities, the leagues would not be subject to section 1 claims because the concerted conduct of individuals (different entities within the league) would not be present.[147] The Supreme Court finally clarified the issue of whether a sports league is a single entity in *American Needle v. National Football League*.[148]

The issue arose when the NFL granted exclusive headwear rights to Reebok, and American Needle brought suit stating that this exclusive licensing agreement violated section 1.[149] The NFL argued that it was incapable of conspiring under section 1 because the NFL and its member teams must be considered a single entity.[150] The Seventh Circuit held that the NFL and its teams operate as a single entity for antitrust purposes, and American Needle petitioned for certiorari from the Supreme Court.[151] The Supreme Court chose to review the American Needle case specifically to determine whether the NFL is exempt from antitrust scrutiny under section 1.[152] The Supreme Court held that "[e]ach of the [NFL] teams is a substantial, independently owned, and independently managed business" and "[w]hen each NFL team licenses its intellectual property, it is not pursuing the 'common interests of the whole' league but is instead pursuing interests of each 'corporation itself . . . ."[153] For antitrust purposes,

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[144] Blakely, *supra* note 136, at 115.

[145] *Id.* Major League Baseball is the only league that has escaped most antitrust scrutiny since it was awarded an antitrust exemption in 1922 that has been reaffirmed in several cases by the Supreme Court. *Id.* at n.73.

[146] *Id.*; *see also* Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991).

[147] Blakely, *supra* note 136, at 117.

[148] 560 U.S. 183 (2010).

[149] *Id.* at 187.

[150] *Id.* at 188.

[151] *Id.* at 188–89.

[152] *Id.* at 189.

[153] *Id.* at 196–97.

the Court determined that decisions by the NFL regarding teams' intellectual property amounted to concerted action within the meaning of section 1 because they were individuals and not a single entity.[154] This case established a precedent that will likely prevent sports leagues from asserting the single entity defense in federal courts again.[155]

The *American Needle* decision came down in 2010, less than a year after *Dewey Ranch* was finalized. It can be argued that if *American Needle* occurred prior to *Dewey Ranch*, it may have affected the outcome. *In re Dewey Ranch I* relied heavily on the lack of decision on whether non-bankruptcy law would allow the sale.[156] However, *In re Dewey Ranch II* merely assumed that there was a bona fide dispute, allowing for the idea that there may be a valid antitrust issue, and even then the NHL's interests could not be adequately protected.[157]

V. EFFECT OF THE *DEWEY RANCH* CASES ON A BANKRUPTCY SALE OF A PROFESSIONAL SPORTS TEAM

The most obvious lesson from the *Dewey Ranch* holdings for professional sports team owners is to exercise caution when they try to sell a team through a bankruptcy sale. While the NHL heavily speculated in *Dewey Ranch* whether the Coyotes were attempting to use the bankruptcy to push the sale to PSE through, that view was never confirmed. It is entirely possible that Moyes found a viable bidder and was ready to be done drowning in the Coyotes' debt. He could have been in serious financial strain and needed the sale and the bankruptcy to pay off his creditors and receive some relief, just like many other debtors who file Chapter 11. As discussed before, the price tag to purchase a team is at an all-time high, and there are a number of teams that are not particularly profitable. The allure of owning a team may be attributable to the exclusivity of it, rather than the profitability (although many teams are very profitable). It is reasonable to assume that there could be another bankruptcy of a sports franchise, with an intention to sell a team to relieve a debtor of significant debts.

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[154] *Id*. at 202–03.
[155] Blakely, *supra* note 136, at 123.
[156] *See* discussion *supra* Section IV A. *In re Dewey Ranch I*.
[157] *See* discussion *supra* Section IV B. *In re Dewey Ranch II*.

The *American Needle* decision post-*Dewey Ranch* could be significant in the bankruptcy sale context for a professional sports league. The Bankruptcy Court for the Coyotes bankruptcy decided it could not adequately protect the interest of the NHL under section 363(e) because of the NHL's right to admit new members, and the NHL's right to determine where a team can play.[158] If the teams are independently owned and operated businesses, it could be up to them to determine where they can play, and how to determine who can be a member. The NHL, or other professional sports league, regulating this process of individual entities could be seen as a concerted action, as in *American Needle*, and therefore section 363(e) may not be available to a league as a defense to a section 363 sale, assuming the buyer agrees to pay the league's relocation fee.

The outcome of a section 363 sale of a professional sports team in bankruptcy may be significantly different if the new owner does not wish to relocate the team, or the league is not a secured creditor. If a new owner does not wish to relocate the team, and league's non-monetary interests are reduced to the exclusive membership process, this may not be an interest that warrants adequate protection. Conversely, if the league were not a secured creditor, it may not have an interest that would need to be adequately protected under section 363(e) depending on the circumstances.

Therefore, if a professional sports league owner needs to submit himself to the bankruptcy process to receive the same relief that other debtors filing bankruptcy receive, he may be able to sell the sports team to any buyer, regardless of objections by the league. The seller must take caution to ascertain that the requirements of section 363 are met and understand the risk that a bankruptcy court may find that the league's interests are not adequately protected under section 363(e). Additionally, there is the possibility that a court could condition a section 363 sale to proceed as long as the interests of the league are adequately protected, thereby fulfilling section 363(e). There has not been enough case law or guidance beyond *Dewey Ranch* to determine what the bankruptcy court may do in this situation. In any case, a professional sports team owner should not be excluded from the relief of a Chapter 11 filing, and the creditors should not be

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[158] *See In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 590–92 (Bankr. D. Ariz. 2009).

punished by receiving a smaller payout because of the league's interests.

VI. APPLYING *DEWEY RANCH* BEYOND THE SPORTS WORLD

The business of professional sports is specific and unique. All the teams in a league work together through competition to create one product—competitive sporting events. Therefore, the applicability of *Dewey Ranch* outside of the sporting context is likely limited. Leagues and teams operate at almost a vertical monopoly, with a union to protect players' rights, and team owners to ensure competitive balance within the league. Due to antitrust concerns, there is likely no parallel to this structure outside of professional sports teams.

One of the closest parallels to a professional sports league and its member teams would be a franchisor-franchisee relationship. The judge in *Dewey Ranch* used the same analogy:

> [T]he assertion here is akin to a purchaser of a bankrupt franchise in a remote location asserting that it can be relocated far from its original agreed site to a highly valuable location, for example to New York City's Times Square, because the contractual geographic requirement/limitation is a restriction, prohibition, or condition precluding assignment.[159]

However, this analogy does not seem to be completely accurate, nor does this situation seem to elicit the same holding or consequences as in *Dewey Ranch*. Generally, the relationship between franchisor and franchisee is mainly monetary. Some franchisors require new franchisees to submit to background checks and comply with certain membership restrictions, and some require the franchise to be in specific locations. However, many of the franchise problems can be resolved with money. If a franchisee wishes to run their business in a specific location, the franchisor likely is indifferent as long as the franchisee can continue to make their payments of royalty fees. Additionally, if the franchisor is worried about its interest being adequately

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[159] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30, 37 (Bankr. D. Ariz. 2009).

protected, it likely could put a monetary value on that concern based on a franchisee in a location where the other franchisee wished to move. Both parties could likely be compensated for a relocation. Therefore, the specific interests in the sports context (to determine where a team can play and who can be a member) are not relevant as long as the franchisor is getting paid and the franchise is being used within the contract terms.

Shopping malls and their retailers are potentially another business similar to professional sports leagues. A shopping mall owner regulates what businesses may lease space in the mall and how a retailer can become a member of the shopping mall experience. However, the *Dewey Ranch* outcome would be inapplicable to a shopping mall because the Bankruptcy Code has a specific provision to deal with shopping malls and bankruptcy. Under section 365(b)(3), a debtor may not assign a shopping center lease unless: (1) the assignee can prove that its finances and operating condition will be similar to the debtor; (2) the assignment is subject to existing lease provisions, including, but not limited to, radius, location, use, or exclusivity; and (3) the assignment does not disrupt the tenant mix or balance in the shopping center.[160]

Should a specific provision in the code be created for professional sports leagues? The assumption would be that not enough of them enter Chapter 11 bankruptcy to warrant a provision in the Code. However, when professional sports teams do enter bankruptcy, there is very little guidance in the Code, and based on existing case law (*Dewey Ranch*), very little relief offered to team owner debtors. It appears that a bankruptcy court must make an antitrust determination or have a previously made antitrust determination to proceed with a sale of a professional sports team in bankruptcy. Leaving the antitrust decision up to a bankruptcy court may be outside the scope of what a bankruptcy court should decide. The shopping center provision in the Code provides guidance on some very similar concerns as a professional sports league, mainly that having too many teams or retailers in a single market will not upset the competitive balance of the league or shopping mall. However, the NHL and other professional sports leagues appear to be significantly concerned with the exclusivity of their members and membership process, which is not addressed in the shopping mall provision, and probably should not be. While a Code provision could provide guidance, ultimately

[160] 11 U.S.C. § 365(b)(3) (2012).

the antitrust issue likely needs to be resolved outside of bankruptcy court to provide clear guidelines to professional sports teams entering bankruptcy.

It is possible that some of these issues may arise with future digital trends. Streaming services come to mind, if only because there are a few companies that monopolize the market and compete with one another for digital media content like Netflix, Hulu, Amazon Video, and HBO GO. If one entity were to purchase these digital streaming services, it could create a professional sports-like universe within the bounds of digital streaming. However, digital streaming services do not have to worry about relocation issues since they exist digitally.

Ultimately, while the boundaries of the *Dewey Ranch* holding seem to specifically target professional sports leagues, it could extend to other types of businesses. This extension could occur where a business that basically had a monopoly over one industry, and that monopoly was maintained by the business keeping a roster of members below it, and the membership was exclusive and tied to specific territorial locations. In this scenario, the main business would have the power to prohibit any debtor sales under section 363 because its non-monetary interests will never be adequately protected as required under section 363(e). Thus, a bankruptcy should prohibit the sale.

CONCLUSION

The bankruptcy filing of the Phoenix Coyotes and the subsequent dispute has left an interesting mark on the business of professional sports leagues and bankruptcy filings. At the time of the Phoenix Coyotes bankruptcy, there was conflicting antitrust case law, and now it has been determined that professional sports teams are independently owned and operated, and leagues are not a single entity. This could create an opening for a bona fide dispute claim to effectuate a sale against the league's wishes. But even with this new antitrust case law, the *Dewey Ranch* holding specifically prohibits a section 363 sale if the interests cannot be adequately protected, both economic and non-economic. And, there was no resulting guidance from the *Dewey Ranch* cases on whether a non-economic interest is compensable. Any subsequent bankruptcy filings by a professional sports team attempting to sell their team and relocate them under a section 363 sale, should be done with caution and attempt to protect all the various interests. The outcome of a section 363 sale in a case where the league is not a secured creditor, or the party interested is not attempting to

relocate the team may be significantly different, so a section 363 sale may still be an adequate remedy for a debtor. However, finding a buyer who is willing to take on a team in an unsuccessful market may be more difficult than a buyer who is willing to relocate the team to a potentially more profitable market.

Outside of the professional sports context, the *Dewey Ranch* holding is likely unusable. No other entities are run like a professional sports league—the closest being a shopping mall, where the Bankruptcy Code provides for specific protection when lessors enter bankruptcy. However, as many sports teams are cash strapped, it is absolutely possible that the same scenario as in *Dewey Ranch* will arise again. It is also possible that there could be a significantly different outcome because of clarification and binding precedent on antitrust issues in sports, or future Bankruptcy Code revisions regarding professional sporting teams in bankruptcy, or even more possibly, new section 363(e) case law on how to protect non-economic interests.

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