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Major League Baseball Team Bankruptcies: Who Wins? Who Loses?

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MAJOR LEAGUE BASEBALL TEAM BANKRUPTCIES: WHO WINS? WHO LOSES?

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Baseball is America's sport. It evokes a sense of tradition and a love for the home team. Like all professional sports teams, however, baseball teams are part of a league, which restricts team ownership through contractual "constitutional" provisions and agreements and limits the number of teams that exist. In this limited and restricted entertainment market, professional sports teams operate highly lucrative businesses that sometimes seek bankruptcy protection through Chapter 11 reorganization. Bankruptcy generally allows the debtor to alter existing contractual rights and restructure its operations to avert the financial crisis that precipitated the bankruptcy filing. However, professional sports leagues have pre-existing contractual rights and remedies in place for the benefit and protection of all of their member teams that may conflict with bankruptcy laws, and the leagues try to enforce those rights, even in the bankruptcy arena. The league's existing contractual rights may conflict with bankruptcy laws that afford the debtor team to free itself from such obligations. This Comment discusses the extent to which professional sports teams can make material business decisions affecting their Chapter 11 reorganization without complying with the league's constitution and associated agreements. These conflicts are at the forefront of all professional sports team bankruptcies. The Dodgers bankruptcy provides a classic example of the clash between a debtor team's rights in bankruptcy and MLB's existing "constitutional" rights.

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I. INTRODUCTION

Baseball is America's sport.[1] A classic form of entertainment, baseball provides daily drama and culminates in the World Series—the "Fall Classic."[2] Baseball thrives because millions of fans "can open up the sports page, digest the box scores, and learn whether their team triumphed or failed the night before."[3]

However, baseball is more than a game; it is a business.[4] Like any other business, baseball teams can reap great profits or falter into bankruptcy.[5] When a club files for Chapter 11 bankruptcy, Major League Baseball ("MLB") must confront the intricacies of that bankruptcy.[6] However, resorting to bankruptcy is a relatively rare occurrence in professional sports.[7]

Recently, the Los Angeles Dodgers became baseball's third team in three years to file for bankruptcy.[8] Although MLB supported the bankruptcy filings of the Chicago Cubs and the Texas Rangers, it did not support the Dodgers' bankruptcy.[9] When the Dodgers filed for bankruptcy on June 27, 2011,[10] Frank McCourt, the Dodgers' owner, and MLB were locked in a highly publicized public dispute for ultimate control over the Dodgers,[11] the third most valuable team in baseball.[12]

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1. *See generally* Andrew P. Hanson, *The Trend Toward Principled Negotiation in Major League Baseball Collective Bargaining*, 15 SPORTS LAW. J. 221, 221 (2008).

2. *See World Series Overview*, MLB.COM, http://mlb.mlb.com/mlb/history/postseason/mlb_ws.jsp (last visited Nov. 26, 2012).

3. Hanson, *supra* note 1, at 221.

4. SCOTT R. ROSNER & KENNETH L. SHROPSHIRE, THE BUSINESS OF SPORTS xi (Scott R. Rosner & Kenneth Shropshire eds., 2d ed. 2011).

5. Ralph C. Anzivinio, *Reorganization of the Professional Sports Franchise*, 12 MARQ. SPORTS L. REV. 9, 9–10 (2001).

6. *Id.*

7. *Dodgers Just Latest Team to File for Bankruptcy*, YAHOO! SPORTS (June 28, 2011), http://sports.yahoo.com/top/news?slug=ys-cnbc_dodgers_not_first_bankrupty_team_062811.

8. Tom Hals, *Dodgers Win Court Approval for $60 Mln Bankruptcy Loan*, REUTERS (June 28, 2011), http://www.reuters.com/article/2011/06/28/losangelesdodgers-bankruptcy-idUSN1E75R06120110628.

9. Maury Brown, *Sizing Up the Dodgers Bankruptcy to the Cubs, Rangers, and Coyotes*, THE BIZ OF BASEBALL (June 28, 2011), http://bizofbaseball.com/index.php?view=article&catid=26%3Aeditorials&id=5301%3Asizing-up-the-dodgers-bankruptcy-to-the-cubs-rangers-and-coyotes&tmpl=component&print=1&layout=default&page=&option=com_content&Itemid=39.

10. Voluntary Petition, *In re*: Los Angeles Dodgers LLC, No. 11-12010 (KG) (Bankr. D. Del. 2011).

11. Eryn Doherty, *The Dodger Debacle*, MARQ. U. L. SCH. FACULTY BLOG (Aug. 18, 2011), http://law.marquette.edu/facultyblog/2011/08/18/the-dodgers-debacle/.

McCourt alleged the Dodgers were forced to file for bankruptcy after Commissioner Allan "Bud" Selig refused to approve an approximately $3 billion telecast agreement that McCourt needed to meet payroll and other financial obligations.[13] However, Commissioner Selig contended that the bankruptcy filing "does nothing but inflict harm to this historic franchise."[14] McCourt expected the bankruptcy to allow him to obtain temporary financing to meet payroll and other obligations and retain control of the team.[15] McCourt also anticipated the bankruptcy would allow him to sell the television rights to the highest bidder and, in the process, override MLB rules governing the clubs, including the Dodgers.[16]

Typically, bankruptcy allows the debtor sports club to alter certain contractual rights and to restructure its operations to avert the financial crisis that precipitated the bankruptcy filing.[17] However, professional sports leagues have pre-existing contractual rights and remedies in place for the benefit and protection of all member teams, and the leagues try to enforce those rights, even in the bankruptcy arena.[18] For example, in professional baseball, MLB is governed by a constitution, an "agreement" among MLB clubs.[19] Like other professional sports leagues' constitutions (e.g., National Football League[20] and National Hockey League[21]), the MLB Constitution contains rules governing the sale, transfer, or assignment of ownership interests in the teams,[22] and other important approval and consent provisions.[23]

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12. *Full List: Baseball's Most Valuable Teams*, FORBES, http://www.forbes.com/2011/03/22/mets-yankees-phillies-dodgers-baseball-valuations_slide_4.html (last visited Nov. 26, 2012). In March 2011, Forbes ranked the Dodgers as baseball's third most valuable team, at $800 million, with only the New York Yankees and Boston Red Sox worth more. *Id.*

13. Bill Shaikin, *In Filing for Bankruptcy, Dodgers Will Ask Judge to Override MLB Rules*, L.A. TIMES (June 27, 2011), http://articles.latimes.com/2011/jun/27/sports/la-sp-dodgers-bankruptcy-20110628.

14. Commissioner Allan H. (Bud) Selig, *MLB Statement Regarding Dodgers Chapters 11 Filing*, MLB (June 27, 2011), http://mlb.mlb.com/content/printer_friendly/mlb/y2011/m06/d27/c21076822.jsp.

15. Shaikin, *supra* note 13.

16. *Id.*

17. Anzivinio, *supra* note 5, at 10–11.

18. *Id.* at 29.

19. MAJOR LEAGUE CONST. art. I (2005), *available at* http://bizofbaseball.com/docs/MLConsititutionJune2005Update.pdf.

20. NAT'L FOOTBALL LEAGUE CONST. art. III § 3.5 (2006), *available at* http://static.nfl.com/static/content//public/static/html/careers/pdf/co_.pdf.

21. NAT'L HOCKEY LEAGUE CONST. art. III § 3.5, *available at* http://www.bizofhockey.com/docs/NHLConsitution.pdf.

22. MAJOR LEAGUE CONST. art. V, § 2(b)(2).

23. *Id.* § 2(a).

However, the "constitutional rights" guaranteed by MLB may conflict with bankruptcy laws, which are supposed to afford the debtor the right to free itself from onerous contracts, leases, restrictive covenants, and other obligations.[24] The Dodgers' bankruptcy filing represents the most recent example of this clash between bankruptcy law and professional sports.[25] The fundamental debate centers on who should win and who should lose the game when the parties enter the "bankruptcy" arena.[26]

This comment will address the extent to which MLB teams can make material business decisions affecting their Chapter 11 reorganization without complying with the terms of the MLB Constitution and associated regulations.[27] These competing interests are at the forefront of all contested sports team bankruptcies.[28] The Dodgers' bankruptcy provides a classic case study of the clash between a debtor team's rights in bankruptcy and MLB's existing "constitutional" rights.[29] Although MLB and the Dodgers have settled their differences,[30] the legal issues addressed in this bankruptcy case are likely to recur in other sports team bankruptcies as other teams face economic problems.[31] Also, recurrence is likely because the law is unsettled and each side can present persuasive arguments.[32]

Section II of this comment will summarize MLB's structure and highlight prior sports team bankruptcies. Section III will evaluate the events that led to the Dodgers' bankruptcy filing, and Section IV will provide an overview of bankruptcy reorganization. Section V will address the bankruptcy issues raised in the Dodgers bankruptcy, but are likely to reoccur in other future sports team bankruptcies. The section will analyze whether the

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24. *See generally* Anzivinio, *supra* note 5, at 28–36.

25. *See generally* Alicia Jessop, *For the Love of The Game: Why "The Game" Prevents MLB's Takeover of The Dodgers*, RULING SPORTS: A SPORTS L. BLOG (July 6, 2011, 12:13 AM), http://rulingsports.com/2011/07/06/for-the-love-of-the-game-why-the-game-presents-a-challenge-to-mlb-overtaking-dodgers.

26. Jeffrey I. Golden & Robert S. Marticello, *Sports Team Bankruptcies: Home Runs or Strikeouts?*, L.A. DAILY J., Aug. 11, 2011, at 3.

27. *Id.*

28. *Id.*

29. *Id.*

30. Debtors' Motion for Order, Pursuant to Sections 363(b) and 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving Settlement Agreement with the Office of the Commissioner of Baseball, Doing Business as Major League Baseball at ¶ 1, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Dec. 6, 2011), 2011 WL 6057895.

31. For example, the New York Mets lost $70 million in 2011 and cut payroll by $52 million in 2012 due to mounting liabilities and cash-strapped ownership. Bill Shaikin, *Steven Cohen, Dodgers Bidder, May Buy a Piece of the Mets*, L.A. TIMES (Feb. 1, 2012), http://articles.latimes.com/print/2012/feb/01/sports/la-sp-0202-dodgers-steve-cohen-20120202.

32. Golden & Marticello, *supra* note 26.

debtor sports team can assume or assign league and other agreements if the team is in incurable breach of those agreements. In addition, it will discuss whether MLB's consent is required as a predicate to the assumption or assignment of such agreements. Compliance with such agreements is the very foundation of a debtor sports team's ability to reorganize successfully and continue to operate the team as a member of the league. Finally, this Comment will discuss whether MLB can terminate a team from the league for filing bankruptcy, or whether termination on such grounds would constitute an unenforceable *ipso facto* clause.

II. THE STRUCTURE OF MAJOR LEAGUE BASEBALL AND TEAM BANKRUPTCIES

Professional baseball is one of America's oldest organized league sports, which dates back to 1869.[33] Every year, "[f]rom April through October . . . , [Major League Baseball ("MLB")] runs a 162-game regular season and a post-season playoff that determines that season's World Series Champion. [MLB] teams are divided into two leagues (American and National) and six divisions ([American League East, Central, and West; and National League East, Central, and West])."[34] Doing business as "MLB," the Office of the Commissioner of Baseball is an unincorporated association of its thirty member clubs.[35] MLB's primary purpose is to undertake centralized activities on behalf of the thirty clubs.[36]

A. Historical Overview

Since the beginning of professional baseball in the mid-nineteenth century, the game has been governed by an associational structure.[37] The first structure, the "National Association of Base Ball Players," created a National Commission, consisting of a three-person body with supervisory control of professional baseball.[38] The National Association, a loose assemblage of players, was ineffective at controlling the gambling and brib-

33. Objection of Major League Baseball to Debtors' Motion to Obtain Post-Petition Financing and for Related Relief at 5, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. June 28, 2011), 2011 WL 2678238 [hereinafter *Objection of Major League Baseball*].

34. *Id.*

35. *Id.*

36. *Id.* at 5–6.

37. *The Commissionership: A Historical Perspective*, MLB.COM, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com (last visited Nov. 26, 2012).

38. *Id.*

ery that became widespread in baseball; therefore, it was replaced by the "National League of Professional Base Ball Clubs" ("National League").[39]

The National League was set apart from the National Association because it was an organization of baseball clubs, rather than a players' association.[40] Although the National League was still maintained by a group of committees, a group of five directors had most of the administrative power.[41] Shortly after formation of the National League, other leagues were formed, which resulted in increased competition amongst the teams for players.[42] To control the appropriation of players from league to league, the three major leagues committed to the "Triparte Agreement," later renamed the "National Agreement," which served as the "central law" of the three-league system.[43]

The 1919 Black Sox scandal led to the demise of baseball's initial structure.[44] In response, the National League proposed to eliminate the National Commission and replace it with "one leader, a man 'of unquestionable reputation and standing in fields other than baseball' whose 'mere presence would assure that public interest would first be served, and that therefore, as a natural sequence, all existing evils would disappear.'"[45] On January 12, 1921, "the position of Baseball Commissioner was created . . . with the ratification of the new Major League Agreement."[46] Baseball's first Commissioner was United States District Court Judge Kenesaw Mountain Landis, who served as a Commissioner for twenty-four years, the longest tenure of any Commissioner to date.[47] The current baseball commissioner is Allan H. "Bud" Selig.[48]

B. The Major League Constitution

Originally adopted as the Major League Agreement of 1921, the MLB Constitution entitles each club to the benefits of the Constitution, but also

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *The Commissionership: A Historical Perspective*, *supra* note 37.

44. *Id.* Eight players from the Chicago White Sox allegedly took bribes to intentionally lose the 1919 World Series against the Cincinnati Reds. *Id.*

45. *Id.*

46. *Id.*

47. *Commissioner*, BASEBALL-REFERENCE, http://www.baseball-reference.com/bullpen/Commissioner (last modified Feb. 9, 2010).

48. *Id.*

binds each club to its terms and provisions.[49] For example, Article VIII specifies the thirty-team membership and requires its members to "act at all times in the best interests of Baseball."[50]

Article II establishes the Office of the Commissioner of Baseball.[51] The Commissioner's functions include serving as the "Chief Executive Officer" and investigating "any act, transaction or practice" alleged or suspected "to be not in the best interests" of baseball.[52] With the appropriate vote of the MLB clubs, the Commissioner may take "punitive action" to correct offenses deemed not to be in the "best interests" of baseball.[53] The penalties range from a reprimand or a fine to removal of "any owner, officer or employee of a Major League Club."[54]

The Commissioner's powers and remedial measures are extremely broad and extend to "such other actions as the Commissioner may deem appropriate."[55] The "best interests of baseball" clause authorizes the Commissioner to protect and regulate the conduct of each MLB club so that each club operates in the best interests of baseball, baseball fans, and sponsors.[56] Furthermore, this clause protects the integrity of the game.[57] Specifically, the Commissioner's authority extends to "any matter that involves the integrity of, or public confidence in, the national game of Baseball."[58]

Importantly, each club has agreed to act in the "best interests of baseball" as required by the MLB Constitution.[59] The Constitution's "Superseding Effect" clause provides as follows:

> This Constitution, and all actions taken pursuant to this Constitution, *shall supersede any conflicting provisions of any other agreement*, as amended, whether now existing or hereinafter en-

49. MAJOR LEAGUE CONST. art. I (2005), *available at* http://bizofbaseball.com/docs/MLConsititutionJune2005Update.pdf.

50. *Id.* at art. VIII, § 1.

51. *Id.* at art. II, § 1.

52. *Id.* at art. II, § 2; *see* Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1220–21 (N.D. Ga. 1977) (relying on the "best interests clause" to suspend an owner for tampering with a potential free agent).

53. MAJOR LEAGUE CONST. art. II, § 3.

54. *Id.* at art. II, § 3(a)–(g).

55. *Id.* at art. II, § 3(g).

56. *Objection of Major League Baseball*, *supra* note 33, at 4.

57. MAJOR LEAGUE CONST. art. II, § 4.

58. *Id.*

59. *Id.* at art. VIII, § 1.

> tered into, *to which any Major League Club is a party* and any conflicting actions taken pursuant thereto.[60]

Moreover, the MLB Constitution addresses the issue of the "involuntary termination" of a club.[61] With the approval of three-fourths of all MLB clubs, the "rights, privileges, and other property rights of a Major League Club" may be terminated involuntarily "if the Club in question shall do or suffer" certain specified conditions.[62] The most important of these "involuntary termination" conditions include the following:

> (f) Fail or refuse to comply with any requirement of the Commissioner; . . .
> (j) Fail or refuse to fulfill its contractual obligations; . . . or
> (l) [F]ile a voluntary petition in bankruptcy . . . or if reorganization proceedings in bankruptcy are instituted by or against the Club.[63]

The MLB Constitution also contains rules governing the sale or transfer of control interests in each club, which often are at the heart of sports teams' bankruptcies.[64]

C. Professional Sports Team Bankruptcies

Although uncommon, professional sports teams occasionally file for bankruptcy.[65] The financial viability of a professional sports team is driven by a complex combination of revenues and expenses: (a) ticket sales; (b) broadcast media revenue; (c) venue revenues; (d) license revenues; (e) naming rights revenues; (f) concessions; (g) player costs; (h) venue costs; and (i) operating expenses.[66] Teams are typically forced into bankruptcy due to huge debt, bad investments, or the financial hardship of the owner's primary business.[67] When a default in significant financing is imminent,[68]

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60. *Id.* at art. VII (emphasis added).

61. *Id.* at art. VIII, § 4.

62. *Id.*

63. MAJOR LEAGUE CONST. art. VIII, § 4(f), (j), (l). Due to the Dodgers' bankruptcy filing, Article VIII of the Major League Constitution allows MLB, acting through its Commissioner, to eject the Dodgers from the league, with the approval of three-fourths of all major league clubs. *Id.* (examining the legal permissibility of such an expulsion).

64. *Id.* at art. V, § 2(b)(2). In the Dodgers' bankruptcy, MLB's refusal to approve a new agreement between the Dodgers and Fox Sports Net West 2, LLC ("Fox Sports") for the sale of telecast rights was one of the alleged reasons for the Dodgers' bankruptcy filing. *See In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Dec. 15, 2011), 2011 WL 6257336.

65. *Dodgers Just Latest Team to File for Bankruptcy*, *supra* note 7.

66. Anzivino, *supra* note 5.

67. *Dodgers Just Latest Team to File for Bankruptcy*, *supra* note 7.

or when expenses exceed revenues, a Chapter 11 reorganization becomes an option.[69] Of the nine professional teams that have filed for bankruptcy in the past forty years (with the Pittsburgh Penguins filing twice), six are National Hockey League teams and three are MLB teams.[70] Over that time, the bankruptcies did not lead to a forfeiture or dissolution of the sports team, but rather resulted in a shift in ownership.[71]

In contrast, in the Dodger's bankruptcy, MLB has taken the position that the Dodgers, as debtors, should be compelled to abide by the MLB Constitution and other baseball agreements or reject them and effectively terminate the debtors' rights to the team.[72] This approach is at odds with other MLB bankruptcies. For example, MLB's Seattle Pilots played one season in Seattle, but the owners did not have sufficient funds to continue operating the team.[73] As a result, in March 1970, the owners filed for bankruptcy after a state court granted the State of Washington an injunction to prevent the owners from relocating the team.[74] Placing the team into bankruptcy allowed the approximately $10 million sale of the team to Bud Selig, the current MLB Commissioner.[75] The sale took place in time for the 1970 season.[76] The team later relocated to Milwaukee[77] and was re-named the "Milwaukee Brewers" as a result of the bankruptcy.[78]

Second, in 1989, Eli Jacobs led a group that purchased the Baltimore Orioles for $70 million.[79] In 1992, the Baltimore Orioles opened the season in Camden Yards, the first of the "retro" ballparks.[80] However, even

68. Anzivino, *supra* note 5, at 14.

69. *Id.* at 63–64.

70. *Dodgers Just Latest Team to File for Bankruptcy*, *supra* note 7; Brown, *supra* note 9; Darren Rovell, *10 Sports Franchises That Have Gone Bankrupt*, CNBC (June 28, 2011), http://www.cnbc.com/id/39915632?__source=yahoosports&par=yahoosports.

71. *Dodgers Just Latest Team to File for Bankruptcy*, *supra* note 7.

72. Motion of Major League Baseball to Terminate Exclusivity or, in the Alternative, to Compel the Debtors to Seek Assumption or Rejection of the Baseball Agreements at 23, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Oct. 7, 2011), 2011 WL 4945134.

73. *Ten Franchises that Filed for Bankruptcy: Seattle Pilots—1970*, REAL CLEAR SPORTS (Apr. 26, 2011), http://www.realclearsports.com/lists/franchise_bankruptcy/seattle_pilots_1970.html.

74. *Dodgers Just Latest Team to File for Bankruptcy*, *supra* note 7.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Ten Franchises that Filed for Bankruptcy: Baltimore Orioles—1993*, REAL CLEAR SPORTS (Apr. 26, 2011), http://www.realclearsports.com/lists/franchise_bankruptcy/baltimore_orioles_1993.html.

80. Rovell, *supra* note 70.

with consistent attendance,[81] Eli Jacobs filed for bankruptcy in his other primary business venture, Memorex Telex, and was forced into bankruptcy in March 1993.[82] During the bankruptcy, the Orioles were sold at auction with MLB's approval to lawyer Peter Angelos, who paid $173 million.[83]

Third, in 2009, the Tribune Company placed the Chicago Cubs into bankruptcy as a technical maneuver to help expedite the sale of the team, which was approved by the Tribune's creditors.[84] The sale received MLB's approval as well.[85]

Finally, in 2010, Texas Rangers' owner Tom Hicks incurred over $500 million in debt and defaulted, which caused chaos.[86] To raise funds, Hicks agreed to sell the team to Nolan Ryan and attorney Chuck Greenberg for $525 million.[87] However, when the creditors did not approve the sale, the Texas Rangers filed for Chapter 11 bankruptcy.[88] In an August 2010 auction, Ryan and Greenberg purchased the team for a reported $593 million, after besting Dallas Mavericks owner Mark Cuban and others.[89] In that bankruptcy, "the court was presented with, but did not ultimately resolve, the issue of whether the debtor could sell the team to a lower bidder because [MLB] had approved that bidder."[90] However, the court implied that the debtor could not sell the team without the league's approval, provided the league exercised its approval rights in good faith.[91] While the Texas Rangers' bankruptcy was contentious, it did not compare to the "tangled web" surrounding the Los Angeles Dodgers' Chapter 11 bankruptcy.[92]

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81. *Id.*

82. *Ten Franchises That Filed for Bankruptcy: Baltimore Orioles—1993*, *supra* note 79.

83. *Id.*

84. Brown, *supra* note 9.

85. *See* Steven Church, *Cubs File Bankruptcy, Plan Sale to Ricketts Family (Update3)*, BLOOMBERG (Oct. 12, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7Piey9m.a7g.

86. *See* Brown, *supra* note 9.

87. *Dodgers Just Latest Team to File for Bankruptcy*, *supra* note 7.

88. *In re* Texas Rangers Baseball Partners, 434 B.R. 393, 399 (Bankr. N.D.Tex. 2010).

89. *Dodgers Just Latest Team to File for Bankruptcy*, *supra* note 7.

90. Golden & Marticello, *supra* note 26.

91. *Id.*

92. Mark Harriman, *Dodgers Bankruptcy: A Tangled Web Woven*, BOS. SPORTS DESK (July 10, 2011), http://bostonsportsdesk.wordpress.com/2011/07/10/dodgers-bankruptcy-a-tangled-web-woven.

III. THE LOS ANGELES DODGERS CALAMITY

The well publicized calamity associated with the Los Angeles Dodgers began with the Frank McCourt acquisition of the team in 2004 and culminated in a hotly disputed bankruptcy in 2011, with accusations of wrong-doing by both McCourt and Major League Baseball ("MLB").[93] The dispute has forced both sides to raise legal issues not yet answered in the context of professional sports team bankruptcies.[94] To provide context for the legal issues presented in the Dodgers' bankruptcy, some background is needed of the team, the McCourt acquisition, the messy divorce that spotlighted the McCourt financial woes, and the bankruptcy filing.[95]

A. The Los Angeles Dodgers

The Los Angeles Dodgers, located in the second most populous metropolitan area in the United States, is one of only thirty MLB clubs and one of three clubs in southern California.[96] The Dodgers have a storied history,[97] which dates back to the late 1800s.[98] In 1947, the Dodgers broke baseball's color barrier by hiring Jackie Robinson, the first African American Major League Baseball player.[99] The Dodgers won their first World Series Championship in 1955.[100] In 1962, the Dodgers moved from New York to their new home at Dodger Stadium, located in Chavez Ravine, Los Angeles, where they continue to play.[101] The Dodgers have won six World Series Championships (five in Los Ange-

93. *See* Houston Mitchell, *Frank McCourt and the Dodgers: A Chronology*, L.A. TIMES (June 27, 2011), http://articles.latimes.com/2011/jun/27/sports/la-sp-0628-mccourt-chronology-20110628.

94. Golden & Marticello, *supra* note 26.

95. *See generally* Jessop, *supra* note 25.

96. *Objection of Major League Baseball*, *supra* note 33, at 6.

97. U.S. Bankruptcy Judge Kevin Gross, who presided over the Los Angeles Dodgers' bankruptcy, described the Dodgers' history as "rich and successful" and "of mythical proportions." Judge Gross captured that history: "Its great former players, managers and executives could justify their own hall of fame. Formerly the Brooklyn Dodgers, the team name is derived from fans who used to 'dodge' that city's trolleys." Voluntary Petition, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. 2011).

98. Declaration of Jeffrey J. Ingram in Support of Debtors' Chapter 11 Petitions and First Day Motions at 4, Voluntary Petition, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. June 27, 2011).

99. *Id.*

100. *Objection of Major League Baseball*, *supra* note 33, at 6.

101. *Id.*

les).[102] The Dodgers' most recent World Series championship occurred in 1988.[103]

In 1998, Fox Sports purchased the Dodgers and created a regional sports network.[104] Thereafter, in November 2001, the Dodgers and Fox Sports entered into a Telecast Rights Agreement.[105] In 2003, Fox Sports decided to sell the team along with the surrounding real estate (stadium and parking lots), and in early 2004, McCourt purchased the Dodgers and the associated real estate.[106] In connection with the purchase, Fox Sports and McCourt agreed to an amendment to the Telecast Rights Agreement.[107] Under the amended agreement, the term of the Telecast Rights Agreement was extended to grant Fox Sports the right to telecast Dodger games through the 2013 season.[108] Furthermore, Fox Sports received an exclusive renegotiation right for an additional five-year term, with negotiations to take place from October 15 to November 30, 2012.[109] Fox also received a right of first refusal as to third-party offers.[110]

B. 2004: The McCourt Era

In February 2004, Frank McCourt acquired the Dodgers and associated real estate from Fox Sports for $430 million.[111] MLB unanimously approved the sale to McCourt;[112] however, the acquisition of the team was based almost wholly on borrowed funds.[113] Further, there were important conditions to the acquisition. First, McCourt and the Dodgers were required to acknowledge their obligation to comply with all the terms and

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102. Declaration of Jeffrey J. Ingram, *supra* note 98.

103. *Id.* Kirk Gibson's two-run home run in the ninth inning of the first game of the 1988 World Series is an indelible memory from that World Series. *World Series Summary*, MLB, http://mlb.mlb.com/mlb/history/postseason/mlb_ws.jsp (last visited Apr. 22, 2012).

104. Memorandum Opinion at 2, Voluntary Petition, *In re*: Los Angeles Dodgers LLC, et al., No. 11-12010 (KG) (Bankr. D. Del. Dec. 15, 2011).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Memorandum Opinion, *supra* note 104, at 2.

111. Declaration of Jeffrey J. Ingram, *supra* note 98.

112. *Id.*

113. Objection of Major League Baseball to Final Approval of Debtors' Emergency Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post Petition Financing, Pursuant to 11 U.S.C. §§ 105, 362, and 364, and (II) Scheduling Final Hearing Pursuant to Bankruptcy Rules 4001(B) and 4001(c) at 8, Voluntary Petition, *In re*: Los Angeles Dodgers LLC, et al., No. 11–12010 (KG) (Bankr. D. Del. July 14, 2011).

conditions imposed by MLB, including the MLB Constitution and other rules and regulations.[114] Second, MLB "required that Mr. McCourt agree to provide an additional $30 million in liquid equity within three years [of acquisition] through the sale of certain real estate assets or by securing equity investors."[115]

Under the McCourt ownership, the Dodgers performed well.[116] For example, in 2004, the Dodgers won their first playoff game in several years, and in both 2008 and 2009, the team advanced to National League Championship Series games for the first time in several decades.[117] However, on October 14, 2009, while the Dodgers entered into its second championship series, Frank and Jamie McCourt announced their separation after thirty years of marriage.[118] A few days later, Frank McCourt claimed he owned one hundred percent of the team; Jamie claimed otherwise, stating she held a fifty percent ownership interest.[119] On October 22, 2009, Frank McCourt fired his wife as the Chief Executive Officer of the Dodgers.[120] This action triggered Commissioner Bud Selig to announce that the league would track the McCourts' ongoing and much publicized dispute.[121] Shortly thereafter, on October 27, 2009, Jamie McCourt filed for divorce and spousal support.[122]

In May 2010, the divorce court ordered McCourt to pay Jamie $640,000 per month in support, including $225,000 in spousal support, and $412,159 per month for costs associated with their real property.[123] Overall, McCourt was ordered to pay more than $7.6 million per year.[124] To cover the spousal support and other financial obligations, McCourt entered into a proposed transaction with Fox Sports, which involved the sale of the

114. *Id.* at 7–8.

115. *Id.* at 8.

116. *See* Declaration of Jeffrey J. Ingram, *supra* note 98, at 6.

117. *Id.*

118. Helene Elliot & Bill Shaikin, *Dodgers Owner Frank McCourt, Wife Jamie Separate*, L.A. TIMES (Oct. 15, 2009), http://articles.latimes.com/2009/oct/15/sports/sp-mccourts15.

119. Mitchell, *supra* note 93.

120. Jessop, *supra* note 25.

121. *Id.*

122. Order to Show Cause to Modify *Pendente Lite* Spousal Support, *In re* Marriage of McCourt, No. BD 514309 (Cal. Super. Ct. Oct. 27, 2009).

123. Court's Ruling on Submitted Matter at 44–45, McCourt v. McCourt, No. BD514309 (Cal. Super. Ct. May 7, 2010), 2010 WL 1848207.

124. *See id.*

Dodgers' future telecast rights.[125] The transaction was reportedly valued at about $1.7 billion in telecast fees,[126] but also involved Fox Sports making a $385 million loan to one of the McCourt-owned entities to pay for the proposed divorce settlement and to satisfy other financial obligations.[127]

The telecast rights transaction was subject to MLB approval and required the consent of Jamie McCourt due to her claimed ownership interest in the Dodgers and related assets.[128] Moreover, if MLB did not approve the proposed Fox transaction, it would be "null and void."[129] Jamie McCourt consented to the proposed Fox transaction[130] but MLB did not immediately respond to McCourt's request for approval.[131]

Meanwhile, the divorce proceedings exposed the McCourts' lavish lifestyle and use of Dodgers funds for personal purposes.[132] On December 7, 2010, the court invalidated the post-nuptial marital agreement that Frank McCourt had claimed provided him with sole ownership of the Dodgers.[133] The divorce left McCourt financially distressed and exposed him to a potential loss of fifty percent of the team and its assets.[134]

Additionally, at the beginning of the 2011 season, a violent fight occurred at Dodger Stadium.[135] A San Francisco Giants fan, Bryan Stow, was attacked in the Dodger Stadium parking lot after the Dodgers' opening day game.[136] As a result, Stow was in a coma for several weeks and suffered brain damage, raising the prospect of a suit for substantial damages.[137] On April 20, 2011, Commissioner Selig announced that he would appoint a monitor to oversee the Dodgers' day-to-day operations, effectively taking control of the team from McCourt.[138]

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125. Marie-Andrée Weiss, *Take Me Out to the Courts: The Los Angeles Dodgers File For Bankruptcy*, ENT., ARTS & SPORTS L. BLOG (July 1, 2011, 8:24 AM), http://nysbar.com/blogs/EASL/2011/07/take_me_out_to_the_courts_the.html.

126. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 23–24.

127. *See* Binding Term Sheet at 1, *In re* Marriage of McCourt, No. BD 514309 (Cal. Super. Ct. Jun. 17, 2011), 2011 WL 2420345.

128. *See id.* at 1–2.

129. *Id.* at 1.

130. *Id.* at 4.

131. Declaration of Jeffrey J. Ingram, *supra* note 98, at 11.

132. Doherty, *supra* note 11.

133. Mitchell, *supra* note 93.

134. Doherty, *supra* note 11.

135. Jessop, *supra* note 25.

136. *Id.*

137. Doherty, *supra* note 11.

138. Mitchell, *supra* note 93.

With attendance down and financial pressures mounting, McCourt pushed MLB for its approval of the proposed Fox transaction—a transaction that would bail out McCourt from financial ruin for the time being.[139] However, on June 20, 2011, Commissioner Selig advised McCourt by letter that MLB would not approve the proposed Fox transaction.[140] Commissioner Selig declined to approve the transaction for multiple reasons, including: (a) McCourt did not obtain other offers for the telecast rights and, therefore, did not maximize the value of those rights; (b) the loan advance would "hamstring" the Dodgers going forward and would sacrifice the Dodgers' future in exchange for an immediate payoff; (c) a substantial portion of the loan advance would be used to pay for McCourt's other financial obligations unrelated to the Dodgers; and (d) it represented a short-term fix with the Dodgers facing liquidity issues again as early as 2013.[141]

C. 2011: Bankruptcy Filing

Based on Commissioner Selig's refusal to approve the proposed Fox transaction, the Los Angeles Dodgers LLC did not have sufficient funds to meet payroll and other expenses in June 2011.[142] Accordingly, on June 27, 2011, the Los Angeles Dodgers LLC and other debtors[143] negotiated a debtor-in-possession financing commitment and filed for Chapter 11 bankruptcy.[144] In response to the filing, the Bankruptcy Court in Delaware directed the procedural consolidation and joint administration of the Chapter 11 cases[145] and allowed the debtor entities to continue to manage their assets as debtors-in-possession,[146] pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.[147]

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139. Declaration of Jeffrey J. Ingram, *supra* note 98, at 8–13.

140. Order to Show Cause, *supra* note 121.

141. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72.

142. Declaration of Jeffrey J. Ingram, *supra* note 98, at 14.

143. The Debtors are Los Angeles Dodgers LLC; Los Angeles Dodgers Holding Company LLC; LA Holdco LLC; LA Real Estate Holding Company LLC; and LA Real Estate LLC. *See* Order Directing Joint Administration of The Debtors' Chapter 11 Cases and Granting Related Relief, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Jun. 28, 2011).

144. Declaration of Jeffrey J. Ingram, *supra* note 98, at 14.

145. Order Directing Joint Administration, *supra* note 143.

146. Section 1107 of the Bankruptcy Code allows debtors to remain in control of the business entities that file bankruptcy; the debtor-in-possession acts as a fiduciary and must perform the functions and duties of a Chapter 11 trustee, which include accounting for property, examining and objecting to claims, and filing reports as required by the Bankruptcy Court. 11 U.S.C. § 1107 (2006); *see also Chapter 11 Reorganization Under the Bankruptcy Code*, U.S. COURTS, *available at* http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter11.aspx (last viewed Nov. 27, 2012).

147. Objection of Major League Baseball to Final Approval, *supra* note 113, at 8.

Throughout the bankruptcy proceedings, the Dodgers contended that the purpose of the bankruptcy was to obtain court permission to hold a competitive sale of the Dodgers' exclusive telecast rights, a move that would permit McCourt to maintain control of the team and allow for the payment of all outstanding financial obligations.[148] To implement the McCourt plan, the Dodgers and other debtors filed a motion to establish bidding procedures for an auction and sale of the Dodgers' telecast rights under section 363 of the Bankruptcy Code.[149]

At issue was whether the McCourt bankruptcy plan required MLB approval, with MLB having previously rejected the telecast rights transaction because it was not "in the best interests of Baseball."[150] Also at issue was whether the filing of the bankruptcy itself was a material breach of the MLB Constitution, subjecting the Dodgers to possible involuntary termination.[151]

The McCourt bankruptcy plan was further complicated because the telecast rights were not yet "ripe" for sale. The current telecast rights with Fox Sports[152] ran through 2013; therefore, the McCourt plan to sell such rights as part of the bankruptcy would arguably breach the Dodgers' Telecast Rights Agreement with Fox Sports.[153] In fact, on September 25, 2011, Fox Sports filed suit against the Dodgers in bankruptcy court, alleging the team breached the Telecast Rights Agreement by pursuing the competitive sale of such rights through bankruptcy.[154] In response, Fox Sports sought damages for such breach, injunctive relief, and requested that the court reject any such sale except in accordance with the terms and conditions of Fox's existing agreement with the Dodgers.[155] According to Fox Sports,

148. Declaration of Jeffrey J. Ingram, *supra* note 98, at 14.

149. Los Angeles Dodgers LLC's Motion for Orders: (I) Approving Marketing Procedures for the Licensing of Telecast Rights, Including the Scheduling of an Auction, Objection Deadline, and Disposition Hearing; and (II) Approving and Authorizing the Licensing of Telecast Rights to the Highest Bidder, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Sept. 16, 2011).

150. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 1–6.

151. *Id.*

152. The Los Angeles Dodgers, LLC is a party to a telecast agreement ("Fox Telecast Agreement") with Fox Sports Net West 2, LLC ("Fox Sports"), under which Fox Sports has been granted exclusive television rights until the end of the 2013 baseball season and exclusive negotiation rights through November 30, 2012 for a future long-term telecast agreement. *See id.* at 8.

153. *Id.* at 9–10.

154. Complaint for Declaratory Judgment, Specific Performance, Temporary and Permanent Injunctive Relief, Breach of Confidence, Intentional and Negligent Interference with Contract Regarding Telecast Rights Agreement and California Business and Professions Code Section 17200 at 1–2, Fox Sports Net West 2, LLC v. Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Sept. 27, 2011), 2011 WL 4469526.

155. *Id.* at 11–12.

the telecast rights to the Dodgers baseball games are an "inherently unique and irreplaceable" asset and business opportunity.[156] Further, Fox Sports argued the McCourt bankruptcy plan and its timing appeared to be tied to McCourt's proposed divorce settlement payment obligations with his ex-wife Jamie McCourt.[157]

MLB vigorously opposed the bankruptcy filing and contended that McCourt was using the bankruptcy as a ploy to avoid preexisting contractual obligations with MLB and Fox Sports.[158] Further, MLB contended that McCourt and the debtor entities could not avoid their obligations by commencing Chapter 11 bankruptcy and that the Bankruptcy Code did not displace MLB's approval rights under the MLB Constitution and other agreements.[159] MLB also contended that the sale of the Dodgers' telecast rights without MLB approval would subject one or more of the debtors to severe discipline including possible termination from MLB.[160]

According to MLB, compliance with the MLB Constitution and other agreements was "the price of membership in Major League Baseball."[161] Further, MLB claimed that the debtor entities cannot "cure" the breaches of the MLB Constitution and other agreements or assign or have a third party assume those agreements due to material breaches.[162] As a result, the McCourt bankruptcy plan would result in valueless broadcast rights if the Dodgers were terminated from MLB.[163]

As a consequence, MLB asserted that the only successful path through bankruptcy was the sale of the Dodgers.[164] In fact, MLB proposed its own reorganization plan for the Dodgers.[165] The plan was to request that the Bankruptcy Court terminate the exclusive periods during which the debtors may file a Chapter 11 reorganization plan.[166] The request, if granted, would

156. *Id.* at 5.

157. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 4.

158. *Id.* at 1–2.

159. *Id.* at 4–5.

160. *Id.* at 5. McCourt and the Dodger-related entities disputed MLB's position, claiming the bankruptcy court should make the decisions based on applicable bankruptcy law and not on Commissioner approval requirements. *Id.* They also contended that seizing ownership of the team was not enforceable under applicable bankruptcy law. Katie Thomas, *Dodgers File for Bankruptcy, Increasing Tension With Selig*, N.Y. TIMES, June 27, 2011, at B15.

161. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 5–6.

162. *Id.*

163. *Id.* at 6.

164. *Id.*

165. *Id.*

166. *Id.* at 30.

allow MLB to file and seek confirmation of the "MLB Plan," which would provide for: (a) "a competitive auction and sale of the Dodgers to a new owner"; (b) payment in full of all allowed bankruptcy claims; and (c) distribution of surplus funds to McCourt and other equity interest holders, "all without breaching the Baseball Agreements and the Fox Telecast Rights Agreement."[167] Alternatively, MLB requested an order compelling the debtors to seek assumption or rejection of the relevant baseball agreements, pursuant to Bankruptcy Code section 365(d)(2) and Bankruptcy Rule 6006.[168] The Dodgers countered, asserting that they had the right under the bankruptcy laws to seek court approval to sell their future telecast rights.[169]

Further, the Dodgers claimed that in Chapter 11 bankruptcy cases, "liquidation is the last resort, not the first choice."[170] The Dodgers also argued that agreements governing MLB's relationship with the team were "no different from other business contracts" and MLB's interpretation of those contracts was not subject to "any greater deference" by the court.[171] Fox Sports then filed an adversary proceeding in bankruptcy court against the Dodger debtors.[172] Fox Sports also joined with MLB "in an effort to compel the sale of the Dodgers, pursuant to the MLB Plan."[173] As the parties became further entrenched in the struggle over control of the Dodgers, the bankruptcy court ordered the parties to mediation.[174] As a result, on November 2, 2011, MLB, McCourt, and the debtors reached a settlement.[175]

Approved by the bankruptcy court, the settlement provided for the sale of the Dodgers, pursuant to a plan of reorganization, on or before April 30, 2012.[176] In addition, the Dodgers debtors were entitled to seek the sale of the telecast rights, subject to the Dodgers filing an amended telecast rights motion.[177] In that motion, the Dodgers claimed they could obtain a higher sale price by marketing their telecast rights without abiding by Fox

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167. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 30.

168. *Id.*

169. *MLB Seeks Sale of the Dodgers*, WORLD BREAKING NEWS, http://uworldnews.blogspot.com/2011/09/mlb-seeks-sale-of-dodgers.html (last visited Nov. 29, 2011).

170. *Id.*

171. *Fox Sports Sues Dodgers*, ESPN L.A. (Sept. 28, 2011), http://espn.go.com/los-angeles/mlb/story/_/id/7027852/fox-sports-sues-los-angeles-dodgers-stop-tv-rights-sale.

172. Memorandum Opinion, *supra* note 104, at 1.

173. *Id.*

174. *Id.* at 1–2.

175. *Id.* at 2.

176. *Id.*

177. *Id.*

Sports' exclusive negotiation rights time frames.[178] Fox Sports, on the other hand, asked for enforcement of its contract, which precluded the Dodgers from negotiating with other broadcast entities before the expiration of Fox Sports' exclusive negotiation date of November 30, 2012.[179]

The bankruptcy court invalidated Fox Sports' exclusive renegotiation time frame in the telecast agreement.[180] The court also granted the Dodgers' amended motion to market the telecast rights, along with the sale of the team.[181] Fox Sports promptly appealed the bankruptcy court ruling,[182] and the U.S. District Court Judge Leonard Stark ruled that the bankruptcy court erred in relieving the Dodgers from its contractual obligations under the Fox Sports/Dodgers telecast agreement.[183] Along with the future telecast rights, Judge Stark also stayed the Dodgers' plans to sell the team.[184]

Thereafter, in January 2012, Fox Sports and the Dodgers settled their dispute.[185] Under the Fox Sports/Dodgers settlement, the Dodgers agreed to abandon its proposed sale of the telecast rights and Fox Sports agreed to withdraw its objections to the settlement between the Dodgers and MLB.[186] As a result, McCourt could proceed with the sale of the Dodgers pursuant to the Dodgers/MLB settlement agreement.[187]

IV. OVERVIEW OF BANKRUPTCY LAW

Chapter 11 reorganization begins by filing a petition with the bankruptcy court.[188] The petition may be voluntarily filed at the election of the debtor, or involuntarily filed by creditors to force a debtor into bankruptcy.[189] The debtor may file a plan of reorganization with the court.[190] Gen-

178. Memorandum Opinion, *supra* note 104, at 4.

179. Bill Shaikin, *Dodgers and Fox Sports Settle Dispute*, L.A. TIMES (Jan. 10, 2012), http://articles.latimes.com/print/2012/jan/10/sports/la-sp-0111-dodgers-fox-20120111.

180. Memorandum Opinion, *supra* note 104, at 8.

181. *Id.*

182. *See* Fox Sports Net West 2, LLC's Designation of Items to Be Included on Appeal and Statement of Issues on Appeal, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Dec. 15, 2011).

183. Judge Explains Dodgers-Fox Decision, ESPN (Dec. 27, 2011), http://espn.go.com/espn/print?id=7393074&type=story.

184. *Id.*

185. Shaikin, *supra* note 179.

186. *Id.*

187. *Id.*

188. 11 U.S.C. §§ 301, 303 (2012).

189. *Id.*

erally, the debtor has the exclusive right to file the reorganization plan until 120 days after the petition date or 180 days, if a small business.[191] However, at the request of a party-in-interest, the bankruptcy court may, for "cause," reduce the debtor's exclusive time periods for filing a reorganization plan.[192] In practice, one or more creditors also may seek to file a "competing" reorganization plan after the debtor's exclusivity period has expired, or after the "for cause" request has been granted to reduce the debtor's exclusivity rights.[193]

Generally, Chapter 11 is used to reorganize a business and allow it to continue to manage its property and assets as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.[194] The Office of the United States Trustee ("U.S. Trustee") plays an important role in monitoring a Chapter 11 case and supervising its administration, including conducting a meeting of the creditors and appointing the official committee of unsecured creditors.[195] This committee consults with the debtor-in-possession, investigates the business and its operations, and participates in formulating a reorganization plan.[196]

A Chapter 11 bankruptcy petition operates as an automatic stay, suspending all creditor activity associated with any debts or claims arising before the petition.[197] The automatic stay provides the debtor with relief from creditor claims and actions, protects property that may be needed for the debtor's "fresh start[,] and provides breathing space to permit the [debtor] to focus on its reorganization efforts."[198] "Any action taken in violation of the stay is ineffective even if the creditor has no actual knowledge of the bankruptcy."[199] The stay's scope is quite broad and protects virtually any type of action against the debtor or its property and assets.[200] Only under

190. 11 U.S.C. § 1121 (2012); *see Chapter 11 Reorganization Under the Bankruptcy Code*, *supra* note 146 (referencing "How Chapter 11 Works" section).

191. *Id.* § 1121(b)–(d).

192. *Id.* § 1121(d)(1); *see also In re* Grossinger's Assoc., 116 B.R. 34, 36 (Bankr. S.D.N.Y. 1990) (terminating exclusivity for cause where debtor had not filed a plan with "serious reorganizational possibilities").

193. *Chapter 11 Reorganization Under the Bankruptcy Code*, *supra* note 146.

194. *Id.* (referencing "How Chapter 11 Works" and "The Chapter 11 Debtor in Possession" sections).

195. 11 U.S.C. §§ 341, 1102 (2012).

196. 11 U.S.C. § 1103 (2012).

197. 11 U.S.C. § 362(a) (2012).

198. Anzivinio, *supra* note 5, at 24.

199. *Id.*

200. *See* 11 U.S.C. § 362(a)(1)–(8).

specified circumstances can creditors seek a court order granting relief from the automatic stay.[201]

Once the Chapter 11 bankruptcy petition is filed, a debtor can file a motion with the court to receive authorization for post-petition financing.[202] "Oftentimes, post-petition financing is arranged prior to filing the bankruptcy petition through negotiations with a pre-petition lender."[203] The purpose of the post-petition financing is to allow the debtor "to be able to pay its current operating expenses in order to . . . reorganize its affairs."[204]

After notice, the court is required to hold a confirmation hearing on the reorganization plan.[205] A party-in-interest may file an objection to the plan's confirmation.[206] Before confirmation, the court must be satisfied that the plan is in compliance with all applicable requirements, even in the absence of any objections.[207] "[T]o confirm the plan, the court must find, among other things, that: (1) the plan is feasible; (2) it is proposed in good faith; and (3) the plan and the proponent of the plan are in compliance with the Bankruptcy Code."[208] To satisfy the feasibility requirement, the court must find that the plan confirmation is not likely to be followed by liquidation or the need for further financial reorganization.[209] Once the plan is confirmed, and after any post-confirmation modifications and administration, a final decree closing the case must be entered by the court, declaring that the case has been "fully administered."[210]

201. *See id.* § 362(d)(1).

202. 11 U.S.C. § 364 (2012).

203. Anzivinio, *supra* note 5, at 19.

204. *Id.*

205. 11 U.S.C. § 1128(a) (2012); FED. R. BANKR. P. 3020(b).

206. 11 U.S.C. § 1128(b).

207. 11 U.S.C. § 1129 (2012).

208. *Chapter 11 Reorganization Under the Bankruptcy Code*, *supra* note 146 (referencing "Acceptance of the Plan of Reorganization" section); *see also* 11 U.S.C. § 1129.

209. *Chapter 11 Reorganization Under the Bankruptcy Code*, *supra* note 146; *see also* 11 U.S.C. § 1129.

210. FED. R. BANKR. P. 3022.

V. BANKRUPTCY ISSUES ARISING FROM PROFESSIONAL SPORTS TEAM BANKRUPTCIES

A. Can the Debtor Sports Team Assume or Assign the League Agreements if the Debtor Is in Breach and Cannot Cure the Breach?

Before an executory contract may be assumed or assigned, the debtor must cure all defaults under that contract or provide adequate assurance that all such defaults will be cured.[211] The ability of the debtor to cure the default is particularly important in a professional sports team bankruptcy because a successful reorganization requires the team to assume or assign key agreements with the league.[212] An incurable breach of the league agreements would render them non-assumable in sports team bankruptcies.[213] The practical effect of non-assignment of such agreements is the "death knell" of the team.[214]

For example, in the Dodgers' bankruptcy case, Major League Baseball ("MLB") claimed it would be futile to allow the Dodgers to sell the team's future telecast rights, because the sale of such rights over the objection of MLB would breach the League Agreements, precluding the assumption or assignment of those agreements.[215] Further, MLB claimed that its approval was required by the League Agreements, citing the MLB Constitution, which requires a vote of three-fourths of the MLB Clubs to approve "the sale or transfer of a control interest in any Club."[216]

Additionally, MLB claimed that consummating the sale of the Dodgers' future telecast rights would result in an incurable breach of the Fox Sports/Dodgers telecast rights agreement.[217] Relying again on the MLB Constitution, MLB asserted that the Dodgers' breach of the Fox Sports/Dodgers telecast rights agreement provided grounds for involuntary termination because the Dodgers, as an MLB club, failed or refused to "fulfill its contractual obligations."[218] According to MLB, the Dodgers' proposed sale of its future telecast

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211. 11 U.S.C. § 365(b)(1)(A) (2012).

212. Anzivinio, *supra* note 5, at 31.

213. *Id.*

214. *Id.*

215. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 62.

216. MAJOR LEAGUE CONST. art. V, § 2(b)(2) (2005); *see* Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 62.

217. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 62.

218. MAJOR LEAGUE CONST. art. VIII, § 4(j); *see also* Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 62.

rights would violate Fox Sports' exclusive negotiation provisions of the existing Fox Sports/Dodgers telecast rights agreement.[219]

Moreover, MLB argued that McCourt and the Dodgers committed other incurable breaches precluding the assumption and assignment of the League Agreements without MLB's consent.[220] Specifically, MLB claimed that McCourt and the Dodgers failed to act in the best interests of baseball and breached the team's obligations under the League Agreements when McCourt (a) siphoned over $100 million from the Club "to fund personal and business obligations unrelated to the business of baseball, leaving the club insufficiently capitalized and ultimately in need of bankruptcy protection"; (b) failed to disclose and obtain MLB approval for loans secured by the Club in violation of the League Agreements; (c) failed to comply with the condition, at purchase, to make an additional $30 million liquid equity contribution to the Dodgers; (d) refused to comply with the Commissioner's 2011 Directive to appoint a monitor to oversee day-to-day operations of the Dodgers; (e) filed a voluntary petition in bankruptcy without the approval of the Monitor; and (f) pursued economically inferior debtor-in-possession financing.[221]

There is legal support for precluding the assumption and assignment of the league agreements and other key agreements.[222] The case of *In re Lee West Enterprises* involved an analogous franchise setting, in which a court denied a trustee's motion to assume and assign franchise agreements because the debtor/franchisee had committed an incurable default.[223] Further, the court in *In re Deppe* found that the debtor, a gasoline station operator, failed to comply with non-monetary provisions of its gasoline supply agreement, which required no lapse in business operations for seven consecutive days.[224] The court found that the debtor's default was incurable, precluding the debtor from assuming and assigning its rights under that agreement, stating:[225]

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219. Reply of Major League Baseball in Further Support of Its Motion to Terminate Exclusivity or, in the Alternative, to Compel the Debtors to Seek Assumption or Rejection of the Baseball Agreements at 29, *In re*: Los Angeles Dodgers LLC, No. 11–12010 (KG) (Bankr. D. Del. Oct. 24, 2011), 2011 WL 5170773.

220. *Id.* at 31–40.

221. *Id.* at 33–35.

222. *In re* Lee West Enters., Inc., 179 B.R. 204, 208–09 (Bankr. C.D. Cal. 1995); *In re* Deppe, 110 B.R. 898, 900, 903 (Bankr. D. Minn. 1990).

223. *In re Lee West Enters.*, 179 B.R. at 208–09.

224. *In re Deppe*, 110 B.R. at 900, 903.

225. *Id.* at 904.

> [t]he lapse in operations took place. The estate simply cannot overcome that historical fact. Neither can it deny the significance given to such a lapse under the agreements . . . ; as two courts have noted, the steady maintenance of gasoline station operations . . . fixed by franchise agreements is a key goodwill value to the refiner/distributor, which is given special deference in franchise litigation involving such businesses. . . . . The estate cannot "undo" the historical event at this point.[226]

Like the debtor in *In re Deppe*, MLB argued that the Dodgers committed numerous defaults with respect to the League Agreements and that the defaults are "historic events" the Dodgers could not "undo."[227] In contrast, the Dodgers argued it was not futile for the debtors to pursue a plan of reorganization premised on the marketing of the Dodgers' future telecast rights.[228] To support this contrary view, the Dodgers claimed that "vague" allegations of an alleged breach are insufficient to constitute a material default.[229]

In *In re Pyramid Operating Authority, Inc.*, the court held that a contract provision was too vague and subjective where it required the downtown sports arena to be operated "as a first class facility" and "in the best interest" of the city, particularly where the contract also required the notice of default to identify specific acts or omissions to show willful default.[230] The court permitted the debtor to assume the executory contract, notwithstanding the alleged breached claims.[231] However, the agreement at issue in that case required specific acts or omissions to show the default.[232] In contrast, operative MLB League Agreements do not require such specificity before a breach can be determined.[233] Thus, if MLB can establish that the Dodgers defaulted under the League Agreements, the Dodgers should be precluded from assigning the League Agreements without MLB's consent.[234]

As to the alleged breach of the Fox Sports/Dodgers telecast rights agreement, the Dodgers argued that the exclusive negotiation provisions in that

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226. *Id.* (internal citations omitted).

227. *Id.*; Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 37–38.

228. Debtors' Objection to Motion of Major League Baseball to Terminate Exclusivity or Compel Assumption or Rejection of the Baseball Agreements at 45–55, *In re*: Los Angeles Dodgers LLC, No. 11-12010 (KG) (Bankr. D. Del. Oct. 7, 2011), 2011 WL 4945134.

229. *Id.*

230. *In re* Pyramid Operating Auth., Inc., 144 B.R. 795, 823 (Bankr. W.D. Tenn. 1992).

231. *Id.*

232. *See id.*

233. MAJOR LEAGUE CONST. art. VIII, §§ 3, 4.

234. *See In re Deppe*, 110 B.R. at 904 (finding franchisee's rights could be forfeited by termination of the agreement).

agreement were unenforceable in bankruptcy.[235] While there is some case law to support the Dodgers' contention,[236] MLB cites to a more persuasive line of cases. Exclusivity provisions are enforceable, even in bankruptcy.[237]

In summary, compliance with league and other key agreements is the foundation of the sports team's ability to operate the team as a member of the league.[238] Incurable defaults under such agreements will likely render them non-assignable, even in bankruptcy reorganization.[239] The end result will likely preclude a sports team from using bankruptcy to achieve a successful reorganization.[240]

B. Can the Debtor Professional Sports Team Assume or Assign the League Agreements Without the League's Consent?

Membership in a professional sports league is the critical asset for any club that files Chapter 11 reorganization.[241] Membership is recognized through the League Agreements.[242] As part of the Chapter 11 reorganization, the debtor sports team is authorized to assume or reject several types of executory contracts.[243] The debtor's ability to assume or assign such agreements is "vital" to a successful Chapter 11 reorganization.[244]

League Agreements also are executory contracts,[245] and, therefore, a key legal issue in any professional sports team bankruptcy is whether such agreements can be assumed or assigned under the Bankruptcy Code.[246] If

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235. Debtors' Objection to Motion of Major League Baseball, *supra* note 228, at 52–55.

236. *In re* Big Rivers Elec. Corp., 233 B.R. 739, 751–52 (W.D. Ky. 1998) (finding that the no-shop clause prohibiting the debtor from entertaining competing offers for the sale or lease of its assets was "void as a violation of public policy"); *In re* Mr. Grocer, Inc., 77 B.R. 349, 353 (Bankr. D. N.H. 1987) (finding unenforceable a right of first refusal in a lease where the landlord did not show any substantial economic detriment if the provision were not enforced).

237. *In re* IT Group Inc., 302 B.R. 483, 488 (D. Del. 2003) (holding that the right of first refusal was not an impermissible *ipso facto* clause that restricted assignment and was enforceable, notwithstanding that the debtor was in bankruptcy); *see also In re* Capital Acquisitions & Mgmt. Corp., 341 B.R. 632, 637 (Bankr. N.D. Ill. 2006); *In re* Wauka, Inc., 39 B.R. 734, 735, 738 (Bankr. N.D. Ga. 1984).

238. Anzivinio, *supra* note 5, at 28.

239. *Id.* at 31.

240. *Id.* at 28.

241. *Id.*

242. *Id.*

243. 11 U.S.C. § 365(a).

244. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984).

245. Anzivinio, *supra* note 5, at 28–29.

246. *See* 11 U.S.C. § 365(c) (indicating when a trustee may assign or assume a debtor's contract).

the League Agreements are not capable of being assumed or assigned as part of the reorganization, the "practical effect is the death knell" for the debtor sports team.[247] The reason is obvious: without the League Agreements, the debtor team does not exist as a member of the league, and "the value of the Debtor's estate is nominal" at best.[248]

Section 365(c) of the Bankruptcy Code codifies the rule that certain executory contracts cannot be assumed or assigned.[249] Section 365(c) provides, in relevant part:

> The [debtor in possession] may not *assume or assign* any executory contract . . . of the debtor, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties, if—
>
> > (1)(A) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties; and
> >
> > (B) such party does not consent to such assumption or assignment . . . .[250]

In analyzing whether a debtor sports team may assume League Agreements in light of section 365(c) of the Bankruptcy Code, the Third Circuit has adopted the "hypothetical test."[251] Under this test, if the contract cannot be assigned under non-bankruptcy "applicable law," it cannot be assumed or assigned by the debtor, absent the sports league's consent.[252] In applying the hypothetical test, courts emphasize that the "applicable law" rendering a contract non-assumable or non-assignable under section 365(c) must prove that the identity of the contracting party is critical to the contract at issue.[253]

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247. Anzivinio, *supra* note 5, at 31.

248. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 9.

249. 11 U.S.C. § 365(c).

250. *Id.* (emphasis added).

251. *In re* W. Elecs., Inc., 852 F.2d 79 (3d Cir. 1988). The hypothetical test also has been adopted by the Fourth, Ninth, and Eleventh Circuits. *See In re* Sunterra Corp., 361 F.3d 257 (4th Cir. 2004); *In re* Catapult Entm't, Inc., 165 F.3d 747 (9th Cir. 1999); *In re* James Cable Partners, L.P., 27 F.3d 534 (11th Cir. 1994) (per curiam).

252. *In re W. Elecs., Inc.*, 852 F.2d at 83.

253. *In re* ANC Rental Corp., 278 B.R. 714, 721 (Bankr. D. Del. 2002) ("[W]e follow the majority of courts addressing this issue and conclude that, for section 365(c)(1) to apply, the applicable law must specifically state that the contracting party is excused from accepting performance from a third party under circumstances where it is clear from the [law] that the identity of the contracting party is crucial to the contract or public safety is at issue.").

In a professional sports team bankruptcy context, there are no published decisions definitively holding that League Agreements are delegable under applicable law, absent the league's consent.[254] Perhaps this is because the stakes are so high.[255] For example, if the league prevails and League Agreements are not delegable, the value of the debtor's estate would be minimal, hindering a successful reorganization.[256] If, however, the debtor team can successfully convince the bankruptcy court to interpret such agreements as assumable/assignable, membership in the league would be changed by judicial fiat and not by consent of the league and the other member teams.[257]

These precise issues were at the forefront of the Los Angeles Dodgers' bankruptcy.[258] MLB asserted that the League Agreements are neither assumable nor assignable under applicable state law and federal intellectual property law.[259] The Dodgers, in contrast, claimed that there was no "applicable law" preventing the assumption or assignment of the League Agreements.[260] Thus, the relevant inquiry is whether "applicable law" can excuse a professional sports league from accepting performance from, or rendering performance to, any entity other than the debtor sports team.[261]

1. Are the League Agreements Non-Assignable Because the League Is an Unincorporated Association?

In the Dodgers' bankruptcy, MLB argued that applicable law uniformly established that membership in an unincorporated association is not assignable without the consent of the association.[262] The reasoning is that courts generally do not interfere with the internal workings of unincorporated associations.[263] League Agreements are not assignable without con-

254. *See* Anzivinio, *supra* note 5, at 32–36 (discussing the various approaches courts have adopted when identifying delegable contracts, all requiring league consent).

255. *See id.* (discussing three ways to view franchise contracts all of which would have terrible repercussions for the league).

256. *Id.* at 32.

257. *Id.* at 32–36.

258. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 39–46.

259. *Id.*

260. Debtors' Objection to Motion of Major League Baseball, *supra* note 228, at 56–73.

261. *Id.*

262. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 39–41.

263. *Professional Sports: Restraining the League Commissioner's Prerogatives in an Era of Player Mobility*, 19 WM. & MARY L. REV. 281, 284 (1977); *see, e.g.*, *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 591–93 (Bankr. D. Ariz. 2009) (acknowledging the league's "right to admit only new members who meet its written requirements" and denying sale of a hockey

sent, precisely because membership in the unincorporated association generally is considered a privilege that may be granted or withheld, not a right that can be obtained independently and then forced upon the unincorporated association.[264]

In response, the Dodgers argued that "interests" in the membership of an unincorporated association are "somewhat assignable."[265] Thus, there was no "applicable law" precluding the assumption or assignment of the League Agreements.[266] Therefore, the focus should be on the identity of the third party assignee based upon the nature of the entity in question.[267] With that focus, the debtor sports team will contend that League Agreements should be assignable provided that the entity has the financial strength and expertise to manage the sports team, even if the consent of the league is not obtained.[268]

The Dodgers also relied on cases involving seats on stock or commodities exchanges, contending that the exchanges are unincorporated associations and that the membership seats are assignable.[269] Such cases do not support the proposition that League Agreements can be assigned *without* the league's approval because they dealt with the stock exchange, not sports leagues.[270] In fact, the MLB Constitution prohibits the transfer of a

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team's assets over the NHL's objection because the debtor could not provide adequate protection of the NHL's interest in enforcing its approval rights); *In re* Magness, 972 F.2d 689, 696 (6th Cir. 1992) (finding that an Ohio law prohibiting courts from interfering in the internal workings of associations in the application of their rationally developed rules and procedures prevented debtor from assigning contract for golf membership in private club); Affiliated Gov't Employees' Distrib. Co. v. Comm'r Int. Rev., 322 F.2d 872, 873 (9th Cir. 1963) (noting that membership in California retail association was not transferable).

264. *See, e.g.*, 6 AM. JUR. 2D *Assocs. & Clubs* § 17 (2008) ("Membership in a voluntary unincorporated association generally is held to be a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. Generally, courts will not compel admission to a voluntary association . . . .") (footnote omitted).

265. Debtors' Objection to Motion of Major League Baseball, *supra* note 228, at 58–59.

266. *Id.*; *see also* Allentown Ambassadors, Inc. v. Northeast American Baseball, LLC (*In re* Allentown Ambassadors, Inc.), 361 B.R. 422, 449 (Bankr. E.D. Pa. 2007) (finding that under North Carolina law, an LLC interest was "somewhat assignable").

267. Debtors' Objection to Motion of Major League Baseball, *supra* note 228, at 65.

268. *Id.*

269. *Id.* at 64; *e.g.*, Bd. of Trade of Chicago v. Johnson, 264 U.S. 1, 12 (1924) (finding that a seat was transferable property and should pass to the bankruptcy trustee, subject to the rules of the exchange); O'Dell v. Boyden, 150 F. 731, 735–36 (6th Cir. 1906) (finding that membership in the New York Stock Exchange was personal to the holder, but could only be transferred to a new member satisfactory to them, subject to the rules of the exchange and by the consent of its admissions committee).

270. *Johnson*, 264 U.S. at 12 (finding that a seat was transferable property and should pass to bankruptcy trustee, subject to the rules of the exchange); *O'Dell*, 150 F. at 735–36 (finding that membership in the New York Stock Exchange was personal to the holder, but could only be

controlling interest in any team without first obtaining the required vote of a majority of the teams.[271]

Similarly, in *Hyde v. Woods*, the issue was whether membership in the San Francisco Stock Exchange, a voluntary association, may be transferred after an individual member filed bankruptcy pursuant only to the association's rules.[272] The Supreme Court held:

> [a] seat in this board is not a matter of absolute purchase. Though we have said it is property, it is encumbered with conditions when purchased, without which it could not be obtained. It never was free from . . . conditions . . . , neither when . . . [the debtor] bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come.[273]

Thus, even in bankruptcy, the League Agreements should prevail.[274] These agreements should prevail because applicable unincorporated association law precludes assumption or assignment of such agreements without the league's consent.[275] Further, even if the bankruptcy court allows the assumption or assignment of the League Agreements, the court should make the assumption or assignment subject to the rules and regulations set forth in such agreements.[276]

2. Are the League Agreements Non-Assignable Because the League Is Akin to a Sports Franchise?

In the Dodgers' bankruptcy, MLB argued that the law governing professional sports leagues (a subset of the law of unincorporated associations) controls the identity of its members by precluding assumption or assignment of memberships in such leagues.[277] The basic premise is that the economic interdependence of membership in the professional sports league requires protection against unilateral assumption or assignment of such membership.[278]

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transferred to a new member satisfactory to them, subject to the rules of the exchange and by the consent of its admissions committee).

271. MAJOR LEAGUE CONST. art. V, § 2(b)(2).

272. Hyde v. Woods, 94 U.S. 523, 524–25 (1876).

273. *Id.* at 525.

274. *Id.* (stating that transferring an ownership interest in an organization is subject to conditions stated in the governing body's constitution).

275. *See id.* (holding that transfers are encumbered with conditions).

276. *Id.*

277. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 41–42.

278. *Id.*

For example, a league's refusal to grant a new franchise was found not to constitute an antitrust violation, because the business "interdependence" of the team owners, through their leagues, required that the sale of the franchise be approved by a majority of the team owners rather than only by the selling owner.[279] Similarly, a debtor's attempt to sell its NHL franchise to a third party, notwithstanding the NHL's membership approval rights, was rejected by the court, which held that section 363(e) of the Bankruptcy Code required the courts to prohibit any sale where there is no "adequate protection."[280] Although the court relied on Bankruptcy Code section 363(e), rather than section 365(c)(1), the court's reasoning sought to protect the NHL's membership selection rights.[281] In an analogous setting, a court also prohibited the sale of a golf membership because "[t]he interests of the persons presently involved . . . cannot adequately be protected in any manner, except by prohibiting the sale and assignment of the membership."[282]

However, the Dodgers contended that such cases were decided in the context of contractual anti-assignment provisions contained in the league's governing documents or under different provisions of the Bankruptcy Code, and therefore, they were inapplicable or distinguishable.[283] Further, the Dodgers argued that where the law is equivocal, as here, the court ultimately must make a factual determination concerning the "materiality" of the identity of the proposed assignee.[284] The Dodgers asserted that any future assignee would have the required financial strength and expertise to manage the team, even if MLB withholds its consent.[285]

Professional sports leagues, which are unique and economically interdependent, should not have membership imposed on the league.[286] There is "applicable law" prohibiting assignment of such membership, absent the requisite approval.[287]

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279. Mid-South Grizzlies v. Nat'l Football League, 550 F. Supp. 558, 566 (E.D. Pa. 1982) (quoting N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1253 (2d Cir. 1982)).

280. *In re Dewey Ranch Hockey, LLC*, 414 B.R. at 591–92.

281. *Id.* at 591.

282. *In re Magness*, 972 F.2d at 697.

283. *Objection of Major League Baseball*, *supra* note 33, at 65–67.

284. *Id.* (citing *In re Allentown Ambassadors, Inc.*, 361 B.R. at 454–55).

285. *Objection of Major League Baseball*, *supra* note 33, at 67.

286. *Mid-South Grizzlies*, 550 F. Supp. at 566 (quoting *N. Am. Soccer League*, 670 F.2d at 1253.

287. *Id.*

3. Are the League Agreements Non-Assignable Because the League Is Akin to a Joint Venture or Partnership?

Similarly, MLB has contended that the League Agreements are similar to partnership or joint venture membership agreements and that partnership/joint venture law prevents assumption or assignment of a partner's membership without consent of all the partners/members.[288] The Dodgers, of course, argued otherwise.

The Dodgers asserted that partnership/joint venture's *economic interests* are "somewhat assignable" and, therefore, the legal analysis is no different from the law governing unincorporated associations.[289] Because partnership/joint venture membership is not assignable, but the economic interests in those entities may be, the Dodgers claimed that the law remained ambiguous, prompting application of the rule that requires a factual evaluation of the "materiality" of the assignee's "identity."[290]

In assessing the merits of each position, the fundamental issue centers on the League Agreements and whether they are assumable/assignable. Without those agreements, a professional sports team cannot become a member of the league, an unincorporated association.[291] Applicable law appears to preclude assumption or assignment of such agreements because courts are not willing to impose such agreements absent the other parties' consent or approval.[292] As a result, the bankruptcy court should recognize and apply MLB's consent/approval rights as a condition of any assumption/assignment of any league agreements.

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288. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 42–43; *see In re* Schick, 235 B.R. 318, 325 (Bankr. S.D.N.Y. 1999) (refusing to force the objecting party to accept substitute performance from or render performance to a "stranger" in applying partnership law); *see also In re* New Era Co., 115 B.R. 41, 44 (Bankr. S.D.N.Y. 1990) (finding that a person cannot become a member of a partnership without "the consent of all the partners").

289. *In re Allentown Ambassadors, Inc.*, 361 B.R. 442; Debtors' Objection to Motion of Major League Baseball, *supra* note 228, at 64.

290. Debtors' Objection to Motion of Major League Baseball, *supra* note 228, at 64.

291. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 42–43; *see In re Schick*, 235 B.R. at 325 (refusing to force the objecting party to accept substitute performance from or render performance to a "stranger" in applying partnership law); *see also In re New Era Co.*, 115 B.R. at 44 (finding that a person cannot become a member of a partnership without "the consent of all the partners").

292. *See In re Schick*, 235 B.R. at 325 (refusing to force the objecting party to accept substitute performance from or render performance to a "stranger" in applying partnership law); *see also In re New Era Co.*, 115 B.R. at 44 (finding that a person cannot become a member of a partnership without "the consent of all the partners").

4. Are the League Agreements Non-Assignable Because They Are Based on Personal Confidence and Trust, Akin to Personal Services?

Non-bankruptcy "applicable law" provides that executory contracts involving personal services cannot be assumed or assigned without the consent of the other party.[293] In the Dodgers' bankruptcy, MLB relied on such law by analogy, and contended that the League Agreements were not delegable because they were based on the personal trust and confidence between MLB and its thirty clubs.[294] MLB also relied on its Constitution, which required a vote of three-fourths of the MLB clubs to approve the "sale or transfer" of a controlling interest in any club.[295]

The Dodgers asserted otherwise.[296] The Dodgers argued persuasively that the League Agreements should not be construed as personal services contracts because the Dodgers' assets could be transferred to an adequately capitalized entity with little or no impact upon MLB or the other MLB clubs; therefore, no reason existed to extend the law of non-assignable personal services contracts to the professional sports context.[297]

The issue of whether membership in a professional sports league is akin to a personal services contract has been raised, but not yet answered.[298] Therefore, again, the stakes are high in presenting the issue for judicial resolution.[299] If MLB prevails, the League Agreements would not be assignable, precluding a team's reorganization plan, unless it obtains MLB's consent.[300] If the team prevails, however, it could clear the way for the assumption and assignment of the League Agreements to another adequately capitalized entity, without MLB's consent.

On balance, the League Agreements are not likely to fall within a personal service contract exception to otherwise assignable executory agreements.[301] No reason exists to extend or broaden the limited personal ser-

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293. *See, e.g.*, Coykendall v. Jackson, 17 Cal. App. 2d 729, 731 (Cal. Dist. Ct. App. 1936) (precluding personal services contracts from being assigned); Bentley v. Textile Banking Co., 26 A.D.2d 112, 114 (N.Y. App. Div. 1966) (acknowledging that personal services contracts are not assignable without consent of the other party).

294. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 44.

295. MAJOR LEAGUE CONST. art. V, § 2(b)(2).

296. Debtors' Objection to Motion of Major League Baseball, *supra* note 228, at 67–71.

297. *Id.* at 69–71.

298. *In re* Lehigh Valley Prof'l Sports Clubs, Inc., 2000 WL 567905, *5, n. 17 (Bankr. E.D. Pa. 2000).

299. Richard L. Wynne et al., *Sports Fanchises and Bankruptcy Law*, ABI BANKR. BATTLEGROUND WEST, Mar. 19, 1999, at 10–11.

300. *Id.*

301. Anzivino, *supra* note 5, at 32–36.

vices contract exception to cover professional sports teams; and, in any case, MLB's other grounds for precluding assumption/assignment are more persuasive (e.g., applicable law precluding assignment of MLB membership in an unincorporated association).[302]

5. Are the League Agreements Non-Assignable Because They Contain Intellectual Rights Owned by the League that Are Not Assignable Under Federal Law?

Interestingly, MLB League Agreements, like those of other professional leagues, include intellectual rights (e.g., trademarks, copyrights) that may not be delegable under section 365(c) of the Bankruptcy Code.[303] Such rights are generally considered personal and non-delegable.[304] Federal law prohibits the assignment of both copyrights and trademarks because holders of such rights "share a common retained interest in the ownership of their intellectual property—an interest that would be severely diminished if a licensee were allowed to sub-license without the licensor's permission."[305] MLB relied on this federal law, arguing that the League Agreements contain both trademark and copyright rights, which prohibit the assumption and assignment of such rights.[306]

The Dodgers argued that federal trademark and copyright law do not clearly prohibit the assignment of MLB intellectual property rights.[307] However, the Dodgers' attempt to distinguish the federal law cited by MLB is unpersuasive. For example, the Dodgers rely heavily on *In re Golden Books Family Entertainment, Inc.*[308] However, the legal issue in that case turned on whether the subject executory agreement was exclusive or non-

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302. *Id.*

303. 11 U.S.C. § 365(c).

304. *See In re* XMH Corp., 647 F.3d 690, 695 (7th Cir. 2011) (disallowing a debtor to assign a trademark under section 365(c) because "the universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment"); N.C.P. Mktg. Grp. v. Blanks (*In re* N.C.P. Mktg. Grp., Inc.), 337 B.R. 230, 236–37 (D. Nev. 2005), *aff'd*, 279 F. App'x 561 (9th Cir. 2008) ("Because the owner of the trademark has an interest in the party to whom the trademark is assigned so that it can maintain the goodwill, quality, and value of its products and thereby its trademark, trademark rights are personal to the assignee and not freely assignable to a third party.").

305. Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 938 (C.D. Cal. 2004), *aff'd*, 454 F.3d 975 (9th Cir. 2006).

306. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 44–46.

307. Objection of Major League Baseball to Debtors' Motion to Obtain Post-Petition Financing and for Related Relief, at 71–73, *In re*: Los Angeles Dodgers LLC, No. 11-12010 (KG), 2011 WL 4945134 (Bankr. D. Del. Oct. 7, 2011).

308. *In re* Golden Books Family Entm't, Inc., 269 B.R. 311 (Bankr. D. Del. 2001).

exclusive.[309] The court held that the agreement was an exclusive license, which was freely transferable.[310] However, the court also recognized that non-exclusive licensing rights are personal in nature and may not be assigned in bankruptcy.[311]

In the context of professional baseball, neither MLB nor the Dodgers appear to dispute that the trademarks and copyrights held by MLB are non-exclusively granted for use by all thirty MLB clubs.[312] As such, MLB's licensing rights should be construed as non-exclusive and, therefore, personal in nature to the MLB clubs and may not be assigned in bankruptcy without MLB's consent.[313] Again, no case has decided this question in the context of a professional sports league. The issue, therefore, remains unresolved.

B. Can Major League Baseball Terminate the Los Angeles Dodgers from the League by Filing Bankruptcy or Does Such Termination Constitute an Unenforceable Ipso Facto *Clause?*

Ipso facto clauses, which terminate a contract upon the bankruptcy, insolvency, or change in financial condition of a party, generally are unenforceable in bankruptcy.[314] Nonetheless, a professional sports team's bankruptcy filing often constitutes grounds for termination of the team's membership in the league.[315] For example, the MLB Constitution provides for involuntary termination of a team, with approval of three-fourths of all MLB clubs, if a team files for bankruptcy.[316] Relying on the MLB Constitution, MLB argued in the Dodgers' bankruptcy that such *ipso facto* bankruptcy default previsions are enforceable pursuant to section 365(e)(2)(A)

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309. *Id.* at 315–16.

310. *Id.* at 316, 319.

311. *Id.* at 314; *see also In re* Valley Medai, Inc., 279 B.R. 105, 135–36 (Bankr. D. Del. 2002) (holding that non-exclusive copyrights are not assignable under Bankruptcy Code section 365(c)); *In re* Patient Educ. Media, 210 B.R. 237, 242–43 (Bankr. S.D.N.Y. 1997) (holding that debtor could not assign its non-exclusive license without copyright owner's consent).

312. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 44–46 (Oct. 7, 2011); *Objection of Major League Baseball*, *supra* note 33, at 71–73.

313. *See In re* XMH Corp., 647 F.3d at 695 (disallowing a debtor to assign a trademark under section 365(c) because "the universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment"); *In re N.C.P. Mktg. Grp., Inc.*, 337 B.R. at 236–37, *aff'd* 279 F. App'x 561 ("Because the owner of the trademark has an interest in the party to whom the trademark is assigned so that it can maintain the goodwill, quality, and value of its products and thereby its trademark, trademark rights are personal to the assignee and not freely assignable to a third party.").

314. 11 U.S.C. § 365(e)(1).

315. MAJOR LEAGUE CONST. art. VIII, § 4(f), (j), (l).

316. *Id.* § 4(l); *see also* Anzivinio, *supra* note 5, at 35 n.225.

of the Bankruptcy Code to the extent that the League Agreements are found to be non-assignable pursuant to applicable law.[317]

Bankruptcy Code section 365(e)(2)(A) provides an exception to the unenforceability of *ipso facto* bankruptcy default provisions when the subject executory contract is non-assumable/assignable.[318] As shown above, in the Dodgers' bankruptcy, MLB contended that the League Agreements are not delegable under non-bankruptcy applicable law.[319] Therefore, MLB claimed that the Third Circuit precedent applies to render such *ipso facto* provisions enforceable, citing *Watts v. Pennsylvania Housing Finance Co.*[320]

In *Watts*, debtors who had received benefits under a mortgage assistance program brought suit against government officials for terminating their benefits upon filing for bankruptcy.[321] Among other things, the debtors contended that the loan program's *ipso facto* bankruptcy default provision violated the automatic stay provisions under section 362 of the Bankruptcy Code.[322] The Third Circuit rejected the debtor's argument, holding that the commitment to provide mortgage assistance was a non-delegable executory contract to "make a loan or extend other debt financing or financial accommodations, to or for the benefit of the debtor" under sections 365(c)(2) and 365(e)(2)(B) of the Bankruptcy Code.[323] The Third Circuit also found that the automatic stay provisions were inapplicable to such a contract; therefore, the automatic stay provisions were not violated.[324]

While the *Watts* decision was decided under a different Bankruptcy Code provision, the same rationale applies to render *ipso facto* clauses enforceable to the extent they are found to be part of a non-assignable executory contract, pursuant to section 365(e)(2)(A) of the Bankruptcy Code. Indeed, the Bankruptcy Code generally provides for parallel treatment of loans or other "financial accommodation" contracts and non-assignable executory contracts.[325]

In the Dodgers' bankruptcy, MLB did not vigorously advance the validity of the *ipso facto* bankruptcy default provisions in the MLB Constitu-

317. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 62, n. 73.

318. 11 U.S.C. § 365(e)(2)(A).

319. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 36–50.

320. Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1095–96 (3d Cir. 1989).

321. *Id.* at 1091–92.

322. *Id.* at 1092.

323. *Id.* at 1095.

324. *Id.*

325. *Compare* 11 U.S.C. § 365(e)(2)(A), *with* 11 U.S.C. § 365(e)(2)(B).

tion.[326] The likely reason is that the MLB Constitution itself requires the approval of three-fourths of all MLB clubs in order to initiate an involuntary termination.[327] This approval cannot be obtained because the Bankruptcy Code automatic stay provision suspends all such creditor activity.[328] The automatic stay's broad scope would likely preclude MLB from initiating a vote from three-fourths of all the MLB clubs to effectuate involuntary termination.[329] MLB, of course, could seek a court order granting relief from the automatic stay in order to initiate involuntary termination voting procedures.[330] However, MLB did not seek any such relief during the Dodgers' bankruptcy.[331] The likely reason for not seeking such relief is that it would require twenty-three of the thirty MLB clubs to approve the termination of McCourt's membership in the league, a daunting endeavor at best.[332]

VI. CONCLUSION

Several unanswered legal issues are raised in the context of professional sports team bankruptcies.[333] Definitive judicial resolution of such issues may prove beneficial or detrimental depending upon the perspective of the entity.[334] As a practical matter, it is likely that any plan of reorganization by a professional sports team will be forced to abide by the duties and restrictions in the league and other key agreements.[335] After all, such agreements represent valid executory contracts that must be in place to successfully reorganize a team and still maintain the team's membership in the league.[336] Without that membership, the team is essentially without substantive value.[337]

There will be winners and losers when the field of play is the bankruptcy court.[338] Baseball is a game; it is America's game.[339] But, it is also a

326. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72, at 62, n.73.

327. MAJOR LEAGUE CONST. art. VIII, § 4(l).

328. 11 U.S.C. § 362(a) (2012).

329. *Id.* § 362(a)(1)–(8).

330. *Id.* § 362(d)(1).

331. Motion of Major League Baseball to Terminate Exclusivity, *supra* note 72.

332. MAJOR LEAGUE CONST. art. VIII, § 4(l).

333. Wynne et al., *supra* note 299; Golden & Marticello, *supra* note 26.

334. Wynne et al., *supra* note 299.

335. *Id.*

336. Anzivinio, *supra* note 5, at 28.

337. *Id.* at 31.

338. Golden & Marticello, *supra* note 26.

339. Hanson, *supra* note 1.

business – a serious, high stakes multi-billion dollar business.[340] In the end, the better play may be for the parties to create a level playing field based on resolution.[341] The winner in that contest would be the game of baseball.[342]

340. ROSNER & SHROPSHIRE, *supra* note 4.

341. Golden & Marticello, *supra* note 26.

342. At the time this article went to press, the sale of the Dodger franchise was still in a bidding process. *See* Alex Ben Block, Sale of Dodgers Officially Completed, HOLLYWOOD RPTR. (May 1, 2012), http://www.hollywoodreporter.com/news/la-dodgers-sale-magic-johnson-318581. Subsequently, however, on April 14, 2012, a Delaware bankruptcy judge approved the sale of the Dodgers, and on May 1, 2012, the Gughenheim Group finalized and closed a historic $2.15 billion dollar deal for the team's acquisition. *Id.* The new ownership is led by Guggenheim group CEO Mark Walter, Earvin "Magic" Johnson, and Stan Kasten. *Id.* In addition to maintaining an ownership interest in the nearby land that is used for parking around Dodger stadium, Frank McCourt is expected to gain nearly $1 billion dollars from this deal. *Id.*