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FRANCHISE FLIGHT AND THE FORGOTTEN FAN: AN ANALYSIS OF THE APPLICATION OF ANTITRUST LAWS TO THE RELOCATION OF PROFESSIONAL FOOTBALL FRANCHISES

I. INTRODUCTION

One night in March of 1984, all that remained of the once proud Baltimore Colts¹ was loaded secretly into a fleet of moving vans bound for Indianapolis, Indiana.² This event marked the first time a National Football League (NFL) team had moved to a new city without either the league's approval³ or opposition.⁴ Although the NFL remained silent,⁵

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1. The Baltimore Colts contributed significantly to the success of the NFL. The Baltimore Sun, Feb. 2, 1986 at B1 col. 1. The first real television success for the NFL was the Colt's dramatic overtime win over the New York Giants in 1958. Referring to that win, a former Colt recently remarked that the "Colts put the NFL on the map and we should never let them forget that." The Baltimore Sun, Jan. 19, 1985, at C4 col. 1. The Colts have contributed a number of players to the Professional Football Hall of Fame: Coach Webb Ewbank, John Unitas, Lenny Moore, Gino Marchetti, Art Donovan, Jim Parker, and Raymond Berry. The best description of the tradition that was once the Baltimore Colts comes from Baltimore sports columnist Bob Maisel who said "[t]he origins of the Colts are traced and the story line carefully notes that the team was more than just a team. It was interwoven into the very fabric of the city." The Baltimore Sun, Jan. 19, 1985, at C4, col. 1.
 2. The Baltimore Sun, Mar. 29, 1984, at A2, col. 2.
 3. There have been fourteen franchise relocations in professional football. Brooklyn moved to Dallas, Texas, in 1952; the Dallas Texans moved to Baltimore, Maryland, in 1953; the Chicago Cardinals of the NFL moved to St. Louis, Missouri, in 1960; the Los Angeles Chargers of the AFL moved to San Diego, California, in 1961; the Dallas Texans of the AFL moved to Kansas City, Missouri, in 1963; the Boston Patriots moved to Foxboro, Massachusetts, in 1971; the Dallas Cowboys moved to Irvine, Texas, in 1971; the Buffalo Bills moved to Orchard Park, New York, in 1973; the Detroit Lions moved to Pontiac, Michigan, in 1975; the New York Giants moved to Rutherford, N.J., in 1976; the Los Angeles Rams moved to Anaheim, California, in 1978; the Minnesota Vikings moved from Bloomington to Minneapolis, Minnesota, in 1932; the Oakland Raiders moved to Los Angeles, California, in 1982; and the Baltimore Colts moved to Indianapolis, Indiana, in 1984. Professional Sports Antitrust Immunity: Hearings on S.172, S.259 and S.298 Before the Comm. on the Judiciary United States Senate, 99th Cong., 1st Sess. 301 (1985) (Rosenberg, Morton, Proposed Sports Relocation Legislation: Background and Legal Implications).
 4. The NFL officially denied the Oakland Raiders' request to move to Los Angeles. See *infra* note 78 and accompanying text.
 5. The City of Baltimore did not remain silent. The City instituted legal action to condemn the Colt franchise through the novel use of its power of eminent domain. City of Baltimore v. Baltimore Colts, Inc., No. 84-1294 (D. Md. filed — 1984). The City and the Colts eventually settled all legal actions between them. Under the terms of the settlement, the City agreed not to pursue an appeal of its eminent domain suit that was lost in federal court in December, 1985, and not to pursue a conspiracy suit filed against the Colts, the Mayor of Indianapolis and the moving company that hauled the team's property out of Maryland. In return, the Colts agreed to drop their pending suit against Baltimore's Mayor Schaefer and City Council that charged that they violated the team's civil rights in trying to seize the Colts under eminent domain. In addition, the City agreed to buy the Colts training complex and the Colts would pay the City's legal fees incurred in the various law suits. Finally, the Colts have promised to support Baltimore's efforts to secure an

the most noticeable reaction to the uncontested relocation⁶ came from sports fans nationwide who realized that tradition no longer guided the destiny of professional football because team owners evidently were free to relocate their teams at any time and for any reason, without concern for the interests of the host city or the rights of the local fan.⁷

This comment will examine how the application of the antitrust laws to professional football precipitated the Colts relocation and created a climate in which teams can relocate more easily. The comment begins by reviewing the development of general antitrust principles. Following this review, the comment discusses the historical application of antitrust laws to professional sports leagues and focuses on recent decisions that have diminished the NFL's control over the relocation of franchises. Finally, the impact that uncontrolled franchise relocation has had on professional sports, recent legislative proposals intended to clarify the situation, and other possible alternatives to the present system for franchise relocation are examined.

II. GENERAL ANTITRUST PRINCIPLES

Section 1 of the Sherman Act⁸ (section 1) prohibits all contracts, combinations, and conspiracies in restraint of trade or commerce.⁹ Section 1 was enacted to prevent agreements that "restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services."¹⁰ When Congress enacted section 1, however, it recognized that not all business agreements that appear to restrain the agreeing parties' freedom of trading actually suppress com-

expansion franchise and are also willing to discuss the possible return of the Colts name to any future Baltimore football franchise. The Baltimore Sun, Mar. 18, 1986, at A1, col. 5.

6. See *infra* notes 127-28 and accompanying text.

7. In response to the public outcry, several bills have been introduced into Congress that would restrict franchise relocation. See, e.g., S. 259, 99th Cong., 1st Sess. (1985); S. 287, 99th Cong., 1st Sess. (1985); H.R. 751, 99th Cong., 1st Sess. (1985).

8. 15 U.S.C. § 1 (1982). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.* (emphasis added). In *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) the Supreme Court recognized that Congress could not have intended a literal interpretation of the word "every."

9. 15 U.S.C. § 1 (1982). See *Northern Sec. Co. v. United States*, 193 U.S. 197, 331 (1904), where the Court held that the Sherman Act "embrace[s] and declare[s] to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations . . ." *Id.* (emphasis in original). The Court has recognized the need for limitations on the broad sweep of the Act and has fashioned standards that "should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated." *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

10. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

petition.¹¹ For that reason, and because section 1 had to be adaptable to changes in the marketplace, the drafters of section 1 "adopted flexible language instead of narrow definitions of prohibited conduct."¹²

As a result of the broad and flexible language of section 1, there has been an "evolutionary development of antitrust case law responsive to changes in the market place."¹³ In this regard, early in its interpretation of section 1, the Supreme Court recognized that not all agreements alleged to be in restraint of trade actually suppress competition.¹⁴ For that reason, courts must evaluate agreements and determine, with deference to the original purpose of the Sherman Act,¹⁵ whether the alleged restraints actually inhibit the development of competition or whether the conditions of the particular industry justify the alleged restraints. In order to help courts efficiently make this determination, the Court has developed a two-part test that easily disposes of cases involving manifestly anticompetitive practices and provides for in-depth review of cases where joint action perhaps is justified.¹⁶

The first part of the test focuses on agreements that are illegal per se. Certain agreements or practices are illegal per se "because of their pernicious effect on competition and lack of any redeeming virtue."¹⁷ These agreements "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."¹⁸ For example, commercial arrangements such as horizontal price fixing,¹⁹ division of markets,²⁰ resale

11. In *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922), the Court recognized that a combination constituted an unlawful restraint of trade if it "fetter[ed] the free and normal flow of competition in interstate traffic . . ." *Id.* at 229; *see also Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("the true test of legality [under the Sherman Act] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

12. A. AUSTIN, *ANTITRUST: LAW, ECONOMICS, POLICY* § 3.2 (1976).

13. *Id.*

14. *See supra* note 11 and accompanying text.

15. *See generally* 1 E. KINTNER, *FEDERAL ANTITRUST LAW*, pp. 125-242 (1980). "Congress's overriding objective [in enacting the Sherman Act] was to attempt to restore, as far as possible, a free and open competitive environment absent anticompetitive business restraints such as agreements to control production, prices or output, or to divide markets, or restrictions caused by monopolistic control over the sources of raw materials or production of goods." *Id.* at 126.

16. *See infra* notes 17-25 and accompanying text.

17. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

18. *Id.*

19. *See, e.g., Albrecht v. Herald Co.*, 390 U.S. 145, 151-52 (1968); *United States v. Masonite Corp.*, 316 U.S. 265, 274 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940).

20. *See, e.g., United States v. Topco Ass'n*, 405 U.S. 596, 608 (1972); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 235-38 (1899). *But see American Football League v. NFL*, 205 F. Supp. 60 (D. Md. 1962) (NFL did not violate Sherman Act by providing exclusive territories for its member clubs), *aff'd*, 323 F.2d 124, 131 (4th Cir. 1963).

price maintenance,²¹ tying arrangements,²² and group boycotts²³ all have been recognized as per se violations of section 1.²⁴

If a particular restraint is not per se illegal, the restraint then is evaluated under the second part of the test: the rule of reason. The "rule of reason" is a judicially created test for evaluating an agreement alleged to be in restraint of trade.²⁵ It requires that the factfinder weigh all the circumstances of a case to decide whether restrictive practices should be prohibited as imposing an unreasonable restraint on competition.²⁶ In this regard, the factfinder must balance an agreement's anticompetitive effect with its competitive virtues and determine whether an unreasonable restraint on competition exists.

III. THE APPLICATION OF ANTITRUST LAWS TO PROFESSIONAL SPORTS

Since its inception, professional sports has enjoyed a unique affinity with the American public. Sports have become a glorified institution in this country and are an integral part of the everyday life of millions of fans. Despite its revered position in American society, however, professional sports and their organizational practices consistently have been the subject of antitrust challenges.

A. Interstate Commerce

As early as 1922, the organizational practices of professional baseball were questioned in *Federal Baseball Club v. National League of Pro-*

21. See, e.g., *United States v. Parke & Davis Co.*, 362 U.S. 29, 44 (1960); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 720 (1944); *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 941 (5th Cir. 1975).

22. See, e.g., *Northern Pac. R.R.*, 356 U.S. at 8; *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). A tying arrangement is where a seller sells a product on condition that the buyer purchase another product from that seller.

23. See, e.g., *Northern Pac. R.R.*, 356 U.S. at 8; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 (1953); *Keifer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951).

24. See 2 E. KINTNER, *FEDERAL ANTITRUST LAW* § 9.20, at 57-58 (1980).

25. See *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). Justice Brandeis articulated the test that has been uniformly adopted in evaluating a restraint under the rule of reason. He stated:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id.

26. *Id.*

fessional Baseball Clubs.²⁷ In *Federal Baseball*, a member of the Federal League alleged that members of the National League destroyed the Federal League by buying some of the Federal League's constituent clubs.²⁸ The plaintiff claimed that by buying up the Federal League's clubs the defendants brought under their control the entire business of baseball. This, the plaintiff argued, amounted in law to a conspiracy in restraint of trade or a monopoly or both.²⁹ The Supreme Court avoided deciding the complicated antitrust issues involved in the case and held that "the business of giving exhibitions of baseball is purely a state affair."³⁰ This holding essentially made baseball exempt from the antitrust laws because section 1 only applies to restraints on interstate commerce.³¹

The decision in *Federal Baseball* subsequently was upheld in *Toolson v. New York Yankees*.³² In *Toolson*, professional baseball players alleged that organized baseball exploited the players for the benefit of the clubs and leagues through the use of the reserve clause.³³ The reserve clause gave baseball clubs that first signed players the continuing and exclusive right to the players' services.³⁴ The Court refused to reexamine the underlying antitrust and interstate commerce issues involved in the case and simply affirmed the judgment in favor of organized baseball on the authority of *Federal Baseball*.³⁵

The Supreme Court's decision in *Federal Baseball* was not extended to professional football. In *Radovich v. NFL*,³⁶ a former NFL player alleged that the NFL violated sections 1 and 2 of the Sherman Act when the NFL conspired with the Pacific Coast Football League to ban the player's services. The San Francisco Clippers, a member of the NFL affiliated Pacific Coast League, had prepared to sign Radovich as a player-coach. The NFL intervened and advised the Pacific Coast League not to sign Radovich because he was black-listed for deserting his former NFL team.³⁷ The Court found that the "volume of interstate business involved in organized professional football places it within the provisions of the Sherman Act."³⁸ In so finding, the Court refused to extend the

27. 259 U.S. 200 (1922).

28. *Id.* at 207.

29. *Id.* at 205-06.

30. *Id.* at 208.

31. 259 U.S. at 208-09.

32. 346 U.S. 356 (1953).

33. *Id.* at 362-64.

34. *Id.* at 362 n.10.

35. *Id.* at 357. The Court's reliance on *Federal Baseball* was based on four factors: 1) Congress had not acted in contravention to the decision in *Federal Baseball*; 2) baseball had developed in reliance on its antitrust exemption; 3) the Court's unwillingness to override *Federal Baseball*; and 4) deference to a legislative solution. *Id.*; see also *Flood v. Kuhn*, 407 U.S. 258 (1972) (affirming *Toolson* on similar grounds).

36. 352 U.S. 445, *reh'g denied*, 353 U.S. 931 (1957).

37. *Id.* at 448.

38. *Id.* at 452; see also *United States v. International Boxing Club*, 348 U.S. 236 (1955) (*Federal Baseball* not extended to boxing); *United States v. Shubert*, 348 U.S. 222 (1955) (*Federal Baseball* not extended to the theater). Justice Frankfurter, with

decision in *Federal Baseball* to professional football leagues. Similarly, both basketball³⁹ and hockey⁴⁰ have been held to be businesses involved in interstate commerce and thus subject to the federal antitrust laws.⁴¹

B. Organizational Practices

There is a unique and indispensable need for economic interdependence between members of professional sports leagues.⁴² Because true athletic competition cannot exist without two or more teams, teams that are members of sports leagues have found it necessary to reduce the economic competition between themselves in order to facilitate financial stability, and thus parity, within the league.⁴³ By reducing economic competition and combining economic resources, however, sports leagues have exposed their practices to challenges under the anticonspiracy and antimonopoly provisions of the Sherman Act.⁴⁴

The first antitrust challenge to a joint economic agreement between NFL owners involved the NFL's restrictions on television contracts. In *United States v. NFL*,⁴⁵ the United States District Court for the Eastern District of Pennsylvania held that NFL owners could not, by agreement, restrict the areas within which telecasts of league games could be made. This, the court held, was an unlawful conspiracy in restraint of trade.⁴⁶ This decision subsequently was extended when the NFL petitioned that same court for a clarification of its earlier decision.⁴⁷ The NFL owners

some foresight into the problems that were likely to ensue as a result of the inconsistencies created by *Federal Baseball*, *International Boxing*, *Shubert*, and *Radovich*, said: "It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman [Act] becomes applicable to a 'trade or commerce.'" *International Boxing*, 348 U.S. at 248 (Frankfurter, J., dissenting).

39. See *Haywood v. NBA*, 401 U.S. 1204, 1205 (1971) (professional basketball not exempt from antitrust laws).

40. See *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966, 968 (C.D. Cal. 1974) (major league hockey subject to federal antitrust laws).

41. See Glick, *Professional Sports Franchise Movements and the Sherman Act: When and Where Teams Should Be Able to Move*, 23 SANTA CLARA L. REV. 55, 58-59 (1983).

42. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 757 (1979).

43. *Id.*

44. See *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), cert. denied sub nom. *NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984); see also *North Am. Soccer League v. NFL*, 670 F.2d 1249, 1251 (2d Cir.) (professional football league's ban on members owning teams in competing leagues violated the Sherman Act), cert. denied, 459 U.S. 1074 (1982).

45. 116 F. Supp. 319 (E.D. Pa. 1953). Although this case occurred prior to *Radovich* the court found it unnecessary to address whether professional football itself was engaged in interstate commerce. Instead, the court determined that this case concerned only restrictions imposed by the NFL on the sale of radio and television rights. Radio and television, the court held, were clearly in interstate commerce. 116 F. Supp. at 327-28.

46. *Id.* at 330.

47. *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961).

sought a declaratory judgment that the league could negotiate television contracts on behalf of its member clubs without violating section 1.⁴⁸ The government opposed this practice and argued that the NFL's practice of negotiating television contracts on behalf of its member clubs was an unlawful conspiracy in restraint of trade.⁴⁹ The court held that an agreement negotiated by the NFL granting a network the exclusive right to televise games was prohibited by the Sherman Act.⁵⁰

In response to this decision, Congress enacted the Telecasting of Professional Sports Contests Act.⁵¹ This Act authorizes the member clubs of a professional football, baseball, basketball, or hockey league to pool their rights in the telecasting of their games and permits the league to sell the resulting package to a television network⁵² without violating antitrust laws.⁵³ Congress enacted the Telecasting of Professional Sports Contests Act because it recognized that a restriction placed solely on the NFL, and not on other professional leagues, would be inequitable.⁵⁴

48. *Id.* at 446.

49. *Id.*

50. *Id.* at 447.

51. 15 U.S.C. § 1291 (1982) states:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball or hockey by which any league . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games. . . .

52. 15 U.S.C. § 1291 (1982); see S. Rep. No. 1087, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 3042-44.

53. Recently, the NFL's ability to negotiate exclusive television contracts with the networks was unsuccessfully contested. The United States Football League's (USFL) former representative in charge of negotiating television contracts, Eddie Einhorn, accused all three major networks of being "in cahoots" with the NFL against the USFL. Einhorn wrote: "I am firmly convinced that we [USFL] will never get a fair market [television] contract for USFL football in the fall unless the courts or the federal government intercede on our behalf and force the NFL to offer its product to no more than two networks and maybe one." *The Baltimore Sun*, Feb. 19, 1985 at C1, col. 4.

54. S. Rep. No. 1087, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 3042-44. Specifically, Congress justified its action on the following bases: 1) The AFL, the NBA, and the NHL all separately pooled their television rights into a single package for sale to the networks; 2) economic parity would be maintained in the league; 3) weaker teams would be protected, and league structure and operation would not be imperiled; and 4) college football would be protected. *Id.*

In addition, Congress wanted to help preserve the substantial number of college educational programs that were dependent on college football for revenue by not impairing college football gate receipts through network telecasts of professional football games at times when college games were normally played. The Act ensured that most college football games would be played on Saturday and most professional football games would be played on Sunday. In this manner, Congress aided in the formation of the NFL's present format because it guaranteed a single day of each week during the football season for scheduled games. This system, however, was challenged. The newly formed USFL filed an antitrust suit in federal court in New York against the NFL alleging that the NFL held a monopoly on network television. See *Arizona Wranglers Football Club, Inc. v. NFL*, No. 84-7484 (S.D.N.Y. 1984).

Although Congress recognized that nonuniformity in television contract negotiations was a legitimate justification for granting sports leagues this limited exemption⁵⁵ from the Sherman Act, Congress failed to address the obvious inequities created by the decisions in *Federal Baseball* and *Toolson*, which excluded professional baseball from federal antitrust laws, and *Radovich*, which held that professional football was subject to federal antitrust laws.⁵⁶

The next major antitrust challenge in professional football occurred in *American Football League v. NFL*.⁵⁷ The newly created American Football League (AFL) and its franchise owners alleged that the NFL and its franchise owners "monopolized, attempted to monopolize and conspired to monopolize" major league professional football.⁵⁸ The AFL challenged that the NFL used its market power to prevent or impede the formation of the AFL by monopolizing the most desirable franchise locations.⁵⁹ The court held that, although the NFL enjoyed a natural monopoly in certain cities,⁶⁰ the NFL did not misuse the natural monopoly "to gain a competitive advantage for teams located in other cities, or for the league as a whole."⁶¹ The court stated:

It frequently happens that a first competitor in the field will acquire sites which a latecomer may think more desirable than the remaining available sites, but the firstcomer is not required to surrender any, or all, of its desirable sites to the latecomer simply to enable the latecomer to compete more effectively with it. There is no basis in antitrust laws for a contention that American, whose Boston, Buffalo, Houston, Denver and San Diego teams enjoy natural monopolies, has a right to complain that National does not surrender to it other natural monopoly locations so that they too may be enjoyed by American rather than by National. When one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly.⁶²

The results of antitrust challenges to the NFL's power to negotiate television contracts on behalf of league members, and its right to monopolize franchise territories, illustrate the recognition by Congress and the courts that individual members of sports leagues need to act in concert in certain circumstances. In the early 1970's, however, antitrust challenges

55. *Id.*

56. See *supra* notes 27-40 and accompanying text. Congressional enactment of 15 U.S.C. § 1294 (1982) left antitrust laws unaffected as regards to other activities of professional sports contracts. 15 U.S.C. § 1294 (1982).

57. 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

58. *Id.* at 62.

59. *Id.* at 63.

60. Currently, the NFL teams enjoy natural monopolies in all of their territories except New York (Giants and Jets) and Los Angeles (Rams and Raiders).

61. *American Football League*, 323 F.2d at 131.

62. *Id.* (citations omitted).

to some of the most basic attributes of the existing internal structure of sports leagues brought an abrupt end to their insulation from antitrust laws. Many of the successful antitrust challenges have been directed toward the effect of contractual terms used by the leagues to control the movement of players among league clubs.⁶³ The most celebrated challenge, however, involves feuding among NFL owners over the movement of league franchises.

IV. SPORTS FRANCHISE RELOCATION

A. *The Raiders Case: Background*

The NFL, like other sports leagues,⁶⁴ has sought to control the geographic territories occupied by its league members. Rule 4.3 of article 4 of the NFL Constitution (rule 4.3) provides that three-fourths of the league's members must approve any request to relocate a franchise before relocation can occur.⁶⁵

Prior to 1978, the NFL's rule requiring league approval of an owner's request to relocate his franchise was not contested by either league owners or outsiders.⁶⁶ In 1978, however, a series of events began that culminated in the first challenge to the NFL's right to control franchise relocation. The owner of the Los Angeles Rams decided to relocate his team from Los Angeles, California to Anaheim, California.⁶⁷ The NFL owners approved the relocation, but this left a major stadium facility, the Los Angeles Memorial Coliseum,⁶⁸ without a professional football tenant.

In response to this void, the Los Angeles Memorial Coliseum Commission petitioned the NFL for the creation of an expansion franchise to be located in the Coliseum.⁶⁹ When the Coliseum Commission was un-

63. See *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

64. See *Robertson*, 389 F. Supp. at 873-76; *Philadelphia World Hockey Club*, 351 F. Supp. at 465-67.

65. NFL CONST. AND BYLAWS art. IV, § 4.3 (1982). Rule 4.3 states:

The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

Id.

66. *Cf. Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom. NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

67. *Id.* at 1384.

68. The Los Angeles Memorial Coliseum has hosted such events as the 1932 and 1984 Summer Olympic Games. It also is home to the University of Southern California Trojans and, until recently, was home to the UCLA Bruins.

69. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1384. *Cf. S. 259*, 99th Cong., 1st Sess. (1985); *H.R. 751*, 99th Cong., 1st Sess. (1985) (requiring the NFL to create expansion franchises in Baltimore and Oakland by 1988 and 1990, respectively).

successful in its efforts to convince the league to create an expansion franchise in Los Angeles, it began negotiations with the managing general partner of the Oakland Raiders.⁷⁰ On March 1, 1980, the Raiders announced to the NFL that they would be moving the Raiders to Los Angeles.⁷¹ Pursuant to the requirements of rule 4.3,⁷² the NFL owners voted, but overwhelmingly rejected the proposed relocation.⁷³ In response, the Coliseum Commission and the Raiders promptly filed suit alleging that the NFL's present system of control, requiring approval of a proposed franchise relocation by three-fourths of the league's owners, violated section 1 of the Sherman Act.⁷⁴ The question posed to the court, therefore, was whether the NFL's practice of requiring league approval of a proposed franchise relocation was a conspiracy in restraint of trade or commerce.⁷⁵

B. *The Raiders Case: Legal Analysis*

The antitrust analysis of the NFL's regulation of franchise movement can be reduced to three basic issues: 1) whether members of a NFL association can conspire within the meaning of section 1 of the Sherman Act;⁷⁶ 2) if conspiracy is determined, whether the conspiracy is per se illegal;⁷⁷ and 3) if the conspiracy is not per se illegal, whether the NFL practice of regulating franchise movement is an unreasonable restraint on competition.⁷⁸

1. Single Entity Rule — Can the Members of the NFL Conspire?

To invoke section 1 of the Sherman Act, there must be a contract, combination, or conspiracy in restraint of trade.⁷⁹ In *Nelson Radio & Supply v. Motorola*,⁸⁰ the court said, "[i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy."⁸¹ The NFL has maintained that it is incapable of conspiring to restrain trade under the Sherman Act because it is a single economic entity.⁸² The NFL claims that the "unitary nature of the product it creates —NFL

70. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1384.

71. *Id.*

72. *See supra* note 68 and accompanying text.

73. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1385. "[T]he NFL teams voted on March 10, 1980 22-0 against the move, with five teams abstaining . . . [despite the Raiders'] objection that Rule 4.3 is illegal under the antitrust laws . . ."

Id.

74. *Id.*

75. *Id.* at 1387.

76. *See infra* notes 84-103 and accompanying text.

77. *See infra* notes 104-111 and accompanying text.

78. *See infra* notes 112-21 and accompanying text.

79. *Nelson Radio & Supply v. Motorola*, 200 F.2d 911 (5th Cir. 1952).

80. *Id.*

81. *Id.* at 914.

82. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 519 F. Supp. 581, 583 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom. NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

football — necessarily implies that it is a single . . . firm selling a single product involving a necessary contribution from each member.”⁸³

The NFL's position is supported by the holding in *San Francisco Seals Ltd. v. National Hockey League*.⁸⁴ In *San Francisco Seals*, the Seals filed an antitrust action against the National Hockey League (NHL) and its members claiming that the league unlawfully had prevented the team from relocating the franchise from San Francisco to British Columbia. Like the NFL, the NHL rules required league approval of a member's request to relocate a franchise.⁸⁵ The United States District Court for the Central District of California did not address the legitimacy of the approval rule under the antitrust laws; instead, the court held that the NHL is incapable of conspiring to restrain trade within the meaning of section 1 of the Sherman Act because it is a single economic entity.⁸⁶

In *Los Angeles Memorial Coliseum Commission v. NFL*,⁸⁷ the league sought protection within the ambit of the holding in *San Francisco Seals*. The NFL contended that its “league structure was in essence a single entity akin to a partnership or joint venture,⁸⁸ precluding application [of section 1].”⁸⁹ The Coliseum and the Raiders rejected this position and asserted that the league was composed of twenty-eight separate legal en-

83. *Id.* For a detailed discussion of the NFL's status as a group of separate entities, see Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983).

84. 379 F. Supp. 966 (C.D. Cal. 1974).

85. *Id.* at 968.

86. *Id.* at 968-71. The court's holding also was based on its determination that the denial of the move had no anticompetitive effect. *Id.* Cf. *North American Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.) (characterizing the NFL as a joint venture, but not to the extent of exempting the league from the antitrust laws), *cert. denied*, 459 U.S. 1074 (1982). The court said:

The sound and more just procedure is to judge the legality of such restraints according to well-recognized standards of our antitrust laws rather than permit their exemption on the ground that since they in some measure strengthen the league competitively as a “single economic entity,” the combination's anticompetitive effects must be disregarded.

Id. at 1257-58.

87. 726 F.2d 1381 (9th Cir.), *cert. denied sub nom.* *NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

88. *Id.* at 1387. Neither a partnership nor a joint venture is immune from scrutiny under section 1. See generally E. KINTNER, *FEDERAL ANTITRUST LAW* §§ 9.14-.15 (1980). In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), the appellant contended that its practice of allocating trade territories among its international partners, British Timken and French Timken, did not violate the Sherman Act because it was not a joint venture. The court disagreed:

[We do not] find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a “joint venture.” Perhaps every agreement and combination to restrain trade could be so labeled.

Id. at 598.

89. *Id.* at 598; *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1387.

tities that acted independently.⁹⁰ Notwithstanding *San Francisco Seals*,⁹¹ the Ninth Circuit held that the league is a group of separate economic entities.⁹² The court stated:

The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of league revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources . . . [In addition], in certain areas of the country, where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.⁹³

Subsequently, the United States Supreme Court denied *certiorari* in *Los Angeles Memorial Coliseum Commission*.⁹⁴ The NFL, therefore, failed to obtain single entity status and thereby achieve the antitrust exemption it consistently has been denied.⁹⁵

90. 726 F.2d at 1387.

91. *Id.* at 1390. The Court of Appeals for the Ninth Circuit was not persuaded by *San Francisco Seals*, but did not elaborate beyond offering its view that the NFL should not be immune from the Sherman Act. *Id.* at 1387 n.4. The district court, however, distinguished *San Francisco Seals*. The court reasoned that in *San Francisco Seals*, unlike the *Los Angeles Memorial Coliseum Comm'n*, the team was "not being prevented from moving into another team's home territory." See *Los Angeles Memorial Coliseum Comm'n v. NFL*, 519 F. Supp. 581, 585 (C.D. Cal. 1981). Thus, the district court interpreted *San Francisco Seals* to uphold the NHL's rule restricting franchise location because the rule does not impede competition. In *Los Angeles Memorial Coliseum Comm'n*, the effect of the NFL's rule restricting franchise location prevented two teams, the Rams and the Raiders, from competing economically in the same territory. In its opinion, however, the district court may have endorsed unknowingly the NFL's rule in the situation where an NFL team seeks relocation in an otherwise unoccupied territory.

92. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1390.

93. *Id.* at 1389-90.

94. *NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984). The single entity issue was also on appeal when the Supreme Court denied *certiorari* in *North American Soccer League v. NFL*, 459 U.S. 1074 (1982). Justice Rehnquist filed a stinging dissent to the *certiorari* denial in which he stated that under the decision of the court of appeals, "the *maxim* that the antitrust laws exist to protect *competition*, not *competitors*, may be reduced to a dead letter." *Id.* at 1080 (Rehnquist, J., dissenting); see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) where the Court said "the antitrust laws . . . were enacted for the protection of competition not competitors"). *Id.*

95. See, e.g., *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d 1381; *North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). In many cases, rules governing player contracts have been held to violate section 1 of

2. Per Se or Rule of Reason Analysis

It is now clear that the NFL is an association capable of conspiring in violation of section 1 of the Sherman Act.⁹⁶ The next step in the anti-trust analysis involves an evaluation of the alleged conspiracy to determine whether it constitutes an unreasonable restraint on trade. In *Broadcast Music, Inc. v. CBS*,⁹⁷ the Court said, "in construing and applying the Sherman Act's ban against contracts, conspiracies and combinations in restraint of trade, certain agreements or practices are so 'plainly anticompetitive' and so often 'lack . . . any redeeming virtue,'⁹⁸ that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."⁹⁹

In *Los Angeles Memorial Coliseum Commission*, the district court held that the NFL rule restricting franchise relocation was not per se illegal¹⁰⁰ because the NFL's rule actually promoted competition to some extent. The district court explained: "it cannot be said that [those agreements] have a 'pernicious effect on competition' or that they lack 'any redeeming virtue.'"¹⁰¹ Each member of a sports league is dependent on the financial success of other team owners.¹⁰² If a team is financially unsuccessful then that team will not be able to compete effectively for quality players.¹⁰³ One team's financial troubles will defeat the NFL's goal of parity in its athletic contests, thereby diminishing the NFL's competitive balance.¹⁰⁴ Consequently, the court in *Los Angeles Memo-*

the Sherman Act. *Compare* *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (NFL draft as existed in 1968 constituted an unreasonable restraint on trade) with *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977) (free agent compensation system constituted an unreasonable restraint on trade) and *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (certain NFL rules governing player contracts held violative of antitrust laws).

96. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom. NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984); *North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

97. 441 U.S. 1 (1979).

98. *Id.* at 7-8; *see also* *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

99. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 7-8 (1979); *National Society of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977).

100. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1392; *see also* *North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). *But cf.* *United States v. Topco Ass'n, Inc.*, 405 U.S. 596, 608 (1972) ("an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition" is per se illegal).

101. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 468 F. Supp. 154, 166 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom. NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

102. *See* J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 696-97 (1979); *see also* *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1396.

103. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 697 (1979).

104. *Id.*

rial Coliseum Commission analyzed the NFL's rule regulating franchise movement under the rule of reason to determine whether the practice constituted an unreasonable restraint on trade.¹⁰⁵

3. Rule of Reason Analysis

Under the rule of reason, a plaintiff alleging a conspiracy in restraint of trade must "prove that an adverse impact on competition in a relevant market exists."¹⁰⁶ In a normal antitrust case, the practice of providing exclusive territories for business franchises is unlawful per se because the practice restricts market participation in order to regulate supply and thereby control prices.¹⁰⁷ According to the *Los Angeles Memorial Coliseum Commission* trial court, the NFL's goals in providing its members with exclusive territories were legitimate and, therefore, not per se ille-

105. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1392; see also *Los Angeles Memorial Coliseum*, 468 F. Supp. at 166.

106. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1392. It is crucial in any antitrust analysis to pinpoint the precise "market" that is adversely affected by an agreement alleged to be in restraint of trade. According to the ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 322 (1955), "the market is the sphere of competitive rivalry within which the crucial transfer of buyer's patronage from one supplier of goods or services to another can take place freely." *Id.* For purposes of the NFL's rule 4.3, the court in *Los Angeles Memorial Coliseum Comm'n* noted that any market consists of a product market and a geographic market. The product market consists of the type of product the competitors are distributing. The geographic market is the area where the competitors sell their products. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1392-93; see generally KINTNER, FEDERAL ANTITRUST LAW §§ 12.2-.4 (1980).

There has been much dispute as to what constitutes a particular market. For example, in *Los Angeles Memorial Coliseum Comm'n*, the NFL argued that the product market was the entire entertainment market and the geographic market was the United States. The Raiders argued that the product market was NFL football and the geographic market was Southern California. The Coliseum claimed that the product market was stadia offering their facilities to NFL teams in the geographic market of the United States. See *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1393. The court ultimately evaded the issue as not necessary to assist the jury in determining whether rule 4.3 "reasonably served the NFL's interest" *Id.* at 1394.

The resolution of this issue involves several questions:

1. What products would the public choose instead of NFL football?
 - a. other sporting events played at the same time;
 - b. other forms of non-sporting entertainment; or
 - c. other NFL football games played at the same time.
2. What geographical area does the product market encompass?
 - a. a local region; or
 - b. the whole country.

The focus of the relevant market analysis should be on those who support professional football. The product market should consist of all other products considered by supporters of professional football in lieu of an NFL football game and the geographical area should encompass that area where these products are available. The product market consists of other sporting events offered at the same time as an NFL game and the geographical area is the entire nation because alternative sporting events are televised all over the country. Consequently, competition for an NFL home game comes from other home or televised sporting events.

107. See *United States v. Topco Ass'n, Inc.*, 405 U.S. 596, 611 (1972).

gal.¹⁰⁸ The court stated:

Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.¹⁰⁹

The court also recognized that in order to effectuate the NFL's right to negotiate lucrative television contracts, the NFL must have "some control over the placement of teams to ensure NFL football is popular in a diverse group of markets."¹¹⁰ The NFL also has a legitimate interest in prohibiting relocations because such prohibitions allow cities to recover substantial investments made in stadiums and other facilities.¹¹¹ The trial court, therefore, held that the NFL had legitimate reasons for regulating the territories of its members.

On appeal, the Ninth Circuit also was persuaded by many of the NFL's arguments regarding the legitimacy of its rule.¹¹² The court, however, was "not persuaded the jury should have concluded" that rule 4.3 was a reasonable means to effectuate those interests.¹¹³ The court advised the NFL that "an *express recognition* and consideration of the objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised."¹¹⁴ Although the NFL convinced the court that it had a right to regulate franchise relocation, the court recognized that right only to the extent that it was implemented objectively. The overwhelming problem with rule 4.3 was that it granted the NFL arbitrary power to grant or deny an owner's request to relocate. In *Los Angeles Memorial Coliseum Commission*, "testimony indicated that some owners, as well as Commissioner Pete Rozelle, dislike[d] Al Davis and consider[ed] him a maverick."¹¹⁵ This suggested that the vote against the Raiders' move could have been motivated by animosity rather than business judgment.¹¹⁶ Because there was no evidence of an objective decision-making process, rule 4.3 in its present form violated the rule of reason because of the potential anticompetitive effect. Consequently, the Ninth Circuit sustained the

108. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1396.

109. *Id.*

110. *Id.*

111. *Id.* "Of the 13 stadium complexes built in the United States since 1970, taxpayers helped finance 12, typically through the sale of government bonds, but sometimes through outright tax increases." *The Baltimore Sun*, Jan. 24, 1985 at 8A, col. 4.

112. *Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1396.

113. *Id.*

114. *Id.* at 1397 (emphasis added).

115. *Id.* at 1398.

116. *Id.* at 1397.

Raiders' right to relocate to Los Angeles.¹¹⁷

V. THE EFFECT OF THE NINTH CIRCUIT'S HOLDING IN *LOS ANGELES MEMORIAL COLISEUM COMMISSION*

After the unfavorable decision in *Los Angeles Memorial Coliseum Commission*, the NFL petitioned for review in the United States Supreme Court.¹¹⁸ In the interim, Robert Irsay, the owner of the Baltimore Colts, displeased with the condition of Baltimore's Memorial Stadium, his treatment by the press, and poor attendance at Colt games, moved the Colts to Indianapolis.¹¹⁹ The NFL "took no action, one way or the other, on the Colts' relocation" largely because the league was still seeking clarification from the Supreme Court on its authority to control franchise relocation and, pending such clarification, NFL owners feared that any further attempt to preserve league stability would result in another antitrust lawsuit.¹²⁰

In spite of the league's silence, the Colts' abrupt move to Indianapolis provoked increased concern among mayors, sports leagues, and Congress over how to restore franchise stability.¹²¹ This concern was heightened by two events. First, the NFL lost its bid for judicial clarification of the Ninth Circuit's holding in *Los Angeles Memorial Coliseum Commission* when the Supreme Court declined to review that decision.¹²² The second event occurred only a month later when the Philadelphia Eagles, "a well-supported NFL club with 50 years of history [announced plans to leave] the country's fourth largest market for a smaller city, [Phoenix], where the United States Football League already had a franchise."¹²³ In view of these two critical events, the NFL decided to abandon its "no action" stance and once again oppose a relocation. The NFL sued the Eagles "to confirm the League's right to evaluate a proposed franchise move in concrete terms," and to require the Eagles to justify their relocation from a well-established market.¹²⁴ The suit was very significant because it would have tested the effectiveness, under the antitrust laws, of the NFL's newly adopted objective standards. But the test never materialized because the suit eventually was settled when the

117. *Id.*

118. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom. NFL v. Oakland Raiders Ltd.*, 469 U.S. 990 (1984).

119. *See supra* note 2 and accompanying text.

120. *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate*, 99th Cong., 1st Sess. 66 (1985) (statement of Pete Rozelle, Commissioner, National Football League).

121. *Id.*

122. *NFL v. Oakland Raiders, Ltd.*, 469 U.S. 990 (1984).

123. *Professional Sports Community Protection Act of 1985: Hearings on S.259 and S.287 Before the Comm. on Commerce, Science, and Transportation United States*, 99th Cong., 1st Sess. 66 (1985) (statement of Pete Rozelle, Commissioner, National Football League).

124. *Id.*

Eagles agreed to remain in Philadelphia.¹²⁵ Nonetheless, the suit did have an important role; it focused substantial public attention on the franchise movement problem.

A. Objective Guidelines.

Following the Ninth Circuit's decision in *Los Angeles Memorial Coliseum Commission* and the ensuing events, Commissioner Pete Rozelle established "procedures and policy to apply to league consideration, pursuant to [rule] 4.3 of the [NFL] Constitution and Bylaws, of any proposed transfer of a home territory."¹²⁶ The NFL established the new procedures, but expressed reservations as to whether they would withstand scrutiny under current legal precedent.¹²⁷ Despite the legal confusion, however, the NFL was determined to stem the tide of franchise relocation and restore franchise stability to the league.

Under the new guidelines, an owner is required to give written notice of a proposed move to other league owners by January fifteenth of the year of the proposed relocation. This notice must be accompanied by a statement of the owner's reasons for the proposed move.¹²⁸ The statement of reasons for the proposed relocation must include the following information: 1) a comparison of team revenues with league averages and medians; 2) a comparison of past and projected stadium revenues at the existing and proposed locations; 3) audited annual financial and profit and loss statements for the last four seasons; 4) operations of other professional and college sports in the existing and proposed locations; 5) effects of the relocation on scheduling patterns, travel requirements of other teams, divisional alignments, traditional rivalries, television patterns and interests, quality of stadium facilities, and the possible reaction of fans and the general public; 6) copies of the current stadium lease and other current agreements regarding concessions, luxury boxes, score board advertising, parking, and practice facilities; 7) financial analyses of projected lease and other arrangements in proposed location as compared with those in the existing locations; and 8) budget projections for the first three years in the new location.¹²⁹ Finally, the owners review the information and three-fourth's majority vote is needed to approve relocation.¹³⁰

These guidelines appear to be in accord with the Ninth Circuit's suggestion in *Los Angeles Memorial Coliseum Commission*. They represent an objective process which considers relevant criteria designed to reflect the legitimate concerns of the league and its host cities. Any restraints imposed by the league, if based upon an objective application of

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 69-71.

129. *Id.*

130. *Id.*

the new procedures, should survive scrutiny under the rule of reason. The rule of reason recognizes that a restraint may be based upon valid considerations and, therefore, not illegal under the antitrust laws.¹³¹ "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."¹³²

The NFL is not convinced that an objective application of its new procedures will withstand scrutiny under the antitrust laws.¹³³ According to the league, there exists legal confusion over the franchise relocation issue and legislative action is needed to rectify the problem.¹³⁴ The view of other professional leagues is that they should be entitled to a limited antitrust exemption over agreements to restrain franchise relocation.¹³⁵ This view, however, is not shared by all. Howard Cosell, testifying before the Committee on the Judiciary, stated that Congressional action is unnecessary to resolve the antitrust problem.¹³⁶ Instead, he recommended that the NFL need only do what the Ninth Circuit said in *Los Angeles Memorial Coliseum Commission*: formulate objective standards for evaluating a proposed relocation and then reduce its vote on the issue to a majority.¹³⁷ The NFL disputes the solution suggested by Mr. Cosell as unsupported by the Ninth Circuit's holding. The league contends that the Ninth Circuit's statement on the need for objective standards was merely dicta and thus the court made no ruling on the legal effectiveness of objective standards.¹³⁸

131. See *supra* notes 25-26 and accompanying text.

132. Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

133. *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate, 99th Cong., 1st Sess. 66 (1985)* (statement of Pete Rozelle, Commissioner, National Football League).

134. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259, and S. 298 Before the Comm. on the Judiciary United States Senate, 99th Cong., 1st Sess. 60-64 (1985)* (statement of Jay Moyer, Counsel to the Commissioner, National Football League, New York, N.Y., Accompanied by Paul Tagliabue, Co-Counsel, National Football League).

135. See, e.g., *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate, 99th Cong., 1st Sess. 54-58 (1985)* (statement of Peter Ueberroth, Commissioner of Major League Baseball). Major League Baseball is opposed to any legislative action to correct the franchise relocation problem. Commissioner Ueberroth said: "The federal government should not be involved in [league decisions relating to the number and movement of franchises] legislatively, and the record shows that the imposition of federal antitrust liability by the judiciary leads to franchise instability, rather than enhanced franchise stability. *Id.*"

136. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259 and S. 298 Before the Comm. on the Judiciary United States Senate, 99th Cong., 1st Sess. 46-56 (1985)* (statement of Howard Cosell, ABC Public Relations, New York, N.Y.).

137. *Id.*

138. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259 and S. 298 Before the Comm. on the Judiciary United States Senate, 99th Cong., 1st Sess. 61 (1985)* (statement of Jay Moyer, Counsel to the Commissioner, National Football League, New York, N.Y., accompanied by Paul Tagliabue, Co-Counsel, National

The NFL's concern over the legal effectiveness of objective standards relates to the components of those standards.¹³⁹ The league believes that they must be permitted to consider the interests of the team's current community.¹⁴⁰ In this regard, Jay Moyer, counsel to the NFL Commissioner, pointed to the NBA's current standards which make no "reference to the record of a team in its current community, or any reference to the interests of that community in the continued presence of its team."¹⁴¹ The NBA has omitted reference to the interests of the community on advice from its lawyers that "under the Ninth Circuit's majority decision in the *Raiders* case, they cannot even consider the interests of the team's current community without risking a serious violation of the antitrust laws and heavy damages."¹⁴² In view of this advice, the NFL believes that Congressional action is necessary so that a league can consider the interests of a team's community without risking further liability under the antitrust laws.¹⁴³ The NFL claims that the Congressional action should be in the form of a limited antitrust exemption over agreements to restrain franchise relocations.¹⁴⁴

Football League). Mr. Moyer disagreed with Mr. Cosell's interpretation of the Ninth Circuit's statement. He said:

As to objective standards in the *Raiders* case a badly divided Court by a 2-to-1 majority entered into its opinion a paragraph's worth of dicta. . . . There is nothing in that court's opinion or in the opinion of any other court in a comparable case that provides the National Football League or any other sports league with any reasonable assurance that simply promulgating standards would resolve the problem.

Id.

139. *Id.* at 62.

140. *Id.* See also *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate, 99th Cong., 1st Sess. 54-58 (1985)* (statement of Peter Ueberroth, Commissioner of Major League Baseball). Mr. Ueberroth emphasized baseball's desire to consider the interests of the local community when evaluating a proposed relocation. He said:

The perspective of both leagues and the Commissioner in evaluating potential relocations is much broader than that of the particular team involved. While the interests of that team are necessarily important, so are those of the local fans and the public. . . . Baseball has made every effort over the years to act responsibly on matters relating to the number and movement of franchises. And in making decisions on those issues, baseball has always attempted to take into account the interests of the fans and the public.

Id. at 56.

141. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259 and S. 298 Before the Comm. on the Judiciary United States Senate, 99th Cong., 1st Sess. 62 (1985)* (statement of Jay Moyer, Counsel to the Commissioner, National Football League, New York, N.Y. accompanied by Paul Tagliabue, Co-Counsel, National Football League).

142. *Id.*

143. *Id.*

144. *Id.* at 83.

B. Congressional Intervention

The new procedures established by the NFL demonstrate the league's internal resolve to ensure franchise stability. Nevertheless, the uncertainty over the legal effectiveness of the new procedures has precipitated Congressional intervention. Several bills designed to rectify the franchise movement problem were introduced at the 99th Congress.¹⁴⁵ The bills range from proposals to bar relocations to proposals to create an unrestricted relocation system.¹⁴⁶ In the middle, are several bills that would subject franchise relocation requests to an objective decision making process.

The Professional Sports Community Protection Act of 1985, S. 259, was introduced by Senator Eagleton and is co-sponsored by Senator Danforth and other members of the Senate.¹⁴⁷ The Act provides sports leagues with a broad antitrust exemption over the enforcement of rules preventing a team relocation.¹⁴⁸ According to the bill, league decisions on relocation would be subject to a variety of procedures and a determination must be based upon specified criteria and other appropriate factors which must be considered and upon which written findings must be made.¹⁴⁹ Any decision is subject to judicial review by a federal district

145. S. 259, 99th Cong., 1st Sess. (1985); S. 287, 99th Cong., 1st Sess. (1985); S. 298, 99th Cong., 1st Sess. (1985); S. 172, 99th Cong., 1st Sess. (1985); H.R. 885, 99th Cong., 1st Sess. (1985); H.R. 510, 99th Cong., 1st Sess. (1985); H.R. 785, 99th Cong., 1st Sess. (1985); H.R. 956, 99th Cong., 1st Sess. (1985).

146. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259 and S. 298 Before the Comm. on the Judiciary United States Senate*, 99th Cong., 1st Sess. 314 (1985) (Rosenberg, Morton, Proposed Sports Relocation Legislation: Background and Legal Implications).

147. S. 259, 99th Cong., 1st Sess., *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259 and S. 298 Before the Comm. on the Judiciary United States Senate*, 99th Cong., 1st Sess. 209 (1985).

148. *Id.* at §§ 4(1), 4(2), 4(3) and 4(4).

149. *Id.* at § 6(b). The criteria are: (1) the adequacy of such member club's existing stadium or arena in relation to other stadiums or arenas with such league; (2) the adequacy of facilities related to or in the vicinity of such stadium or arena, including transportation, vending, retail and other facilities; (3) the desire and ability of the owner or operator of such stadium, arena or facilities and officials of local government to remedy any inadequacies in such stadium, arenas or facilities, or to provide other incentives or arrangements which would make it reasonable and appropriate for such member club to be located in its home territory; (4) the extent to which such member club has, directly or indirectly, received public financial support by means of construction of any publicly financed playing facility, special tax treatment, or other form of public financial support, and the extent to which such support continues or remains unamortized; (5) the effects of such change on any contract or agreement entered into by such member club and any public or private party; (6) the extent to which ownership or management of such member club has contributed to any circumstance that might demonstrate the need for a change in the member club's operating revenues from sports operations, including net revenues from ticket and other stadium or arena receipts from games played in the member club's stadium or arena, in relation to the median and average levels or revenues for other member clubs in the three seasons preceding the date of the member club's notice furnished under section 5 of this act; (8) the extent of any net operating losses experienced by such member club, exclusive of depreciation and

court and may be set aside if not supported by substantial evidence or if obtained by fraud, corruption, or undue means.¹⁵⁰ In addition, host cities also may seek review under the antitrust laws.¹⁵¹

The NFL views S. 259 as a "starting point" for the resolution of the franchise relocation problem.¹⁵² In this regard, the NFL supports certain aspects of the bill. The NFL stated:

[S. 259] authorizes professional sports leagues to keep well supported teams in their existing home territories; it involves no license for leagues to relocate well supported teams; it recognizes that team stability in professional sports cannot be achieved by outside direction but must be accompanied by sound league operating practices; it leaves decision-making on team location matters with leagues themselves while identifying certain of the many factors that leagues would consider in making those decisions; and it provides for outside judicial review.¹⁵³

The NFL does not completely support S. 259, however, because the bill does not expressly eliminate conspiracy liability under the antitrust laws.¹⁵⁴

Another bill before Congress is the Professional Sports Team Community Protection Act, S. 287, co-sponsored by Senator Gorton and other members of the Senate.¹⁵⁵ S. 287 establishes a more complex procedure designed to prevent relocations.¹⁵⁶ More specifically, S. 287 re-

amortization, in the three seasons preceding the date of the member club's notice furnished under section 5 of this Act; (9) the extent to which support for such member club has been demonstrated by attendance, ticket sales, and other factors while the member club has played in its home territory; (10) the number of professional, university, and college teams playing in the same sport as the member club which are currently conducting sports operations in the member club's home territory and in the proposed location of such member club, and in the effects that the proposed change in the location of such member club may have on such loans and their leagues; (11) any bonafide offer to purchase such member club at fair market value, if such offer includes continued location of such member club in its home territory; (12) the extent to which such member club has engaged in good faith negotiations concerning reasonable arrangements under which such member club would continue to be located in its home territory and in its stadium or arena (or a suitable alternative facility in its home territory).

150. *Id.* at § 7.

151. *Id.*

152. *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate, 99th Cong., 1st Sess. 67 (1985)* (statement of Pete Rozelle, Commissioner, National Football League).

153. *Id.*

154. *Id.* at 67-68.

155. S. 287, 99th Cong., 1st Sess., *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate, 99th Cong., 1st Sess. 20 (1985)*.

156. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259 and S. 298 Before the Comm. on the Judiciary United States Senate, 99th Cong., 1st Sess. 321*

quires a team desiring to relocate to comply with strict notice provisions as well as a requirement that the team cover the expenses of a league initiated hearing.¹⁵⁷ The league must evaluate the relocation under specified criteria and any decision must be "necessary and appropriate."¹⁵⁸ A league decision is then subject to review by an arbitration board which has the authority to reject the move.¹⁵⁹ If the league rejects the relocation the board need not review the decision.¹⁶⁰ Judicial review is precluded except to determine whether the criteria were properly considered.¹⁶¹ The bill also requires the NFL to increase its membership by two members by 1988, one of which must be located in Baltimore, Maryland, and by an additional two members by 1990, one of which must be located in Oakland, California.¹⁶²

The NFL opposes S. 287. In the league's view, S. 287 "establishes an excessively elaborate new "court or superstructure . . . with virtually unfettered power to determine the location of all professional sports teams in the United States."¹⁶³ In addition, the league views "the governmentally forced expansion provisions of the bill as unwarranted in economic, legal, practical, and policy terms."¹⁶⁴ This bill is an unlikely candidate because it goes beyond the franchise relocation problem. Forcing the NFL to expand seems an unwarranted intrusion into the League's

(1985) (Rosenberg, Morton, Proposed Sports Relocation Legislation: Background And Legal Implications).

157. S. 287, 99th Cong., 1st Sess. § 105, *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate*, 99th Cong., 1st Sess. 7-8 (1985).

158. *Id.* at § 104. The criteria are: (1) the adequacy of the stadium in which the team played its home games in the previous season and the willingness of the stadium authority to remedy any deficiencies in such facility; (2) the extent to which fan support for the team has been demonstrated during the team's tenure in the community; (3) the extent to which the team has, directly or indirectly, received public financial support by means of any publicly financed playing facility, special tax treatment, and any other form of public financial support; (4) the degree to which the owner or management of the team has contributed to any circumstance which might otherwise demonstrate the need for such relocation; (5) whether the team has incurred net operating losses, exclusive of depreciation and amortization, sufficient to threaten the continued financial viability of the team; (6) the degree to which the team has engaged in good faith negotiations with members and representatives of the community concerning terms and conditions under which the team would continue to play its games in such community; (7) whether any other team in its league is located in the community in which the team is currently located; (8) whether the team proposes to relocate to a community in which no other team in its league is located; and (9) whether the stadium authority, if public, is not opposed to such relocation.

159. *Id.* at § 106.

160. *Id.*

161. *Id.* at § 108.

162. *Id.* at § 303.

163. *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Comm. on Commerce, Science, and Transportation United States Senate*, 99th Cong., 1st Sess. 68 (1985) (statement of Pete Rozelle, Commissioner, National Football League).

164. *Id.* at 67.

internal affairs. Expansion will and should occur. It is questionable, however, whether Congress is acting in an appropriate manner when it interjects itself into the internal affairs of the NFL.

The final viable bill is the Professional Football Stabilization Act, S. 172, introduced by Senator Specter.¹⁶⁵ This bill only applies to professional football and precludes a relocation unless a stadium lease is breached, the current stadium is inadequate and there is no intent to remedy the inadequacies, or the team has lost money for three consecutive years.¹⁶⁶ The NFL does not oppose this bill completely, but it does find the standards inadequate.¹⁶⁷ The league claims that the standards in S. 172 do not give appropriate weight to the ability of a community to support a professional sports team.¹⁶⁸ The league nevertheless has expressed interest in revising the enumerated standards to make the bill more acceptable.¹⁶⁹ The most undesirable provision is in section 5¹⁷⁰ of the bill, which provides that the antitrust laws shall not apply to agreements among members of a professional football league to restrain the relocation of one of the franchises.¹⁷¹ Instead, S. 172 authorizes any government authority in a municipality from which a team relocates or seeks to relocate to bring a civil action for equitable and monetary relief in federal court.¹⁷² The bill, however, seems to preclude redress for a league member who is denied relocation.¹⁷³ Thus, a dissatisfied owner is stripped of any right to contest league action denying relocation. This is an unwarranted intrusion into the rights of a team owner and should not be permitted.

The proposals discussed herein provide workable models for a legislative solution. The need for such Congressional action, however, is questionable. The Ninth Circuit's decision in *Los Angeles Memorial Coliseum Commission* confirmed the NFL's right to control franchise relocation. The only point of dispute involves the methods that the league uses to evaluate a relocation request. Under the antitrust laws, a reasonable restraint is permitted. The objective guidelines established by the NFL are reasonable and find their genesis in valid considerations. Any objective relocation decision by the NFL, therefore, can withstand scrutiny

165. S. 172, 99th Cong., 1st Sess., *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259 and S. 298 Before the Comm. on the Judiciary United States Senate*, 99th Cong., 1st Sess. 3 (1985).

166. *Id.* at § 4.

167. *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259, and S. 298 Before the Comm. on the Judiciary United States Senate*, 99th Cong., 1st Sess. 65 (1985) (statement of Jay Moyer, Counsel to the Commissioner, National Football League, New York, N.Y. accompanied by Paul Tagliabue, Co-Counsel, National Football League).

168. *Id.* at 85.

169. *Id.* at 65.

170. S. 172, 99th Cong., 1st Sess. § 5 (1985).

171. *Id.*

172. *Id.* at § 6.

173. *Id.* at §§ 5 and 6.

under the antitrust laws. To the extent that the NFL's procedures adequately reflect valid considerations, the antitrust laws provide an adequate mechanism for affirming league action, while providing a sufficient deterrent to anticompetitive practices.

VII. CONCLUSION

Professional sports leagues historically have been treated unequally. These inequities stem from judicial rulings giving various sports leagues different statuses in the eyes of the law. Baseball is expressly exempt from federal antitrust laws, the NHL has been found to be a single entity and thus not subject to federal antitrust laws, and the NFL is subject to antitrust laws because it is neither expressly exempt from antitrust laws nor deemed to be a single entity.

Recently, the debate over the legal status of professional team sports has reached congressional levels. Several bills have been introduced and Congress has promised that it will take legislative action to correct the franchise relocation problem. Congressional action is unnecessary to correct this problem. The antitrust laws provide a workable mechanism for resolving disputes involving professional sports leagues. In the context of franchise relocation, league rejection of a proposed move should be subject to independent review by the courts and courts will not disturb league action that is based upon valid considerations.

The Ninth Circuit's holding in *Los Angeles Memorial Coliseum Commission*, permitting the Raiders to move to Los Angeles, was based on the possibility that the NFL's decision opposing the Raider's request to relocate to Los Angeles was motivated by consideration of arbitrary and improper criteria. Such consideration violates federal antitrust laws and for that reason the Ninth Circuit's decision was appropriate. Thus, the antitrust laws were successful in remedying a potentially anticompetitive process.

Federal antitrust laws are an effective tool with which to resolve disputes involving professional sports leagues. So long as sports leagues act objectively and do not discriminate against individual members and host cities, their practices will survive scrutiny under the federal antitrust laws.

Whatever solution is ultimately adopted, it must place primary emphasis on the rights of the fans and the interests of the host city. If sports leagues are to continue to provide a profitable and marketable product, their policies should be set internally and objectively so as to reflect not only pure monetary considerations, but also the interests of the fans.

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