Franchise Relocation: Reconsidering Major League Baseball's Carte Blanche Control

I. INTRODUCTION

In the United States, professional sports are both a major industry and a part of the American way of life. Considering the importance of professional sports in this country, it is a bit puzzling that there is no uniformly established relationship between professional sports leagues and the Sherman Antitrust Act.[1] With the exception of baseball, all other major professional sports, including football,[2] basketball,[3] hockey,[4] boxing,[5] golf,[6] and tennis,[7] are

1. Section 1 of the Sherman Act states that:
[e]very 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 declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
15 U.S.C. § 1 (1982).

2. Radovich v. NFL, 352 U.S. 445 (1957) (holding that the amount of business involved in organized professional football made it subject to the antitrust laws).

3. Washington Professional Basketball Corp. v. NBA, 147 F. Supp. (S.D.N.Y. 1956). *See*

subject to antitrust laws. A judicially created exemption from antitrust laws has given Major League Baseball (MLB) a unique status and the power to resist franchise relocation.[8]

Unlike any other professional sports leagues, Major League Baseball (MLB) has enjoyed an exemption from the antitrust laws for many decades as a result of three United States Supreme Court

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Haywood v. NBA, 401 U.S. 1204 (1971) (holding that a preliminary injunction would be reinstated to allow petitioner, who had signed a contract with a professional basketball team before he graduated from college in violation of a professional basketball rule, to play for the team which had signed him; additionally, the injunction forbade the league from taking sanctions against the team); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (holding that the bylaws of the National Basketball Association (NBA), prohibiting a player from negotiating with any NBA team until four years after graduation from high school, constituted a "group boycott" within the antitrust laws).

4. Philadelphia World Hockey Ass'n v. Philadelphia Hockey Club, 351 F Supp. 462 (E.D. Pa. 1972) (involving an injunction so that the established professional hockey league would be preliminarily enjoined from enforcing a reserve clause to prevent players from playing for clubs in the new leagues who had signed a standard contract in the established league).

5. United States v. International Boxing Club, 348 U.S. 236 (1955) (holding that the promotion of professional championship boxing matches on a multistate basis, together with the sale of rights to televise, broadcast, and film contest for interstate transmission, constituted "trade" or "commerce" within the scope of the Sherman Act).

6. Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966) (holding that evidence sustained finding that golfers' association and individual defendants neither conspired nor combined to monopolize, boycott, or restrain business of tournament golf professionals in violation of antitrust laws); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (finding that an agreement to suspend a female professional golfer for a year from the Ladies Professional Golf Association (LPGA) for alleged cheating not only excluded her from the market but was a "naked restraint of trade," but was also illegal under the Sherman Act).

7. Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222 (8th Cir. 1981). In *Gunter*, the United States Court of Appeals for the Eighth Circuit held that there was sufficient evidence to support a finding that the National Tennis Association legitimately functioned as private, nonprofit regulating entity. *Id.* The National Tennis Association ensured that competitive tennis was conducted in an orderly manner and preserved the essential character of the game. *Id.* Additionally, the National Tennis Association's regulation of racket characteristics was rationally related to such goals. *Id.* The court also held that although the association did not manufacture or sell commercial goods, its actions could still substantially influence the marketplace for products used in tennis, and thus, the association was subject to antitrust laws. *Id.*

8. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 208-09 (1922). In *Federal Baseball*, the United States Supreme Court held that baseball is neither business nor commerce, but it is, rather, a sport and not subject to the Sherman Act. *Id. See* Geoff Hosford, *Professional Sports Franchise Relocation: After the Failed Move of the San Francisco Giants, Major League Baseball's Ability to Prevent Franchise Relocation Through Its Exemption from Antitrust Is in Jeopardy*, 2-3 (1993) (unpublished manuscript, on file with the *Seton Hall Journal of Sport Law*) (analyzing the history of MLB's exemption from the Sherman Act and anticipating its abolition).

decisions.[9] The Court first addressed the issue of the applicability of the antitrust laws to professional baseball in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[10] where the Court determined that the playing of professional baseball games did not constitute interstate commerce.[11]

Over thirty years later, the Court reconsidered baseball's antitrust exemption in *Toolson v. New York Yankees, Inc.*[12] In this case, Toolson petitioned the Court to overrule *Federal Baseball* and to eliminate baseball's antitrust immunity.[13] The Court stated in a *per curiam* opinion that if a problem existed with the immunity, it should be handled by legislation.[14] The Court further declined to review the underlying antitrust issue and affirmed the lower courts' judgments for the New York Yankees based upon the authority of *Federal Baseball*.[15]

In 1972, the United States Supreme Court again dealt with the issue of professional baseball's immunity from antitrust laws in *Flood v. Kuhn*.[16] In its analysis, the Supreme Court advanced several points with regard to professional baseball.[17] Recognizing that baseball is a business engaged in interstate commerce, the Court noted that baseball's reserve clause enjoyed an exemption from the antitrust laws, which is both an exception and an anomaly.[18] The

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9. *Federal Baseball*, 259 U.S. 208-09 (1922).

10. *Id.* at 200.

11. *Id.* at 208-09. A club in the Federal League brought an action in the against the National League of Professional Baseball Clubs, the American League of Professional Baseball Clubs, the National Commission, and three officials of the Federal League, alleging conspiracy to monopolize professional baseball. *Id.* at 207. The Court held that the defendants were not subject to the Sherman Act. *Id.* While the Court noticed that baseball games must be arranged between various clubs from different states, the Court reasoned that this fact "is not enough to change the character of the business." *Id.* at 209.

12. 346 U.S. 356 (1953). Toolson was a pitcher who refused to report to the New York Yankees' farm team when the Yankees assigned his contract to the minor league club. Toolson v. New York Yankees, 101 F. Supp. 93 (S.D. Cal. 1951), *cert. granted*, 345 U.S. 963 (1953). He was subsequently found "ineligible" and was not allowed to play for any other professional team. *Toolson*, 346 U.S. at 357.

13. *Id.*

14. *Id.*

15. *Id.*

16. 407 U.S. 258 (1972). Flood instituted this suit in January 1970 against the Commissioner of Major League Baseball (MLB), the presidents of the two leagues, and the then 24 major league clubs. *Id.* at 265. Flood challenged the legality of baseball's reserve clause in a player's contract under the Sherman Act. *Id.*

17. *Id.* at 282.

18. *Id.* In fact, the Court stated that *Federal Baseball* and *Toolson* had "become an aberration confined to baseball." *Id.* In regard to the "aberration," the Court stated the following:

Court also emphasized the fact that baseball has been allowed to develop and to expand without being hindered by federal legislation since 1922.[19] Although a great deal of remedial legislation has been introduced in Congress, the Court in *Flood* noted that none of the legislation has ever passed, so the Court concluded that Congress has had no intention to subject baseball to antitrust laws.[20] Finally, the Court expressed concern about the possible confusion and retroactivity that would result in overturning *Federal Baseball*.[21] As a result, it proposed that "if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation."[22] In contrast to MLB, the past two decades have seen teams in the National Football League (NFL), the National Basketball Association (NBA), and the National Hockey League (NHL) relocate from one city to another as a result of their inclusion under the antitrust laws.[23]

Pertinent to MLB's exemption from antitrust laws are the two cases concerning the Oakland Raiders and the Los Angeles Clippers.[24] As a result, the NFL and NBA franchise relocation rules

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> Even though others might regard this as "unrealistic, inconsistent, or illogical" the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs. Other professional sports operating interstate — football, boxing, basketball, and, presumably, hockey and golf — are not so exempt.

Flood v. Kuhn, 470 U.S. 258, 282 (1972).

19. *Id.* at 283.

20. *Id.*

21. *Id.* at 258.

22. *Id.* With respect to the legislature, the United States Supreme Court stated the following:

> We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Flood v. Kuhn, 470 U.S. 258, 283-84 (1972).

23. NBA v. SDC Basketball Club, Inc. 815 F.2d 562 (9th Cir. 1987) [*Clippers*] (San Diego Clippers' 1984 move to Los Angeles); Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984), *cert denied*, 469 U.S. 990 [*Raiders I*] (Oakland Raiders' 1980 move to Los Angeles). *See Hockey Coming to Dallas, NHL. City Council Paves Way for North Stars to Move South Next Season*, L.A. TIMES, Mar. 11, 1993, at 7 (detailing the Minnesota North Stars move to Dallas in 1993).

24. *Clippers*, 815 F.2d at 562; *Raiders I*, 726 F.2d at 1381.

have been challenged as violative of antitrust laws.[25] In 1980, the Oakland Raiders announced their plans to move to Los Angeles.[26] After eight years of litigation, both the NFL and the City of Oakland unsuccessfully opposed the Raiders' relocation.[27] The NFL, denying the Raiders' request to relocate, claimed that the franchise could not move without three-fourths approval of all teams in the NFL.[28] After the NFL's attempted block failed, the City of Oakland filed an eminent domain action against the Raiders.[29] Ultimately, both the NFL and the City of Oakland failed in their efforts to prevent the Raiders' move.[30]

After the conflict began between the Raiders and the NFL, the NBA experienced a similar relocation problem when the San Diego Clippers moved to Los Angeles in 1984 without the NBA's approval.[31] Although the NBA continually claimed that the relocation violated NBA rules, it was unable to persuade the court that basketball was exempt from antitrust laws; consequently, the Clippers were permitted to move to Los Angeles.[32]

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25. *Clippers*, 815 F.2d at 562; *Raiders I*, 726 F.2d at 1381.

26. *Id.* at 1385 (noting that Al Davis, the managing general partner of the Raiders, announced his plans to move the team at the March 3, 1980, meeting of the NFL owners).

27. *Id.* at 1386 (affirming the lower court's ruling in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of implied promise of good faith and fair dealing); City of Oakland v. Oakland Raiders, 478 U.S. 1007 (1986) (denying certiorari to the City of Oakland).

28. NFL CONST. & BYLAWS, § 3.1(b) (1970) (amended 1982) [hereinafter NFL BYLAWS]. Section 3.1(b) reads that "[t]he Admission of a new member club, either within or outside the home territory of an existing member club, shall require the affirmative vote of three-fourths of the existing member clubs of the League." *Id.* This section continues that:

> [t]he 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 the home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

NFL BYLAWS, § 3.1(b) (1970).

29. City of Oakland v. Oakland Raiders, Ltd, 646 P.2d 835 (Ca. 1982), *cert. denied*, 478 U.S. 1007 (1986).

30. *Raiders I*, 726 F.2d 1381, 1386 (9th Cir. 1984), *cert. denied*, 469 U.S. 990; *City of Oakland*, 646 P.2d 835 (Ca. 1982). *See* Los Angeles Memorial Coliseum Comm'n v. NFL, 791 F.2d 1356, 1371 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) [*Raiders II*] (holding that the judgment in *Raiders I* to the Raiders is to be offset by the value of the "expansion opportunity" gained by Los Angeles and paid to the NFL).

31. NBA v. SDC Basketball Club, Inc., 815 F.2d 562, 564 (9th Cir. 1987), *cert. dismissed*, Los Angeles Memorial Coliseum Comm'n v. NBA, 484 U.S. 960 (1987).

32. *SDC Basketball Club*, 815 F.2d at 567. Although the United States Court of Appeals for the Ninth Circuit did not determine whether the NBA's franchise relocation rule complied with antitrust laws, it did state that antitrust issues in professional sports should be decided

Much like the relocation conflicts within the NFL and the NBA, MLB experienced a similar problem with the San Francisco Giants in 1992.[33] A group of investors were to purchase the Giants from Tampa Bay for $115 million.[34] Negotiations, however, broke down when the MLB Ownership Committee used various delay tactics to hinder the approval of the team's relocation.[35] As a result, the Giants remained in San Francisco.[36]

This Comment explores the numerous franchise relocations that have occurred in professional sports leagues within the past two decades, including the San Francisco Giants' failed attempt to relocate to Tampa Bay-St. Petersburg. It then discusses the impact these moves have made on professional sports' relationship with antitrust laws as well as baseball's exemption from antitrust laws. Finally, this Comment analyzes the "Professional Baseball Antitrust Act of 1993," which may soon eliminate baseball's exemption from the Sherman Act and terminate its ability to prevent franchise relocation.

II. NATIONAL FOOTBALL LEAGUE FRANCHISE RELOCATION AND THE OAKLAND RAIDERS

In 1978, Carroll Rosenbloom, the owner of the Los Angeles Rams, moved the Los Angeles Rams from the Los Angeles Memorial Coliseum to Anaheim Stadium in Anaheim, California.[37] Since the move left the Los Angeles Coliseum without a major tenant, officials of the Coliseum then began to look for NFL franchises that would be interested in relocating to Los Angeles.[38] In attempting to convince a franchise to relocate, the Coliseum confronted Rule 4.3 of Article IV of the NFL Constitution.[39] As the Coliseum was

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in accordance with *Raiders I* and *Raiders II*. *Id.*

33. *Chronology of Events*, USA TODAY, Nov. 11, 1992, at 3C.

34. *Id.*

35. *Hearing Before the Subcommittee on Antitrust, Monopolies and Business Rights of the Committee on the Judiciary United States Senate on the Validity of Major League Baseball's Exemption from the Antitrust Laws*, 101st Cong., 2d Sess. 390-404, 393 (1992) (statement of Richard B. Dodge, St. Petersburg Assistant City Manager).

36. *Id.* at 398. *See* Hosford, *supra* note 8.

37. *Raiders I*, 726 F.2d 1381, 1384 (9th Cir. 1984), *cert. denied*, 469 U.S. 1990. Anaheim Stadium is commonly referred to as the "Big A." *Id.*

38. *Id.* Coliseum officials asked NFL Commissioner Pete Rozelle if an expansion franchise could be located in the Coliseum, but they were told it was impossible at that time. *Id.*

39. *See* NFL BYLAWS, *supra* note 28, § 4.3.

within the home territory of the Rams, Rule 4.3 required the unanimous approval of all twenty-eight teams in the NFL in order for the Raiders to relocate.[40] The Los Angeles Memorial Coliseum Commission (Commission) believed that Rule 4.3 violated § 1 of the Sherman Act.[41]

In the subsequent lawsuit against the NFL, the Commission filed two specific actions against the NFL.[42] In the first action, Judge Pregerson of the United States District Court for the Central District of California, held that since no NFL team had committed to relocate to Los Angeles, the Commission's complaint presented no justiciable controversy.[43] The court also stated that under a rule of reason analysis, Rule 4.3 violated the Sherman Act.[44] As a result of the Commission's suit, the NFL amended Rule 4.3 so that it required three-fourths of the NFL teams' approval in order for an NFL team such as the Raiders to move to another team's home territory.[45]

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40. *Raiders I*, 726 F.2d at 1384. Section 4.1 defines home territory as "the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . ." *Id.* § 4.1.

41. *Raiders I*, 726 F.2d at 1385.

42. Los Angeles Memorial Coliseum Comm'n v. NFL, 468 F. Supp. 154 (C.D. Cal. 1979) [*Coliseum I*]; Los Angeles Memorial Coliseum Comm'n v. NFL, 484 F. Supp. 1274 (C.D. Cal. 1980) [*Coliseum II*].

43. *Coliseum I*, 468 F. Supp. at 161. In *Coliseum I*, the district court held that in order for the Coliseum to have a significant threat of injury with respect to Section 4.3, "the Coliseum must allege a reasonable likelihood that an affirmative vote by the club owners would bring a team to the Coliseum." *Id.*

44. *Id.* at 166-67. Under the rule of reason, the court must compare the anticompetitive evils of the challenged restraints against their procompetitive virtues to ascertain whether the restraints are reasonable and legal. *Id.* As observed by the United States Supreme Court, "[t]he 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." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

45. *Raiders I*, 726 F.2d 1381, 1385 (9th Cir. 1984), *cert. denied*, 469 U.S. 990. Originally Section 4.3 stated that:

> [a]ny transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

Raiders I, 726 F.2d 1381, 1385 (9th Cir. 1984), *cert. denied*, 496 U.S. 990.
After the 1978 amendment, Section 4.3 read that:

> [t]he 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

Subsequent to this suit, Al Davis, managing general partner of the Raiders, commenced discussions with the Commission about the Raiders' possible relocation to Los Angeles.[46] Because the Commission believed a successful deal with the Raiders might result, it filed a motion to enjoin the NFL from preventing the Raiders' relocation.[47] The United States District Court for the Central District of California granted the injunction,[48] but the United States Court of Appeals for the Ninth Circuit reversed, declaring that the requisite level of irreparable injury had not been shown.[49]

Although the court of appeals reversed the injunction, Al Davis signed a "memorandum of agreement" with the Commission outlin-

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of three-fourths of the existing member clubs of the League.

Raiders I, 726 F.2d 1381, 1385 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

46. *Id.* When the Raiders' lease with the Oakland Coliseum expired in 1978, Davis, who was unhappy with the condition of the facility and who believed it needed major improvements, attempted to convince Oakland officials to agree with his proposal, but failed. *Id.*

47. *Id.*

48. *Coliseum II*, 484 F.Supp. 1274, 1277-78 (C.D. Cal. 1980). Judge Pregerson enjoined the NFL from enforcing Rule 4.3 to prevent the Raiders' move to Los Angeles. *Id.* The court determined that Rule 4.3 violated the Sherman Act, declaring:

> [a] three-fourths vote requirement appears to more than meet the NFL's interest, while giving marginal support to the interest of the individual team desiring to relocate. A majority vote requirement, on the other hand, would seem to provide a fairer accommodation of league and individual team interests [and] is more consistent with the traditions of our democratic society.

Coliseum II, 484 F. Supp. 1274, 1277-78 (C.D. Cal. 1980).

49. *Id.* at 1197.

ing the terms of the Raiders' move to Los Angeles.[50] The NFL then blocked the move invoking Rule 4.3 and claiming that three-fourths of the NFL franchises did not approve the Raiders' relocation.[51] As a result of the NFL's block, the Commission renewed its action against the NFL and its member teams.[52] The court considered whether the NFL was a "single business entity" and thus incapable of combining or conspiring in restraint of trade.[53] The United States District Court for the Central District of California concluded that the NFL was not a "single business entity" and was therefore not immune from the Sherman Act.[54] After hearing testimony from several witness, including then NFL Commissioner Pete Rozelle[55], the jury returned a verdict for the Commission and the Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing.[56] The court, as a result, permanently enjoined the NFL and its member clubs from interfering with the relocation of the Raiders from Oakland to Los Angeles.[57]

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50. *Raiders I*, 726 F.2d 1381, 1385 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

51. *Id.* Of the 28 NFL teams, 22 teams voted against the relocation while five abstained. *Id.* At this time, Oakland brought its eminent domain action against the Raiders in an attempt to keep the team in Oakland. *Id.*

52. *Id.* at 581.

53. *Id.*

54. *Id.* In its decision, the district court distinguished the NFL from an earlier NHL relocation case concerning the move of the San Francisco Seals to Vancouver. *Id.* at 585 (citing San Francisco Seals Ltd. v. NHL, 379 F. Supp. 966 (C.D.Cal. 1974)). The court observed that in contrast to the Raiders, the Seals "proposed move to Vancouver had no anticompetitive effect." *Id.* Unlike the Raiders, the Seals "were not being prevented from moving into another team's home territory." *Id.* For a discussion of *San Francisco Seals, see infra* notes 68-75 and accompanying text.

55. Richard Amoroso, *Controlling Professional Sports Team Relocations: The Oakland Raiders' Antitrust Case and Beyond*, 17 RUTGERS L.J. 283, 291 (1986). Throughout the trial, Davis argued that Rozelle acted in a wilful and vindictive manner toward Davis. *Id.* On the ABC televisions series "Sports Beat," Davis told Howard Cosell that attorneys had told him in 1978 that Rule 4.3, as written in the NFL Constitution and By-Laws, was in violation of the federal antitrust laws. *Id.* Additionally, Davis maintained that the Commissioner asked the 28 NFL owners to keep the rule in the Constitution. *Id.* Davis said that in 1978 he went before the NFL owners and said, "[l]et's put the rule in conformity with the antitrust laws. Let's put in the confines of that particular Rule 4.3, the Territorial Exclusivity rule, objective standards and guidelines, we could go to an impartial tribunal." *Id.* In other words, Davis continued,"we would take the vote away from the owners, who could at that time, and still presently can vote, based on malice, whim or caprice, and stop a team from moving without any justifying reasons." *Id.* Davis stated that "[t]hey could stop us from moving because of malice; they could stop us from moving because of caprice." *Id.*

56. *Raiders I*, 726 F.2d 1381, 1386 (9th Cir. 1974), *cert. denied*, 469 U.S. 990.

57. *Raiders I*, 519 F. Supp. 581 (C.D. Cal. 1981), *aff'd* 726 F.2d 1381 (9th Cir. 1984), *cert.*

In the United States District Court for the Central District of California, the jury found that Rule 4.3 was in violation of § 1 of the Sherman Act, which prohibits every contract, combination, or conspiracy in restraint of trade.[58] Typically, such restraints are analyzed under the "rule of reason," which requires the factfinder to decide whether, under all of the circumstances of the case, the agreement imposes an unreasonable restraint on competition.[59] In *Coliseum I*, Judge Pregerson found that the application of the "per se" rule was inappropriate because professional football was a unique business.[60] Thus, the court instructed the jury to determine whether Rule 4.3 was an unreasonable restraint of trade.[61]9 The NFL, however, raised two arguments against the district court's finding that Rule 4.3 violated the Sherman Act.[62] First, the NFL asserted that it was a single entity incapable of conspiring to restrain trade under § 1.[63] Second, if the NFL is deemed to not be a "single entity," the League contended, alternatively, that Rule 4.3 was not an unreasonable restraint of trade.[64]

In order for § 1 of the Sherman Act to be applicable, there must be a contract, combination, or conspiracy in restraint of trade.[65] In *Nelson Radio & Supply v. Motorola*, the United States Court of Appeals for the Fifth Circuit reasoned that "[i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy."[66] In contravention of this theory, the NFL argued that the league structure is basically a single entity, like a partnership or joint venture, precluding the application of § 1 of the Sherman Act.[67]

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denied, 469 U.S. 990 (1984).

58. 15 U.S.C. § 1.

59. Amoroso, *supra* note 55, at 292-93 (referring to Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982)).

60. *Coliseum I*, 468 F. Supp. 154, 165 (C.D. Cal. 1979). The per se rule is "a judicial shortcut applied to those types of business agreements that the courts, after considerable experience, have found to be consistently unreasonable and therefore, plainly anticompetitive." *Id.*

61. *Raiders I*, 726 F.2d 1381, 1387 (9th Cir. 1974), *cert. denied*, 469 U.S. 990.

62. *Id.*

63. *Id.*

64. *Id.*

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

66. *Id.* at 914. The court goes on to explain what is necessary for a conspiracy and asserts that "[a] corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Id.*

67. *Id. See* 15 U.S.C. § 1. *See also Coliseum I*, 468 F. Supp. 154, 163 (C.D. Cal. 1979). In *Coliseum I*, the United States District Court for the Central District of California reasoned that the relationship between NFL teams does not fit the traditional mold because there are

The NFL's claim is supported by the United States District Court for the Central District of California's holding in *San Francisco Seals Ltd. v. NHL*.[68] Implicating the NHL, the Seals owner, Charles Finley, filed an antitrust suit arguing that the NHL had unlawfully prevented the Seals relocation from San Francisco to British Columbia.[69] Similar to the NFL, the NHL had a rule which required league approval of a team's relocation.[70] In contrast to the NFL's case, the court reasoned that the territorial restraints imposed by the NHL's Board of Governors pursuant to its approval rule did not restrain trade or commerce within the relevant market.[71] The court distinguished *Seals* from that of *Raiders I* by recognizing that the NHL did not prevent the Seals from moving into another team's home territory and that the NHL was incapable of conspiring to restrain trade under the antitrust laws because it is a

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certain areas of cooperation amongst the teams. *Id.* For example, the teams must adopt playing rules and a playing schedule; live gate receipts from regular season games are divided sixty-forty between home and visiting teams; television revenue is divided equally among all teams; the teams share the cost of the NFL office and promotional activities; and finally, the teams cooperate in administering a player draft. *Id.* While NFL teams cooperate in a number of ways, this evidence is ambiguous on the question of whether they are economic competitors. *Id.* Such cooperation, may indicate the presence of antitrust violations rather than the existence of a joint venture that is not subject to the Sherman Act. *Id.* Additionally, certain cooperative practices used by the NFL have been struck down as violative of the antitrust laws. *Id.*

68. San Francisco Seals Ltd. v. NHL, 379 F. Supp. 966 (C.D. Cal. 1974).

69. *Id.* at 968.

70. *Id.* The United States District Court for the Central District of California cites the NHL Constitution and Bylaws. *Id.* Section 4.2 establishes the territorial rights of the league as follows:

> The League shall have exclusive control of the playing of hockey games by member clubs in the home territory of each member, subject to the rights hereinafter granted to members. The members shall have the right to and agree to operate professional hockey clubs and play the League schedule in their respective cities or boroughs as indicated opposite their signatures hereto. No member shall transfer its club and franchise to a different city or borough. No additional cities or boroughs shall be added to the League circuit without the consent of three-fourths of all the members of the League. Any admission of new members with franchises to operate in any additional cities or boroughs shall be subject to the provisions of Section 4.3.

San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 966, 968 (C.D. Cal. 1974). Section 4.3 provides the territorial rights of the members:

> Each member shall have exclusive control of the playing of hockey games within its home territory including, but not being limited to, the playing in such home territory of hockey games by any teams owned or controlled by such member or by other members of the League .

San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 966, 968 (C.D. Cal. 1974).

71. *Id.* at 970.

single economic entity.[72]

The Commission and the Raiders rejected the NFL's argument contending that the league was composed of twenty-eight separate legal entities which acted independently.[73] Despite the fact that *San Francisco Seals* seemed to support the NFL's argument, the United States Court of Appeals for the Ninth Circuit stated that the NFL was "an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act."[74] In sum, the Ninth Circuit upheld the trial court's reasoning that the NFL is a group of separate economic entities and decided to reject the NFL's theory that it was a single entity.[75]

After deciding that the NFL was not a single entity, it was necessary for the court to determine whether Rule 4.3 was an unreasonable and unlawful restraint of trade.[76] When approaching such an analysis, courts have developed two complementary modes of analysis.[77] On the one hand, certain kinds of restraint are considered so plainly anticompetitive that they are deemed "illegal per se."[78] Under a per se analysis, there is no elaborate study of the

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72. *Id.* at 971.

73. *Raiders I*, 726 F.2d 1381, 1387 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

74. *Id.* at 1389.

75. *Id.* The United States Court of Appeals for the Ninth Circuit took many factors into account in concluding that the NFL was not a single entity. *Id.* The court stated that the NFL is only an identity separate from the individual teams in very limited respects. *Id.* Although the individual clubs often acted for the collective good of the NFL, the court found that the main purpose of the League, as found in Article I of its constitution, is to "promote and foster the primary business of League members." *Id.* While the business interests of NFL members often coincide with the NFL itself, such a common interest exists in every cartel. *Id.* Thus, the court reasoned that it must look behind the label of "single entity" and determine the substance of the entity as it really existed. *Id.* The court also pointed to the fact that the member clubs are independently owned corporations, partnerships, or sole proprietorships. *Id.* at 1390. While approximately 90% of the NFL's revenue is divided equally amongst the 28 teams, profits and losses are not shared, which is a common characteristic of partnerships or other "single entities." *Id.* Actually, each team's profits vary greatly because of individual management policies. *Id.* With respect to the competition amongst the 28 NFL teams, the court advanced the notion that the clubs compete with each other off the field as well as on to acquire players, coaches, and personnel. *Id.* In areas of the nation where there are two franchises within the same vicinity, there is competition for fan support, local television/radio revenues, and media time. *Id.* In conclusion, the above characteristics serve to make each team an entity which is distinct from the NFL. *Id.*

76. *Id.* at 1391.

77. *Coliseum I*, 468 F. Supp. at 154, 164 (C.D. Cal. 1979).

78. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 7-8 (1979). In *Broadcast Music*, the United States Supreme Court determined that:

industry and the justifications for restraint are not considered.[79] On the other hand, there is the rule of reason.[80] Under this mode of analysis, the competitive effect of a restraint is determined after analyzing the facts unique to the business, the nature of the restraint and its effects, the history of the restraint, and the reasons why the restraint was imposed.[81]

In *Raiders I*, the district court decided that Rule 4.3 was not illegal per se because of the unique nature of the business of professional football[82]. The court noted that the rule actually promoted competition is some respects.[83] As a result, the NFL's rule restricting franchise relocation was not deemed illegal per se because these agreements did not have a "pernicious effect on competition" nor did they lack "any redeeming virtue."[84] The district court, then, decided to apply the rule of reason to determine whether Rule 4.3 was an unreasonable restraint of trade in violation of § 1 of the Sherman Act.[85]

As set forth by the United States Court of Appeals for the

> [i]n 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," that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.

Coliseum I, 468 F. Supp. 154, 164 (C.D. Cal. 1979). *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978) (holding that the canon of ethics which prohibited competitive bidding was not justified under the rule of reason and therefore violated the Sherman Act); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977) (holding that the facts of the case did not warrant the application of a per se rule and location restriction should be judged under the rule of reason).

79. *Coliseum I*, 468 F. Supp. at 165. *See* Northern Pacific R.R. v. United States, 356 U.S. 1 (1958) (holding that where railroad and its subsidiary deeded and leased land of railroad through documents containing clauses requiring grantees and lessees of the land to ship products obtained from use of land by that railroad, unless rates or services of competing lines were more favorable, the "preferential routing" violated the Sherman Act because the clauses were per se unlawful restraints of trade).

80. *Coliseum I*, 468 F. Supp. at 164.

81. *Id. See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 244 (1918) (holding that rules of the board of trade were reasonable because consistent with the provisions of the Sherman Act).

82. *Raiders I*, 726 F.2d 1381, 1387 (9th Cir. 1984), *cert. denied*, 469 U.S. 990; *Coliseum I*, 468 F. Supp. at 164-68.

83. *Coliseum I*, 468 F. Supp. 154, 166 (C.D. Cal. 1979). The district court stated that § 3.1, and § 4.3, on their face, tend to promote competition. *Id.* In order for games to be played and for economic competition to exist, the teams must agree on how the games are to be played, what rules to adopt, and where the games are to be played. *Id.*

84. *Id.*, Northern Pacific R.R. v. United States, 356 U.S. 1, 5 (1958).

85. *Raiders I*, 726 F.2d at 1392.

Ninth Circuit, the rule of reason analysis calls for a "thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition."[86] Before this rule is applied, however, a plaintiff must show that the conduct in question restrains competition.[87] To establish a cause of action, the plaintiff must first prove that there is an agreement among "two or more persons or distinct business entities."[88] Secondly, the agreement must evidence intent to harm or unreasonably restrain competition.[89] Finally, the agreement must actually cause injury to competition."[90]

The United States Court of Appeals for the Ninth Circuit found that the Commission and the Raiders had met their burden of proof.[91] The court's rejection of the NFL's single entity defense recognized the existence of the first element because the twenty-eight NFL franchises had entered an agreement through the NFL Constitution and Bylaws.[92] The court also recognized that the plaintiffs had established the second element, as Rule 4.3, on its face, is an agreement to control competition among the twenty-eight NFL franchises through territorial divisions.[93] Finally, the court found the third element difficult to establish and declared that in order to show injury to competition, the plaintiffs must present "[p]roof that the defendant's activities had an impact upon competition in a relevant market."[94]

The United States Court of Appeals for the Ninth Circuit struggled with this case as it was the first in that circuit where an NFL member club had questioned the legality of an NFL rule.[95] This

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86. *Id.* at 1391. *See* Cascade Cabinet, 710 F.2d at 1373 (quoting Northrop Corp. v. McDonnell-Douglas Corp., 705 F.2d 1030, 1050 (9th Cir. 1983)).

87. *Raiders I*, 726 F.2d 1381, 1392 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

88. *Id.*

89. *Id.*

90. *Id;* Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1296 (9th Cir. 1983); Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

91. *Raiders I*, 726 F.2d at 1392.

92. *Coliseum I*, 468 F. Supp. 154, 166 (C.D. Cal. 1979).

93. *Id.*

94. *Id.* (quoting *Kaplan*, 611 F.2d at 291). Such proof of impact is "an absolutely essential element of a rule of reason case." *Id;* Aydin Corp. v. Local Corp., 718 F.2d 897, 901 (9th Cir. 1983).

95. *Coliseum I*, 468 F. Supp. at 166. The United States Court of Appeals for the Ninth Circuit noted that other courts have applied the rule of reason to determine the legality of the NFL's concerted actions and have found such actions illegal. *Id.* Mackey v. NFL, 434 U.S.

suit required the court to analyze the negative and positive effects of a business practice[96] in an industry that does not fit into the antitrust context well.[97] Formulated to prevent any agreement among competitors to eliminate or reduce competition, § 1 of the Sherman Act was problematic for the NFL because its twenty-eight franchises are not considered true competitors.[98] The court explained that while Rule 4.3 divides the markets among the twenty-eight NFL teams, the per se rule is precluded by the unique structure of the League.[99] Since the per se rule did not apply, the court had to determine whether Rule 4.3 reasonably served the concerns of the NFL owners or whether it instead permitted them to reap excess profits at the consumers' expense.[100] In its evaluation, the court examined the impact on the relevant market, the history and purpose of Rule 4.3, and the ancillary restraints and reasonableness of Rule 4.3.[101]

The NFL contended that the Commission and the Raiders failed to prove an adverse impact on competition in the relevant market.[102] The relevant market provides the basis to balance competitive harms and benefits of the restraint of trade.[103] In anti-

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801 (1977); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

96. *Coliseum I*, 468 F. Supp. at 166.

97. *Coliseum I*, 468 F Supp. at 154, 166 (C.D. Cal. 1979). Generally, *Coliseum I* presented the competing notions of "whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases." *Id.*

98. *Raiders I*, 726 F.2d 1381, 1391 (9th Cir. 1984), *cert. denied*, 469 U.S. 990. In its analysis, the court determined that the NFL's structure has both horizontal and vertical market qualities. *Id.* Horizontally, the NFL can be viewed as an organization of 28 competitors. *Id.* Vertically, the NFL can be considered an entity separate from the team owners. *Id.* In this sense, the team owners are "distributors" of the NFL product within their territorial divisions, and they "have a legitimate interest in protecting the integrity of the League itself." *Id.* at 1392. Collective action such as League divisions, scheduling, and rules must be allowed, and, these actions should not be construed to allow the owners to gain excess profits. *Id.* The court identified action of this sort as a classic cartel. *Id.* Consequently, when owners make agreements to fix prices or divide market territories, they are presumed to be illegal under § 1 of the Sherman Act as they allow competitors to charge unreasonable and arbitrary prices instead of setting prices in compliance with the free market. *Id;* United States v. Topco Assocs., 405 U.S. 596, 611 (1972); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

99. *Raiders I*, 726 F.2d 1381; Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1370-73 (9th Cir. 1983).

100. *Raiders I*, 726 F.2d 1381.

101. *Id.* at 1392-95.

102. *Id.* at 1392.

103. *Raiders I*, 726 F.2d 1381, 1392 (9th Cir. 1984), *cert. denied*, 469 U.S. 990; Lektro-

trust law, the primary components of the relevant market analysis are the product market[104] and the geographic market.[105] The Raiders and the Commission each presented different claims of market considerations.[106] The Raiders attempted to show that the product market was NFL football and the geographic market was Southern California.[107] The NFL, alternatively, contended that it competes with all kinds of entertainment across the United States and that the entire United States is the geographic area.[108] The Commission then argued that the product market is similarly the NFL team and the entire United States is the geographic market, but the relevant market consists of the stadiums that offer its facilities to the NFL team.[109] The NFL agreed with this geographic market, but claimed the product market involves cities competing for all forms of stadium entertainment rather than the stadium itself competing for the team.[110] Although the court considered a great deal of evidence and testimony in regards to the product and geographic markets, it concluded that the market evidence should not be an end in itself.[111]

Vend Corp. v. Vendo Co., 660 F.2d 255, 268-69 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); Kaplan v. Burroughs Corp. 611 F.2d 286, 291 (1979), *cert. denied*, 447 U.S. 924 (1980).

104. *Raiders I*, 726 F.2d at 1392. The product market involves:

> [a] process of describing those groups of producers which, because of the similarity of their products, have the ability — actual or potential — to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Raiders I, 726 F.2d 1381, 1392 (9th Cir. 1984), *cert. denied*, 469 U.S. 990. Two related tests are used in arriving at the product market. *Id.* The first test is the reasonable interchangeability for the same or similar uses. *Id.* The second test used to determine the product market is cross-elasticity of demand, which describes the responsiveness of sales of one product respective to price changes in another. *Id.*

105. *Id.* at 1393. Similar factors determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded." *See Kaplan*, 611 F.2d at 292 (quoting Brown Shoe Co. v. United States, 370 U.S. 294 (1962)).

106. *Raiders I*, 726 F.2d at 1393.

107. *Id.*

108. *Id.*

109. *Raiders I*, 726 F.2d 1381, 1393 (9th Cir. 1984), *cert. denied* 469 U.S. 990.

110. *Id.*

111. *Id.* at 1394. In its decision, the court recognized that NFL football has limited substitutes from a consumer's perspective which can be illustrated by the fact that the Oakland Coliseum sold out for 10 consecutive years and over 100 million people watched the 1982 Super Bowl, the ultimate NFL product. *Id.* at 1393. The court noted that football is extremely important to the television networks as the NFL received about $2 billion for the right to

While the court recognized that the evidence presented provided the jury with an adequate basis on which to determine the reasonableness of Rule 4.3, the court rejected the NFL's arguments.[112] Additionally, the court determined that while a stadium may try to contract with many different forms of entertainment, an NFL franchise is an extremely desirable tenant due to its typically high rent.[113] The nature of the NFL as an industry made it difficult for the court to articulate a precise definition of the geographic market.[114] It noted that a market is largely determined by how the entity is defined.[115] Questioning whether the NFL is a single entity or a partnership which creates a product that competes with other entertainment products for the consumer's business, the court also inquired whether the NFL is really twenty-eight individual teams that compete for consumer support of football.[116] In re-

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televise the games from 1982-86. *Id.* Such a contract indicates that a high number of television viewers will continue to watch NFL football. *Id.* Don Shula, coach of the NFL Miami Dolphins, stated that NFL football has a different group of fans than college football. *Id.* Accordingly, the court noted that the NFL narrowly defined the relevant market by emphasizing that NFL football is a unique product that can be only be produced through the cooperative efforts of the 28 NFL teams. *Id.* The view of the narrow pro football market balanced itself against evidence that showed the NFL competes with other professional sports, particularly those with which its season overlaps. *Id.* Additionally, Pete Rozelle and Georgia Frontierre, owner of the Rams, testified that the NFL competes with "other television offerings for network business, as well as other local entertainment for attendance at the games." *Id.* With respect to the geographic market, Davis, as well as other witnesses, testified that NFL teams compete with each other off the field for fan support in areas where teams operate closely to one another. *Id.* One such overlap is between San Francisco and Oakland. *Id.* He testified regarding the possible competition for fan support between the Raiders and the Rams. *Id.* Additionally, the court heard testimony that described the competition for NFL tenancy between stadiums. *Id.* at 1394. This competition is illustrated by the Rams' move to Anaheim when Carroll Rosenbloom was offered a more lucrative deal to move to Anaheim Stadium. *Id.* As a result, competition developed between the Los Angeles Coliseum and the Oakland Coliseum when the Los Angeles Coliseum tried to lure the Raiders from Oakland. *Id.* The court noted that while competition between the two stadiums is presently limited, it is because of Rule 4.3. *Id.*

112. *Id.* Although the NFL claimed that places, rather than a particular stadium, compete for NFL teams, the court stated that "It is the individual stadia which are most directly impacted by the restrictions on team movement. *Id.* A stadium is a distinct economic entity and a territory is not." *Id.* Typically, the NFL grants franchises to locales, meaning a city and a 75 mile radius extending from the boundaries of that city. *Id.*

113. *Id.* The court emphasized the fact that the Rams paid the highest rent of any tenant that used the Los Angeles Coliseum. *Id.*

114. *Raiders I*, 726 F.2d 1381, 1394 (9th Cir. 1984), *cert. denied* 469 U.S. 990.

115. *Id.*

116. *Id.* The court inquired into the NFL classification as a possible single entity:

> A single entity or partnership which creates a product that competes with other entertainment products for the consumer dollar? Or is it 28 individual entities

sponse to these inquiries, the court reasoned that the NFL had qualities of both examples and evidence supported both.[117] Finally, the court concluded that Rule 4.3 harmed competition amongst the twenty-eight NFL teams to such a degree that any benefits to the NFL were outweighed by this detriment.[118]

After resolving the relevant market issue, the United States Court of Appeals for the Ninth Circuit focused on Rule 4.3.[119] First, the court discussed the NFL history regarding its franchises.[120] It recognized that Rule 4.3 was the result of the high number of failed franchises and consequent relocations in the early days of the NFL, and noted that prior to the rule's amendment in 1978, it required unanimous approval of all twenty-eight NFL teams for one team to move into another team's territory [121] The NFL Constitution, interestingly, required only three-fourths approval for all other moves.[122] The 1978 amendment to Rule 4.3 therefore terminated the existing double-standard and required only three-fourths approval for all moves in the NFL.[123]

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which compete with one another both on and off the field for the support of the consumers of the more narrow football product?

Raiders I, 726 F.2d 1381, 1394 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

117. *Id.* Because of the unique structure of the NFL, the court pointed out that it was not necessary for the jury to completely accept either the NFL's or the plaintiff's definitions of a market. *Id.*

118. *Id.* The issue was the following:

> Whether the jury could have determined Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e. competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed there was ample evidence for the jury to reach the latter conclusion.

Raiders I, 726 F.2d 1381, 1394 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

119. *Id.* For text of rule 4.3, *see supra* note 45.

120. *Raiders I*, 726 F.2d at 1394. Since the 1930s, the NFL has awarded franchises exclusive territories, but in the early days of football, many teams failed and relocated hoping to become economically successful. *Id.* NFL members believed that obtaining exclusive rights to a territory would aid stability and ensure owners, who were attempting to establish an NFL team in a certain area, that another team would not move into the same locale and ruin both franchises. *Id.*

121. *Id.* at 1395. Before its amendment, Rule 4.3 "gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue." *Id.*

122. *Id.* For a comparison between the original Rule 4.3 and the amended Rule 4.3, *see supra* note 45.

123. *Raiders I*, 726 F.2d 1381, 1395 (9th Cir. 1984), *cert. denied*, 469 U.S. 990. When the Commission first filed suit against the NFL, because the Commission believed Rule 4.3 violated the Sherman Act, the NFL owners saw the Commission's suit as a sufficient threat to warrant amending Rule 4.3. *Id.* at 1385.

As the United States Court of Appeals for the Ninth Circuit expressed, the purpose of Rule 4.3 was to restrain competition among the twenty-eight NFL teams.[124] The NFL argued that the rule served numerous legitimate needs including one to ensure franchise stability.[125] Adhering to the United States Supreme Court's rationale in *United States v. Socony-Vacuum Oil Co.*,[126] the court rejected this argument and reiterated the notion that "ruinous competition" can be a defense to the restraint of trade.[127] Conversely, the court found that "anti-competitive purpose alone is not enough to condemn Rule 4.3."[128] To violate antitrust laws, the must actually harm competition, and such harm must take into account the pro-competitive benefits it might foster.[129]

The essence of the NFL's argument was that it was entitled to judgment notwithstanding the verdict because Rule 4.3 is reasonable under the doctrine of ancillary restraint.[130] This doctrine entails the notion that some agreements which restrain competition may be valid if such agreements are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective."[131] The presence of ancillarity would "remove the per se label from restraints otherwise falling within the category."[132] The court assumed that the agreement creating the NFL was valid and that its territorial divisions were ancillary for the main purpose of producing football.[133] As a result, the court reasoned that the ancillary restraint must be tested under the rule of reason.[134]

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124. *Id.* at 1395.

125. *Id.*

126. 310 U.S. 150 (1940).

127. *Id.* at 221. In *Socony-Vacuum*, the Court held that an oil company engaged in an unlawful combination and conspiracy resulting in a restraint of trade and commerce in gasoline products was in violation of Sherman Act. *Id.*

128. *Id.* (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

129. Kaplan v. Burroughs, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

130. *Raiders I*, 726 F.2d 1381, 1395 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

131. Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 797-98 (1965)).

132. Robert Bork, *Ancillary Restraints and the Sherman Act*, 15 ANTITRUST L.J. 211, 212 (1959)).

133. *Raiders I*, 726 F.2d at 1395.

134. *Id.* The court stated that the relevance of ancillarity is that it "increases the probability that the restraint will be found reasonable." *Id.* (quoting Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir. 1983)).

Under the rule of reason, the United States Court of Appeals for the Ninth Circuit weighed both the "harms and benefits to competition caused by the restraint and whether the putative benefits could possibly be attained through a less restrictive means."[135] The NFL consequently argued that "territorial allocations are inherent in an agreement among joint venturers to produce a product."[136] The NFL also claimed that Rule 4.3 aids the League in maintaining and controlling its overall geographical balance[137] protects the varied investments necessary to establish a team.[138]

In evaluating the NFL's arguments, the United States Court of Appeals for the Ninth Circuit concluded that the district court correctly considered the existence of less restrictive alternatives.[139]

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135. *Raiders I*, 726 F.2d 1381, 1395 (9th Cir. 1984), *cert. denied*, 469 U.S. 990. The court continued that:

> [e]xclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants The harm from Rule 4.3 was especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue be to the benefit of those who consume the NFL product in the Los Angeles area.

Raiders I, 726 F.2d 1381, 1395 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

136. *Id.* at 1396. The NFL asserted that this inherent nature "flows from the need to protect each joint venturer in the 'legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.'" *Id. See* Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *modified and aff'd*, 75 U.S. 211 (1899).

137. *Raiders I*, 726 F.2d at 1396. The NFL asserts that "Rule 4.3 aids the League in determining its overall geographical scope, regional balance and coverage of major and minor markets." *Id.*

138. *Id.* The court pointed out that:

> [e]xclusive 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.

Raiders I, 726 F.2d 1381, 1396 (9th Cir. 1984), *cert. denied*, 469 U.S. 990. In addition, the NFL has an interest "in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures." *Id.* When addressing the NFL's interest to safeguard the city's and the local government's return on investment, the court stated two ways such an interest is undercut:

> First, the local governments ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Raiders I, 726 F.2d 1381, 1396 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

139. *Id.* To evaluate the reasonableness of the territorial restraints of Rule 4.3, the court

With substantial evidence backing the existence of such alternatives, the court determined that the jury could have reasonably concluded that the NFL's "ancillary restraint" could have been formulated so that it did not eliminate competition.[140] In response the NFL argued that Rule 4.3 and its three-fourths requirement was a reasonable measure for the purpose of preventing unwise franchise relocations, but the court maintained that, while owner's interests are protected, "no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied."[141] Additionally, the NFL claimed that all decisions on matters such as relocation would be based on reasonable decisions to maximize profits; nevertheless, the court held suspect the validity of such a voting process.[142]

Finally, the court recognized that "the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League."[143] Considering the size of Los Angeles, the court rationalized that the area had a market large enough to absorb the two franchises.[144] The court also noted that the NFL presented no evidence that its desire to retain regional balance "would be adversely affected by the move of a northern California team to southern California."[145]

In concluding its analysis of this case, the court recognized that in order to withstand antitrust scrutiny, restrictions on franchise relocation "should be more closely tailored to serve the needs inherent in producing the NFL 'product' and competing with other forms of entertainment."[146] Additionally, the court suggested a procedur-

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considered its competitive effects and found that they had caused problems within the NFL. *Id.*

140. *Id.* at 1395. The district could ruled that the "NFL should have designed its 'ancillary restraint' in a manner that served its needs but did not so foreclose competition." *Id.*

141. *Id.* at 1396. In addition, factors such as fan loyalty and team rivalries are ignored.

142. *Id.* at 1397. Questioning whether the NFL owners would make reasonable decisions, the court recognized that "an owner need muster only seven friendly votes to prevent three-quarters approval" to prevent another team from entering its market, regardless of whether or not two franchises could be successfully supported in the vicinity. *Id.* Concerned with the potential for collusion, the court noted that a basic premise of the Sherman Act is that it is best to leave the regulation of private profit to the marketplace in lieu of private agreement. *Id.* Market forces will deter unwise moves because a team will not easily leave an established base of support in order to compete with another team in an uncertain market. *Id.*

143. *Raiders I*, 726 F.2d 1381, 1397 (9th Cir. 1984), *cert. denied*, 469 U.S. 990.

144. *Id.* The court stated that there would not be any problems with scheduling, facilities, or loss of future television revenue. *Id.*

145. *Id.*

146. *Id.* In tailoring needs for relocation, the court further advised that important factors

al mechanism in which the team attempting to relocate could state its case and assure proper factors are considered.[147] Such a procedure would allow for or disallow relocation upon objective measures rather than subjective and personal feelings amongst the owners.[148]

Despite the court's conclusions about the conflict between the Commission, the Raiders, and the NFL, it is important to note that *Raiders I* and *Raiders II* were based on a conspiracy to prevent the Raiders from moving into an area where an NFL franchise was already located.[149] As a result, the court does not set a clear precedent for future teams to relocate to another city where there is no NFL team already in existence.[150] *Raiders I* and *Raiders II*, rather, made the NFL aware that it needed to modify Rule 4.3 so that it will no longer violate antitrust laws.[151]

Shortly after the Raiders announced their plans to move to Los Angeles, the city of Oakland, California, filed an eminent domain action against the Raiders franchise hoping to keep the team in Oakland.[152] Under the theory of eminent domain, Oakland attempted to acquire all property rights associated with the Oakland Raiders franchise.[153]

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such as population, economic projections, facilities, regional balance, fan loyalty, and location continuity should be taken into consideration. Lewis Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws:* Los Angeles Memorial Coliseum Commission v. NFL, 15 CONN. L. REV. 183, 206-07 (1983). The court recognized that when Davis testified that in 1978 he proposed that the NFL adopt a set of objective guidelines to govern franchise relocation rather than continuing to use a subjective voting procedure. *Raiders I*, 726 F.2d at 1397.

147. *Id.*

148. *Raiders I*, 726 F.2d 1381, 1398 (9th Cir. 1984), *cert. denied*, 469 U.S. 990. As an example, many of the owners disliked Davis and often referred to him as a "Maverick." *Id.*

149. *See* Amoroso, *supra* note 55, at 308.

150. *Id.*

151. *Id.* For an detailed analysis of *Raiders I*, *see* Hosford, *supra* note 8, at 3-33.

152. City of Oakland v. Oakland Raiders, 646 P.2d 835 (Ca. 1982), *cert. denied*, 478 U.S. 1007 (1986).

153. *Id.* at 837. The power of eminent domain is an inherent power in a sovereign state and is provided for in the Fourteenth Amendment of the United States Constitution, where it reads that "[n]o [s]tate shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV Eminent domain also exists in the Fifth Amendment where it states that "private property [shall not] be taken for public use without just compensation." U.S. CONST. amend. V There are two constitutional restraints on a state's exercise of eminent domain. City of Anaheim v. Michel, 66 Cal. Rptr. 543 (1968). First, the taking must be for a "public use," and, second, there must be "just compensation" paid for the taking. *Id.* The power of eminent domain can be used to condemn both tangible and intangible property, and any restrictions on this power can be based only upon a statutory or state constitutional provision. Thomas W.E. Joyce III, Note, *The Constitutionality of Taking a*

When the City of Oakland brought its eminent domain action against the Oakland Raiders, the Raiders contended that an NFL franchise did not constitute property under the California eminent domain statute and sought summary judgment.[154] In *City of Oakland*, the California Supreme Court,[155] recognized that several states had authorized the use of the power of eminent domain in constructing, owning, and managing stadiums for use by professional and amateur sporting events.[156]

After making its way back up to the First Appellate District of the California Court of Appeals,[157] the court began its analysis by

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Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation, 13 FORDHAM URB. L.J. 553, 561 (1985). It is relevant to Oakland's position that "a city may acquire by eminent domain any property necessary to carry out any of its powers or functions." *See* CAL. GOV'T CODE § 37350.5 (West 1994). The courts have interpreted the "public use" requirement both broadly and narrowly. *See* J. NOWAK ET AL., CONSTITUTIONAL LAW § VII D, at 493 (2d ed. 1983). The broad view "equates public use with public advantage or public benefit and tends to define as a public use anything that benefits the state by creating jobs, promoting land sales, developing natural resources or increasing industrial activity." City of Oakland v. Oakland Raiders: *Defining the Parameters of Limitless Power*, UTAH L. REV. 397, 405 (1983). The narrow view favors a "use-by-public" test, which allows courts to have more control over the use of the eminent domain power delegated to private enterprises by requiring that the public actually use the condemned property. *Id.* at 404. The broad view has reemerged in the twentieth century and has become the majority view. *Id.* at 404-05.

154. City of Oakland v. Oakland Raiders, Ltd., 176 Cal. Rptr. 646 (Cal. App. 1981), *vacated*, City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982), *cert. denied*, 478 U.S. 1007 (1986).

155. *Id.* The trial court granted the Raiders' motion for summary judgment and the appellate division affirmed. *Id.*

156. *City of Oakland*, 646 P.2d 835, 841 (Ca. 1982), *cert. denied*, 478 U.S. 1007 (1986). The California Supreme Court noted that the fact that Candlestick Park in San Francisco and Anaheim Stadium in Anaheim were both owned and operated by municipalities, suggested that there was an acceptance of the notion that "providing access to recreation to its residents in the form of spectator sports was an appropriate function of city government." *Id.* The California Supreme Court reversed and remanded the appellate decision. *Id. See City of Anaheim*, 66 Cal. Rptr. at 543 (upholding that the power of Anaheim to condemn land for parking areas near the stadium on the principle that the construction, of a stadium by a city represented a public purpose). In Martin v. Philadelphia, 215 A.2d 894 (Pa. 1966), the Pennsylvania Supreme Court recognized that:

> [a] sports stadium is for the recreation of the public and is hence for a public purpose; for public projects are not confined to providing only the bare bones of municipal life, such as police protection, streets, sewers, light, and water; they may provide gardens, parks, monuments, fountains, libraries, [and] museums.

Martin v. Philadelphia, 215 A.2d 894 (Pa. 1966).

157. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153 (Cal. app. 1985), *cert. denied*, 478 U.S. 1007 (1986). After the California Supreme Court reversed the holding that the "eminent domain statute allowed condemnation of intangible property and that plaintiff had a right to show whether its attempted exercise of eminent domain over the Raiders franchise

evaluating the trial court's Commerce Clause determination.[158] The city argued that its eminent domain action was exempt from the Commerce Clause for three reasons.[159] First, Oakland asserted the notion that the "law of the case doctrine precluded Commerce Clause review because the Raiders raised the commerce clause issue in *Raiders I*.[160] In response, the court noted that since the Commerce Clause issue was never settled, the doctrine was not applicable.[161]

Second, Oakland claimed an exemption from the Commerce Clause on the premise that it entered the market as a participant rather than a regulator.[162] The court countered this argument with the stipulation that if Oakland truly was a market participant,

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would be a valid public use," the court issued peremptory writ for the trial court, City of Oakland v. Superior Court of Monterey County, 186 Cal. Rptr. 326 (Cal. App. Dep't Super. Ct. 1982), to "hold a hearing on plaintiff's application for reinstatement of the preliminary injunction against [the] transfer of the franchise from Oakland." *City of Oakland*, 220 Cal. Rptr. at 155. After reinstating and modifying the injunction, a series of procedural moves brought the case on back remand, in City of Oakland v. Superior Court of Monterey County, 197 Cal. Rptr. 729 (Cal. App. 1983), *cert. denied*, 478 U.S. 1007 (1986), with a mandate to "vacate its judgment and proceed to determine those remaining objections to plaintiff's eminent domain action that it had not previously ruled on." *City of Oakland*, 220 Cal. Rptr. at 155. The trial court entered judgment in favor of the Raiders on the primary grounds "that plaintiff's stated purpose is not a public use; that plaintiff's action is invalid under federal antitrust law; and that plaintiff's action is invalid under the Commerce Clause of the Federal Constitution." *Id.*

158. *Id.* Article I, Section 8, clause 3 of the Constitution gives Congress the power "[t]o regulate [c]ommerce among the several [s]tates " U.S. CONST. art. I, § 8, cl. 3. Today, it is recognized that state or local regulation of interstate commerce is valid if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits." Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970). *See* Elberton Southern Ry. Co. v. State Highway Dep't, 89 S.E.2d 645, 649 (1955) (holding that a state may exercise its power of eminent domain even though such action will either directly or indirectly burden interstate commerce).

159. *City of Oakland*, 220 Cal.Rptr. at 156.

160. *Id.* The law of the case doctrine "generally binds all subsequent proceedings, trial or appellate, to prior appellate determinations in the same action." *Id.*

161. *Id.* The court pointed out that the doctrine:

> does not extend to points of law that might have been but were not presented and determined on a prior appeal Because the briefs in *Raiders I* contained nothing on the Commerce Clause issue and because denial of rehearing decides nothing on points raised for the first time in the rehearing petition, law of the case did not preclude Commerce Clause review in the trial court.

City of Oakland v. Oakland Raiders, 220 Cal Rptr. 153, 156 (Cal. App. 1985), *cert. denied*, 478 U.S. 1007 (1986).

162. *Id.* at 156. *See e.g.*, South Cent. Timber Dev., Inc. v. Winnicke 467 U.S. 82 (1984); White v. Massachusetts Council of Const. Employers, 460 U.S. 204 (1983).

it would have avoided Commerce Clause review.[163] Oakland did not escape review here because its action "was grounded on the governmental power of eminent domain that it possessed as an agent of a sovereign, the State of California."[164]

Third, Oakland argued that its exercise of the power of eminent domain cannot be precluded by the Commerce Clause as there is no prior case law to support such a Constitutional constraint.[165] In response to Oakland's claim, the appellate court held that the lack of case merely demonstrated that eminent domain cases, which traditionally concern real property, rarely impacts interstate commerce.[166] Noting the novelty of the question of whether the Commerce Clause precludes the taking of intangible property, the court acknowledged the Raiders' argument that professional football is a national business with a certain impact on interstate commerce.[167]

To resolve the issue, the court compared the Raiders' situation to *Partee v. San Diego Chargers Football Co.*[168] In *Partee*, the California Supreme Court held that because the NFL required uniform regulation, interstate commerce certainly be impacted if a state applied its antitrust laws to an NFL franchise located within the state.[169] The Court of Appeals for the First District of California, therefore, believed that the same situation that existed in

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163. *City of Oakland*, 220 Cal. Rptr. at 156. The court stated, in respect to Oakland, that "if it had attempted to enter the football market on equal footing, bidding with other potential market participants and seeking to purchase from someone willing and able to sell," it would be considered a market participant. *Id.*

164. *Id.* The court asserted that Oakland did not even enter the marketplace until the power of eminent domain was exercised; therefore, Oakland cannot avoid the Commerce Clause as a market participant. *Id.*

165. *Id.*

166. City of Oakland v. Oakland Raiders, 220 Cal. Rptr. 153, 156 (Cal. App. 1985), *cert. denied*, 478 U.S. 1007 (1986).

167. *Id.* at 156-57. The Raiders argued that "professional football is such a nationwide business and so completely involved in interstate commerce that acquisition of a franchise by an individual state through eminent domain would burden interstate commerce." *Id.*

168. Partee v. San Diego Chargers Football Co., 668 P.2d 674 (Cal. 1983).

169. *Id.* The Court in *Partee* noted that nationwide regulation was necessary because:

> [p]rofessional football's teams are dependent upon the league playing schedule for competitive play The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state.

Partee v. San Diego Chargers Football Co., 668 P.2d 674 684-88 (Cal. 1983).

Partee, existed in *City of Oakland.*[170] The court asserted that the relocation of the Raiders would impact not only the welfare of the Raiders franchise but also the entire league throughout the country.[171] Any action taken by Oakland will have ramifications throughout the league.[172] Under such circumstances, the court observed that if disproportionate harm to a local entity will result from the Raiders' relocation, regulation and control should come from Congress.[173]

In concluding its analysis, the court rationalized that the burden on interstate commerce brought on by enforcement of the antitrust laws outweighed California's interest in enforcing its antitrust laws against an NFL franchise.[174] Oakland sought neither to promote the health or safety of its citizens nor did it seek fair economic competition.[175] Oakland, rather, was acting for less compelling reasons, and similar to *Partee,* the court held that "the burden that would be imposed on interstate commerce outweighs the local interest in exercising the statutory eminent domain authority over the Raiders franchise."[176]

III. NATIONAL BASKETBALL ASSOCIATION FRANCHISE RELOCATION AND THE SAN DIEGO CLIPPERS

Similar to the relocation cases concerning the Oakland Raiders and the NFL, *NBA v. SDC Basketball Club*[177] illustrates the problems that the NBA has experienced with franchise relocation.[178] The NBA's conflict with the Clippers further exemplifies the fact

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170. *City of Oakland,* 220 Cal. Rptr. at 157.

171. City of Oakland v. Oakland Raiders, 220 Cal. Rptr. 153, 157 (Cal. App. 1985), *cert. denied,* 478 U.S. 1007 (1986).

172. *Id.* As a result, "the specter of such local action throughout the state or across the country demonstrates the need for uniform, national regulation." *Id.*

173. *Id.* at 157-58. Regulations on team relocations, therefore, should come from Congress where only then "can the consequences to interstate commerce be assessed and a proper balance struck to consider and serve the various interests involved in a uniform manner." *Id.* at 158.

174. *Id.*

175. *Id.*

176. City of Oakland v. Oakland Raiders, 220 Cal. Rptr. 153, 158 (Cal. App. 1985), *cert. denied,* 478 U.S. 1007 (1986). Some of the less compelling reasons the court stated were "to promote public recreation, social welfare, and to secure related economic benefits, as well as to best utilize the stadium in which the Raiders played. *Id.*

177. 815 F.2d 562 (9th Cir. 1987), *cert. dismissed,* 484 U.S. 960 (1987).

178. *Id.*

that, with the exception of MLB, no other sports league is immune from antitrust laws when trying to control relocation of its franchises.[179]

After an unprofitable year, Donald Sterling, owner of the San Diego Clippers, he attempted to move the team to Los Angeles but decided against the move after the NBA filed suit to block the move.[180] After becoming President of the Clippers and without any financial improvement, Alan Rothenberg believed the Clippers were in a desperate predicament.[181] Following the lead of Davis and the recent courtroom success of the Raiders, Rothenberg announced on May 14, 1984, that the Clippers would be relocating to Los Angeles.[182] The Clippers claimed that the move would transpire on the following day and that any action by the NBA to prevent the move would violate the antitrust laws.[183] The NBA responded by considering an investigatory committee to examine the move, but this idea was abandoned because of the Clippers' continued assertions of antitrust violations.[184] Avoiding potential antitrust liability, the NBA refrained from sanctioning the Clippers and, the team scheduled its games in Los Angeles.[185]

The NBA contended that Article 9 of the NBA Constitution[186] was not the only limitation upon franchise movement.[187] This limitation was easily met when the NBA Los Angeles Lakers agreed in writing to waive its rights under Article 9.[188] The NBA, mean-

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179. *Id. See* Hosford, *supra* note 8, at 33.

180. *Clippers*, 815 F.2d at 564.

181. Kenneth L. Shropshire, *Opportunistic Sports Franchise Relocations: Can Punitive Damages in Actions Based Upon Contract Strike a Balance?*, 22 LOY. L.A. L. REV. 569, 582 (1989) (quoting Lancaster, *Hoop Headaches: L.A. Clippers Show Perils of Owning Pro Team*, WALL ST. J., Apr. 17, 1987, at 18). Rothenberg explained his opinion that there was "a feeling of despair, if not desperation, in San Diego, we couldn't give tickets away, we lost our television contract, [and] our radio broadcasts were tape-delayed." *Id.*

182. *Clippers*, 815 F.2d 562 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* At the beginning of the 1984-85 season, the NBA Constitution stated that:

> [a] membership shall not be granted or transferred for operation within the Territory of any [m]ember without the prior written consent of such member. Anything herein contained to the contrary notwithstanding, this provision as to territorial restrictions may be amended only with the consent of all Members of the Association.

NBA CONSTITUTION art. IX [hereinafter NBA CONST.].

187. *Clippers*, 815 F.2d 562 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).

188. *Id.* The United States Court of Appeals for the Ninth Circuit noted that the NBA

while, began drafting a new rule regarding franchise relocation which later became Article 9A.[189] While the NBA argued that Article 9A[190] was a new constitutional provision codifying previous practice in the NBA, the Clippers contended that Article 9A merely amended Article 9.[191] According to the NBA constitution, the Clippers claimed Article 9A was inapplicable because it lacked the necessary unanimous approval by all the NBA teams.[192] As a result, the NBA brought suit in the United States District Court for the Southern District of California for declaratory judgment that the NBA could legally sanction the Clippers.[193] On summary judgment in favor of the Clippers,[194] the court dismissed the NBA's claims and apparently referred to the antitrust claims as nonmeritorious.[195]

Recognizing that antitrust issues were controlled by *Raiders I* and *Raiders II*, the United States Court of Appeals for the Ninth Circuit noted that both decisions held that the rule of reason governed a professional sports league's attempts to restrict franchise relocations.[196] The court reasoned that both the Clippers' and

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took the position that "the league as a body must be permitted to consider moves in order to give effect to number of constitutional provisions for the exclusiveness of franchise territories." *Id.*

189. *Id.* See *Hosford*, *supra* note 8, at 36.

190. Article 9A of the NBA Constitution provided that:

> [a] Member may transfer its franchise, city of operation, or playing site of any or all of its home games, to a different location, within or outside its existing Territory, as defined in Article 10 The question whether to approve the proposed relocation shall be decided by a majority vote of all of the members, and no vote by proxy shall be permitted.

NBA CONST. art. IXA.

191. *Clippers*, 815 F.2d 562, 564 (9th Cir. 1987).

192. *Clippers*, 815 F.2d 562 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).

193. *Id.* The NBA argued that "it could as a league consider the Clippers' move to Los Angeles and sanction the Clippers for failing to seek league approval without violating the antitrust laws." *Id.* at 565. Alternatively, the Clippers counterclaimed that the NBA would violate the antitrust laws. *Id.*

194. *Id.* After much pleading, Judge Ferguson, relying on the standards set *Raiders I*, suggested that the NBA could not succeed and asserted doubt that the NBA had any valid provision to control franchise movement. *Id.* He stated his frustration with the case when he declared that he could not "see spending my time on this case without some instruction from the circuit." *Id.*

195. *Id.* On appeal, the NBA, resting on the decision in *Raiders II* and the "expansion opportunity" lost to the NFL by the Raiders decision to move to Los Angeles, requested judgment for the "expansion opportunity taken by the Clippers in their move to Los Angeles." *Id.* (referring to *Raiders II*, 791 F.2d 1356, 1371-73 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 2 (1987))

196. *Raiders I*, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (holding that the

Coliseum's attempts to establish relocation guidelines based on *Raiders I* were unavailing.[197] The court further recognized that a franchise movement rule violated the Sherman Act.[198]

The Clippers maintained that the NBA three-quarters rule was illegal.[199] Noting this contention, the court determined that the Clippers misinterpreted the effect of *Raiders I* and *Raiders II*.[200] The court speculated that the club's confusion may have been the result of the effort of *Raiders I* to direct sports leagues toward developing procedures that would pass antitrust scrutiny.[201] Although the objective factors and procedures recited may be sufficient to show procompetitive purposes and to place the restriction outside the rule of reason analysis, the court stated that such conditions were nonessential for deciding the validity of the franchise relocation rules.[202]

In its defense, the NBA made several assertions of material issues of fact that the court used on to distinguish the Clippers' at-

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NFL's application of Rule 4.3 was an unreasonable restraint of trade); *Raiders II*, 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (holding Rule 4.3 invalid only with respect to the Raiders' relocation to Los Angeles).

197. *Clippers*, 815 F.2d 562, 567 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).

198. *Id.* The United States Court of Appeals for the Ninth Circuit noted that *Raiders I* established law by applying the rule of reason to a sports franchise relocation asserted that any antitrust claim must meet three elements. *Id.* The elements include "an agreement among two or more persons or distinct business entities; which is intended to harm or unreasonably restrain competition; and which actually causes injury to competition." *Raiders I*, 726 F.2d at 1391 (quoting Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980)). After examining in detail the NFL and its lack of true competitiveness among the teams, the court in *Raiders I* held that "the relevant market for professional football, the history and purpose of the franchise movement rule, and the lack of justification of the rule under ancillary restraint doctrine all supported the jury's verdict." *Clippers*, 815 F.2d at 567. As a result, an absolute rule was not determined for sports leagues. *Id.*

199. *Id.* To support summary judgment, "either the NBA rule is void as a matter of law under *Raiders I*, or that the NBA had not adduced genuine issues of fact to allow the rule to stand." *Id.* In addition, the Clippers assert that the NBA relocation rule "is illegal as applied [but that under *Raiders I*], a professional sports league's club relocation rule must at least be 'closely tailored' and incorporate objective standards and criteria such as population, economic projections, playing facilities, regional balance, and television revenues." *Id.*

200. *Id.* at 567-68.

201. *Id.* (referencing *Raiders I*, 726 F.2d at 1397). The United States Court of Appeals for the Ninth Circuit criticized the fact that many commentators as well have misconstrued the decisions in the *Raiders* cases. *Id. See* Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Interleague Rivalry*, 32 UCLA L. REV. 219 (1984); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013; Comment, *Keeping the Home Team at Home*, 74 CALIF. L. REV. 1329 (1986).

202. *Clippers*, 815 F.2d 562, 567 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).

tempt at relocation from the Raiders' relocation.[203] Unlike the NFL, the issue for the NBA was whether the requirement that a team seek the approval of a league's Board of Governors before moving to a new location violates the Sherman Act.[204] Rather than try to prevent the move to Los Angeles, the NBA scheduled the Clippers' games in the Los Angeles Sports Arena.[205] The NBA only brought suit for declaratory relief after continual allegations of antitrust liability by the Clippers to establish that it could restrain the relocation and impose a charge against the Clippers for its infringement of the franchise opportunity lost in Los Angeles.[206] On appeal, the United States Court of Appeals for the Ninth Circuit reversed the summary judgment entered against the NBA, which held that rules enabling the NBA to review relocation efforts were in violation of the antitrust rules.[207] At trial, the Clippers contended that all provisions to discuss the Clippers' relocation violated antitrust laws.[208] As a result, the presence of relocation rules in the NBA Constitution was not a per se violation of the Sherman Act and that a sufficient amount of conflicting facts existed so as to create a genuine issue of material fact regarding the reasonableness of the restraint.[209]

The Clippers argued that the NBA Constitution did not contain

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203. *Id.* The NBA asserted that:

> [T]he purpose of the restraint as demonstrated by the NBA's use of a variety of criteria in evaluating franchise movement, the market created by professional basketball, which the NBA alleges is significantly different from that of professional football, and the actual effect the NBA's limitations on movements might have on trade.

Clippers, 815 F.2d 562, 568 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).

204. *Id.*

205. *Id.*

206. *Id.* at 568; *Raiders II*, 791 F.2d 1356)9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987). *See* MARTIN J. GREENBERG, 1 SPORTS LAW PRACTICE 1002 (1993).

207. *Clippers*, 815 F.2d at 568. After consideration, the court held that "[g]iven the *Raiders I* rejection of per se analysis for franchise movement rules of sports leagues, and the existence of genuine issues of fact regarding the reasonableness of the restraint, the judgment against the NBA must be reversed." *Id.*

208. *Clippers*, 815 F.2d 562, 568 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987). The court reversed the district court which held that "Article 9, Article 9A if effective, and any meeting of the NBA to consider the Clippers' move, all violate the antitrust laws." *Id.* Referring to *Raiders II*, the court "reemphasized that only the particular application of the franchise movement rules in that case violated antitrust law. The mere existence of Article 9, Article 9A, and various provisions for franchise movement evaluation, cannot violate antitrust law." *Id.*

209. *Id.*

any restrictions on franchise relocations other than Article 9, which did not exist when the Clippers moved, and that the NBA did not have the right to approve the Clippers' relocation.[210] The NBA continually maintained that the league's provisions regarding the territories of franchises implied the right of the NBA to consider the movement of its franchises.[211] Such an implied provision is derived from league precedent and the existence of specific rules concerning the "allocation of franchises.[212] In response, the Clippers asserted that the absence of an express agreement, notwithstanding any implied provision, indicates a lack of intent.[213] On appeal, the United States Court of Appeals for the Ninth Circuit stated that undetermined issues of fact determined the interpretation of the agreement.[214] It appears plausible that a determination of intent would establish whether the NBA intended to develop any further regulations.[215] As a result of *Clippers*, whether there is a violation of antitrust law depends on the facts of a particular case and cannot be generalized from one case to another.[216]

IV. MAJOR LEAGUE BASEBALL FRANCHISE RELOCATION

A. *The San Francisco Giants' Attempted Relocation to St. Petersburg*

On August 6, 1992, Bob Lurie,[217] owner of the San Francisco

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210. *Id.* at 568-69.
211. *Id.* at 569.
212. *Id.*
213. *Clippers*, 815 F.2d 562, 569 (9th Cir. 1987), *cert. dismissed*, 484 U.S. 960 (1987).
214. *Id.*
215. *Id.* at 570. The questions of material fact warranted the remand of the case to the district court for retrial. *Id.* The Clippers and the NBA ultimately settled out of court. *See* Daniel B. Rubanowitz, Note, *Who Said "There's No Place Like Home?:" Franchise Relocation in Professional Sports*, 10 LOY. ENT. L.J. 163, 190 (1990) (citing information provided by Christopher Layne, an attorney for the Clippers). The Clippers were allowed to remain in Los Angeles in return for their acknowledgement of Article 9A, and they agreed to forego expansion funds to which the club was entitled. *Id.* The settlement also included a payment of $5.7 million to the NBA from the Clippers. *Greenberg*, *supra* note 206, at 1004. For a discussion of the "expansion opportunity" theory that is included in the settlement, *see Raiders II*, 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, 484 U.S 826 (1987). The settlement demonstrates how even though the antitrust issue never received a decision on the merits, the antitrust laws forced the NBA to settle with Clippers thereby allowing the team to relocate. *Clippers*, 815 F.2d at 570.
216. Greenberg, *supra* note 206, at 1004.
217. *Hearing Before the Subcommittee on Antitrust, Monopolies and Business Rights of the*

Giants, revealed that he had reached a possible agreement to sell the franchise to a group of investors from Tampa Bay for $115 million.[218] After owning the Giants for seventeen years, Lurie was frustrated with the cold and windy weather conditions at Candlestick Park.[219] Despite the Giants' reasonable success on the field, the condition of the stadium were one of the main reasons for the team's declining attendance and financial difficulties.[220]

In addition to the weather conditions, Lurie encountered financial problems, and the fans from San Francisco were unwilling to help fund the construction for a new stadium.[221] Twice in San Francisco, once in Santa Clara County, and once in San Jose, Lurie unsuccessfully asked the citizens in a referendum to vote for the financing of a new facility [222] The last attempt in San Jose turned down a $265 million stadium plan strongly supported by the mayor.[223] Faced with a $5 to $10 million annual loss and unable to find a local group to purchase the Giants for market value, Lurie obtained permission from then MLB Commissioner Francis Vincent to enter into explorations and discussions to contract to sell and relocate the franchise.[224]

After the Tampa Bay Investor Group's $115 million offer,[225] it

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Committee on the Judiciary United States Senate on the Validity of Major League Baseball's Exemption from the Antitrust Laws, 102d Cong., 2d Sess. 391 (1992) [hereinafter *Hearing*] (statement of Richard B. Dodge, St. Petersburg Assistant City Manager). In 1976, when Lurie bought the Giants, the San Francisco community considered him a savior for preventing the team from relocating to Toronto, Canada. *Id.* Lurie had initiated a civic effort to purchase the franchise and to keep it in the Bay Area. *Id. See* Hosford, *supra* note 8, at 51-55.

218. *Chronology of Events*, USA TODAY, Nov. 11, 1992, at 3C. *See* Hosford, *supra* note 8, at 51.

219. Hank Hersch, *Tale of Four Cities for Giant Fans in Two Bay Areas, It Is the Best of Times, It Is the Worst of Times*, SPORTS ILLUSTRATED, Aug. 24, 1992, at 24.Candlestick Park, the stadium in which the Giants play its home games, has cold, gale force winds which cause fans to wear parkas in August. *Hearing, supra* note 217. The park leads the league in hot coffee sales. *Id.* In fact, the park is "so hated by players that it is referred to as 'Devil's Island,' and many players have stipulated in their contracts that they cannot be traded to San Francisco because of the harshness of the playing conditions." *Id.*

220. Hersch, *supra* note 219. In 1991, the Giants drew a mere 1.7 million fans in attendance. *Id.* Only the Cleveland Indians, Detroit Tigers, Houston Astros, Milwaukee Brewers, and Montreal Expos drew less fans. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* Results of a June 1992 poll found that 35% of the people polled deemed keeping the Giants as "very important," while 40% of the people polled said it was "not important." *Id.* In another poll, 48% of the people polled believed that San Francisco's mayor, Frank Jordan, had spent too much time on the Giants' hopes to build a new stadium. *Id.*

224. *Hearing, supra* note 217, at 392.

225. *Id.* at 390. The offer from the Tampa Bay Investor Group was a result of fourteen

was necessary to obtain franchise relocation approval at the September 1992 meeting of baseball in St. Louis.[226] The Ownership Committee used many delay tactics to stall the approval of the relocation.[227] Despite the exclusive contractual agreement between the Tampa Bay Investor Group and Lurie,[228] Bill White, National League President, announced MLB's intent to accept an offer, separate from Lurie, from an unnamed San Francisco group of investors.[229]

After assembling a San Francisco group, investors were concerned that their offer would be considered a tortious interference with a contractual relationship.[230] The San Francisco group refused to submit an offer unless the City of San Francisco agreed to indemnify them against any future lawsuits instituted by the Tampa Bay Investor Group or the City of St. Petersburg.[231] The San Francisco group offered $95 million to the National League before eventually raising its bid to $100 million.[232] Since White was accepting changes and increases in the bids from the San Francisco

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years of planning by Pinellas County, Pinellas Sports Authority, and the City of St. Petersburg to attract a baseball franchise to the state of Florida. *Id.*

226. *Id.* at 392.

227. *Id.* at 393. According to Richard Dodge, the Assistant City Manager of St. Petersburg:

> [t]he first step in the approval process was for a group of owners, known as the Ownership Committee, to review the credentials and financial capacity of our proposed ownership group. Trying to obtain instructions from the Ownership Committee staff was extremely difficult. Continual changes, revamps of partnership agreements, all done at great time and great expense, were completed, and the Tampa Bay Investor Group was told finally that everything was in place and ready for approval. However, at the same time, some members of the Ownership Committee said publicly that they had not received all the information they needed to make a final recommendation . These delay tactics stalled the vote on the ownership group and on relocation at the September meetings of Major League Baseball.

Hearing, 102d Cong., 2d Sess. 391, 393 (1992) (statement of Richard B. Dodge, St. Petersburg Assistant City Manager).

228. *Id.* The exclusive contractual requirement demanded that Lurie would not attempt to negotiate any other deal for the Giants until MLB had made a decision about the Tampa Bay offer. *Id.*

229. *Id.* At a press conference, White stated, "Bob Lurie is a man of his word and he has given the St. Petersburg group his word that he will not accept an offer I will accept an offer from the people in San Francisco and the League will have to decide what they will do with that offer." *Id.* (quoting Bill White, President of the National League).

230. *Id.* at 394.

231. *Id.* As a result, the "indemnification was considered so onerous and dangerous that a group of San Francisco neighborhoods sued the Board of Supervisors in San Francisco Superior Court attempting to nullify the indemnification." *Id.*

232. *Id.* at 396.

group, the Tampa Bay Investor group questioned if they would get an opportunity to amend its bid.[233] Denying its request, White and the committee said "the Tampa Bay offer was adequate and Baseball was not conducting an auction."[234] As the offers were discussed and the San Francisco group continued to make adjustments, the Commissioner's office announced that there would be a special meeting in Scottsdale, Arizona, to consider the Giants situation.[235] MLB did not indicate that any resolution would be made but did indicate that the relocation issue would be considered.[236] The media reported that the San Francisco offer had too many unacceptable conditions for MLB to accept.[237] Finally, on November 10, the National League voted to reject the proposal to sell and to relocate the Giants to the Tampa Bay Investor Group.[238]

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233. *Id.* The San Francisco group not only adjusted their bids upward $5 million, but they also changed their position on who gets to keep the $11 million in revenue received for expansion fees to the National League. *Id.*

234. *Id.* White was conducting a bid because:

> [w]ith a bonafide bid in hand for $115 million from the Tampa Bay Investor Group, Major League Baseball proceeded to leverage investors in the City of San Francisco to push their bid upward Clearly, it was a reverse auction, and Major League Baseball's reluctance to accept any increase in offer from Tampa Bay Investor Group underscores the strategy of closing the gap between the two bids, thus making the San Francisco bid appear more "competitive."

Hearing, 102d Cong., 2d Sess. 391, 396 (1990) (statement of Bill White, President of the National League).

235. *Id.* at 397.

236. *Id.* Additionally, MLB expressed concern since there would be no competitive counteroffer and prepared for the special league meeting with no deadlines in mind. *Id.*

237. *Id.* Bill Giles, owner of the Philadelphia Phillies, described the last minute changes that MLB permitted and stated that:

> [w]hen I left for Santa Fe on Friday, I felt convinced it would end up in Tampa Bay, because the deal (the San Francisco investor offer) really wasn't a deal. But when I got there, they changed it completely and took out all the loopholes and that's what made the difference.

Hearing, 102d Cong., 2d Sess. 391 (1992) (statement of Bill Giles, Owner, Philadelphia Phillies Baseball Club).

238. *Id.* at 398. Dodge maintained that MLB policy "fails to comply with the spirit or substance of the Antitrust laws that every other sports league in the country must follow." *Id.* In addition, he asserted the following notion:

> It was because of the Antitrust exemption that Baseball is able to artificially restrict the supply of Major League Baseball franchises and thereby artificially drive up the price. This artificial restriction of supply has a number of results which are contrary to good public policy. First, the artificially inflated value of a franchise creates tremendous pressure upon competing communities to subsidize the teams through rent concessions and/or uneconomic leases. Second, the artificial restriction of supply allows and permits competing communities such as St. Petersburg to be

As a result of the Giants staying in San Francisco, the City of San Francisco relinquished its three million dollar yearly revenue for the operation of Candlestick Park.[239] In addition, the city agreed to indemnify the investors making the bid to buy the franchise.[240] Additionally, the city is currently engaged in lawsuits with the Tampa Bay Investor Group and the City of St. Petersburg.[241]

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used to leverage up the value of an existing franchise. Major League Baseball can threaten to allow an existing franchise to move solely in order to improve the bargaining position of the franchise holder. Finally, the lack of Antitrust oversight allows "America's Game" to conduct business in total secrecy, in a conspiratorial fashion and with disrespect for the public good.

Hearing, 102d Cong., 2d Sess. 391 (1992) (statement of Richard B. Dodge, St. Petersburg Assistant City Manager).

239. *Id.* at 398.

240. *Id.* Dodge also observed the following with regard to St. Petersburg's loss of the Giants that:

> [i]t has lost the opportunity to bring major league baseball to Tampa Bay. It has lost a minimum of 27 years of revenues to its stadium that team would provide. It has lost the economic impact that team would bring to the west coast of Florida. Furthermore, it has lost the opportunity to receive the $2 million per year State revenue that the State of Florida had committed for stadium capital improvements had the team had been allowed to come to Tampa Bay. It has also now been leveraged into a position that, to protect its contractual rights, it has joined with Tampa Bay Investor Group to pursue remedies of tortious interference against the investors in the San Francisco group and also officials in San Francisco.

Hearing, 102d Cong., 2d Sess. 391 (1992) (statement of Richard B. Dodge, St. Petersburg Assistant City Manager).

241. *Id.* In Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993), the Tampa Bay Investor Group brought suit against MLB. *Id.* The group claimed that "MLB monopolized the market for teams, and placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such teams." Mark T. Gould, *Fantasy Revisited, Baseball's Antitrust Exemption Gets Hit by a Pitch*, 11 ENT. & SPORTS LAWYER, Fall 1993, at 11. MLB filed a motion to dismiss the case for failure to state a claim upon which relief can be granted. *Piazza*, 831 F. Supp. at 421. After analyzing the trilogy of United States Supreme Court Cases of *Federal Baseball, Toolson,* and *Flood*, Judge Padova denied MLB's motion in part by holding that:

> before *Flood*, lower courts were bound by both the rule of *Federal Baseball* and *Toolson* The Court's decision in *Flood*, however, effectively created the circumstance referred to by the Third Circuit at "result stare decisis," from the English system. In *Flood*, the Supreme Court exercised its discretion to invalidate the rule of *Federal Baseball* and *Toolson*. Thus no rule from those cases binds the lower courts as a matter of stare decisis. The only aspect of *Federal Baseball* and *Toolson* that remains to be followed is the result of the disposition based upon the facts there involved, which the Court in *Flood* determined to be the exemption of the reserve system from the antitrust laws.

Piazza v. Major League Baseball, 831 F. Supp. 420, 438 (E.D. Pa. 1993).

B. The Professional Baseball Antitrust Reform Act of 1993

In December 1992, Senator Howard Metzenbaum's Antitrust Subcommittee of the Senate Judiciary Committee held hearings in which baseball owners were severely criticized for their handling of MLB.[242] Baseball's unique exemption from the antitrust laws has allowed its owners to operate as a legal monopoly thereby making carte blanche decisions on such issues as franchise locations without worry of litigation.[243]

In an attempt to remedy the existing anomaly in antitrust law, Congress recently considered a bill that "professional baseball teams, and leagues composed of such teams, shall be subject to the antitrust laws."[244] The bill was entitled the Professional Baseball Antitrust Reform Act of 1993 and would act to remove the existing blanket exemption that baseball has enjoyed from antitrust laws for the last seventy years.[245] While the game of baseball has been "a national treasure for over a century," it has also become a billion

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242. Alison Muscatine, *Senate Bill Would Revoke Antitrust Exemption*, WASH. POST, Mar. 5, 1993, at F5. Referring to the team owners, Senator Connie Mack proclaimed that, "[e]verybody would be better off if (major league owners) got out of this cocoon that they have lived in." *Id.* In addition, Senator Metzenbaum has criticized owners saying, "Giving baseball owners a free rein to decide what's in the best interest of the game is like giving the members of OPEC free rein to set world energy policy," but owners have argued in response that MLB's antitrust exemption is vital to baseball because it allows team owners to prevent sudden franchise relocations. *Id. See* Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORT LAW 287 (1994) (an edited and an expanded transcript of written testimony given by Zimbalist on December 10, 1992, before the Antitrust Subcommittee of the Senate Judiciary Committee); *see* Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. SPORT LAW 321 (1994) (an edited and an expanded transcript of written testimony given by Roberts on December 10, 1992, before the Antitrust Subcommittee of the Senate Judiciary Committee).

243. Muscatine, *supra* note 242.

244. S. 500, 103rd Cong., 1st Sess. (1993).

245. *Id.* § 1. The bill, submitted by Senators Metzenbaum, read that:

> [t]he Congress finds that—(1) (1) the business of organized professional baseball is in, or affects, interstate commerce; and (2) the antitrust laws should be amended to reverse the result of the decisions of the Supreme Court of the United States in Federal Baseball Club v. National League, 259 U.S. 200 (1922), Toolson v. New York Yankees, Inc., 346 U.S.C 356 (1953), and Flood v. Kuhn, 407 U.S. 258 (1972), which exempted baseball from coverage under antitrust laws.

S. 500, 103rd Cong., 1st Sess. § 2 (1993).

In its application, the bill read that:

> [t]he Clayton Act (15 U.S.C. 12 et seq.) is amended by adding at the end the following new section: Sec. 27. Except as provided in Public Law 87-331 (15 U.S.C. 291 et seq.) (commonly know as the Sports Broadcasting Act of 1961), the antitrust laws shall apply to the business of organized professional baseball.

S. 500, 103rd Cong., 1st Sess. § 3 (1993).

dollar industry.[246] Many of the franchises are owned by large corporations, and, as a result, the business deals of "baseball's barons" not only effect hot dog and ticket prices but also larger items such as the taxes and economic well-being of local communities.[247] Although such deals may incidentally harm the consumers or restrain competition, they are exempt from the antitrust laws.[248]

According to Senator Metzenbaum, the bill was not designed to punish or threaten either the owners or MLB.[249] Senator Metzenbaum believed that revoking baseball's antitrust exemption was in the best interests of the public, baseball fans, and the sport, itself.[250] Granted over seventy years ago by Justice Holmes, Senator Metzenbaum asserted the view expressed by Henry Friendly, the former Chief Justice of the United States Court of Appeals for the Second Circuit, who declared that *Federal Baseball* "was not one of Mr. Justice Holmes' happiest days."[251] Senator Metzenbaum's asserted that the exemption is legally insupportable and the issue is whether some overriding policy exists that would allow baseball to remain outside of the antitrust laws.[252]

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246. 139 CONG. REC. S2416 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum).
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* The United States Supreme Court has suggested that the job of correcting the exemption should come from Congress should. *Id.* In 1971, the last time this issue was brought before the Court, it stated that "if there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by the Court." *Id.* at S2416-17 (citing Flood v Kuhn, 407 U.S. 258 (1972)).
252. *Id.* at S2417. Former MLB Commissioner Vincent testified before the Antitrust Subcommittee and noted that:

> [t]he existing antitrust exemption for Major League Baseball should only be retained only so long as baseball can persuade you that it is a unique institution with special public interest obligations and not merely another business To the extent Major League Baseball acknowledges that the exemption is only justified by continuing recognition that baseball is a national trust — with obligation to this Congress and to the public that are not carried by ordinary businesses — the exception should be continued and the performance of baseball closely monitored If the owners of baseball continue on their stated course of making baseball into their business and at the same time insist that the Commissioner is their CEO to be fired at will, I would no longer support the preservation of the exemption. If the exemption is to be surrendered let it be by the action of the owners. Only a strong Commissioner acting in the interests of baseball, and therefore the public, can protect the institution from the selfish and myopic attitudes of owners .. Baseball is not seriously dependent on the continuation of the anti-trust exemption. This Congress has other alternatives available to it that seriously threatens baseball. If you wish to get the attention of the owners and to recapture their commit-

Senator Metzenbaum addressed several issues as to why the exemption should be lifted.[253] First, he noted that Congress had historically introduced a number of bills that would remove the exemption from baseball.[254] Although, neither the entire House nor the entire Senate have acted on such bills, the House Select Committee on Professional Sports issued a report in 1976, finding that "adequate justification does not exist for baseball's special exemption from the antitrust laws and its exemption should be removed."[255]

Second, Senator Metzenbaum addressed what the exemption allows baseball to do.[256] The exemption allowed owners to engage in anti-competitive behavior that may hurt the consumer and can do so without any fear of antitrust liability.[257] Additionally, MLB may engage in what would otherwise be labeled as per se antitrust violations where the owners agree to divide markets and allocate territories in an effort to maximize their local television broadcasting profits.[258]

Third, Senator Metzenbaum advanced that lifting the exemption is in the public interest.[259] With the consumer and baseball fan in mind, he claimed that the removal of the exemption would make the owners directly accountable to the public for its decisions adversely affecting either competition or consumers.[260] Senator

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> ment to larger public interests, you may wish to consider expanding the range of legislative options. The exemption has become more of a symbol than a vital baseball interest. It symbolizes that baseball is different. The question for you and for baseball is whether Major League Baseball is willing to continue to carry the burdens of being different in order to preserve the exemption.

Hearing, 102d Cong., 2d Sess. 38-39 (1992) (statement of Francis Vincent, Former Commissioner of Major League Baseball).

253. 139 CONG. REC. S2417 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum).

254. 139 CONG. REC. S2418 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum). In addition to S. 500, Congress also introduced a bill that would complement the Professional Baseball Antitrust Reform Act of 1993 by amending "the Act of September 30, 1961, to exclude professional baseball from the antitrust exemption applicable to certain television contracts." H.R. 1549, 103rd Cong., 1st Sess. (1993). The bill was entitled The Baseball Antitrust Restoration Amendment of 1993. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* In respect to franchise relocation or expansion, "baseball owners have deliberately held down the number of franchises in order to reap monopoly profits and to maximize their bargaining leverage with the players and the cities." *Id.*

258. *Id.*

259. 139 CONG. REC. S2419 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum).

260. *Id.*

Metzenbaum believed that owners would be legally obligated to consider how their business decisions would impact the players, cities, and fans.[261] Senator Metzenbaum asserted that the revocation of the exemption would encourage expansion and would preclude a franchise from using a threat of relocation to obtain certain concessions and taxpayer-financed subsidies from its home city.[262] Rather than threatening to relocate to a vacant city, MLB more easily would expand into those markets that can absorb them, and, as a result, greater stability would exist among the clubs.[263]

Finally, Senator Metzenbaum argued that lifting the exemption would not lead to a rash of franchise relocations.[264] He stated that owners would not be completely helpless to curb franchise movement if MLB was subject to the antitrust laws because the Sherman Act would only place reasonable restrictions on MLB.[265] He noted that *Raiders I* and *Raiders II* did not suggest that a sports league is powerless to prevent franchise relocations.[266]

In response to Senator Metzenbaum's assertions that baseball should be stripped of its exemption, MLB argued that the antitrust laws would make it impossible to stop franchise movement.[267] At the Antitrust Subcommittee hearing, Allan Selig, owner of the Milwaukee Brewers and chairman of Baseball's Executive Council, stated that the most appropriate policy is to prohibit relocations except when the local community has shown that it cannot support the team over a long period of time.[268] Additionally, Selig de-

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261. *Id.*

262. *Id.* Witnesses testified to the Antitrust Subcommittee that owners in MLB deliberately maintain an artificial scarcity of franchises in order to maximize revenue and leverage. *Id.* Cities such as Tampa Bay, Washington, D.C., and Phoenix can certainly support a professional MLB franchise but currently do not because it is in "the collective financial interest of the owners to use such cities as bargaining chips in their negotiations with their home cities." *Id.*

263. *Id.* MLB franchises will no longer be able to use another city's eagerness as leverage while negotiating with their home city. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* The franchise movement rules are not invalid as a matter of law. *Id.* Metzenbaum notes that if baseball were exposed to antitrust laws, "it is likely that baseball in the area of franchise migration could construct approval conditions and terms under which baseball could prevent migration [in a manner] that would be legally valid." *Id.*

267. *Hearing, supra* note 217, at 83 (statement of Allan H. Selig, Owner, Milwaukee Brewers Baseball Club).

268. *Id.* At the Antitrust Subcommittee hearing, Selig testified that:

> [i]f baseball were not exempt from the antitrust laws, a decision protecting franchise stability such as the one made in San Francisco would subject baseball to

fended the antitrust exemption on the basis that baseball has not abused its power.[269]

The fight to pass legislation such as the Professional Baseball Antitrust Reform Act of 1993 will be extremely difficult.[270] Team owners will argue that baseball deserves its special exemption and will claim that any drastic change in its status would spark an overflow of franchise relocation.[271] Supporters will contend that MLB is not different from any other professional sports league and should be treated accordingly under the antitrust laws.[272]

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costly and unpredictable treble damage litigation. Without its exemption, baseball might not even have attempted to save the Giants for the people of San Francisco. Ever since a court concluded that the NFL was powerless to stop Al Davis from abandoning Oakland, no sports league other than baseball has been able to stop a franchise from relocating.

Hearing, 102d Cong., 2d Sess. 83 (1992) (statement of Allan H. Selig, Owner, Milwaukee Brewers Baseball Club).

Selig further claimed that:

> [b]ecause of baseball's exemption, it has by far the best record of professional sports this area [franchise stability] No baseball club has been permitted to relocate since the Washington Senators moved to Texas in 1972. In contrast, football and basketball have each had three franchise relocations since 1980 and hockey has had two.

Hearing, 102d Cong., 2d Sess. 83 (1992) (statement of Allan H. Selig, Owner, Milwaukee Brewers Baseball Club).

269. *Id.* Selig asserted that:

> As the record demonstrates, baseball has not abused its antitrust exemption. While we have not prohibited all franchise moves, we do not allow a club to relocate simply so that the owner can earn greater profits. Indeed, the National League rejected the move to Tampa-St. Pete despite the fact that it would have netted Bob Lurie an additional $15 million. This shows that profit is not the driving force in baseball's decisionmaking process.

Hearing, 102d Cong., 2d Sess. 83 (1992) (statement of Allan H. Selig, Owner, Milwaukee Brewers Baseball Club).

See Allan Selig, *Major League Baseball and Its Antitrust Exemption*, 4 SETON HALL J. SPORT LAW 277 (1994) (an edited and an expanded transcript of written testimony given by Selig on December 10, 1992, before the Antitrust Subcommittee of the Senate Judiciary Committee).

270. 139 CONG. REC. S2416, S2417 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum).

271. *Id.* Senator Metzenbaum explained the difficulty of passing the Professional Baseball Antitrust Reform Act of 1993 when he stated that:

> [It] will be an uphill battle. The owners will—as they always have—come before us and plead that baseball continues to deserve its special treatment under the law. There will also be threats that legislators will see teams in their cities and states move to other areas.

139 CONG. REC. S2416, S2417 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum).

272. *Id.*

V. CONCLUSION

The longstanding tradition of MLB's exemption from the antitrust laws has consistently been challenged. The reluctance of Congress to enact legislation to remove baseball's antitrust exemption and the adherence to stare decisis by the United States Supreme Court have maintained baseball's unique status. The Court's decisions in *Federal Baseball*, *Toolson*, and *Flood* have been criticized extensively and have been interpreted in several ways. In its early days, when baseball was more "sport" than business, the anomalous exemption did not have as much of an impact. Since 1922 when the Court decided *Federal Baseball*, the "sport" of baseball has grown into a $1.5 billion industry with extraordinary societal and economic dimensions. As a result, the Court can not justify its adherence to stare decisis any longer because baseball does effect interstate commerce, but a blanket removal of the antitrust laws from MLB is too expansive of a reform. Additionally, neither Congress nor the Court appears to favor such a reform.

A more reasonable approach to dealing with MLB's antitrust exemption may be a sectional approach to removing the antitrust exemption. The most recent demonstration of the inequities found by baseball's exemption is the attempt of the San Francisco Giants to relocate to Florida. Similar instances in the NFL and the NBA witnessed the Raiders and Clippers relocate, respectively. MLB voted to keep the Giants in San Francisco despite the better offer made by the Tampa Bay Investor Group. The subsequent lawsuit, *Piazza v. Major League Baseball*,[273] has raised this issue of the sectionalization of MLB's antitrust exemption. This case recognizes that the antitrust exemption is not absolute since, after *Flood*, MLB's reserve clause is not exempt from the Sherman Act. This may be interpreted to mean either that the Sherman Act applies only to the reserve clause or that the Sherman Act may be applicable to other aspects of baseball in addition to the reserve clause. If the Court can section the reserve clause from the MLB's exemption under the Sherman Act, then other segments of baseball could be removed from the exemption as well.

The next segment of MLB to be removed from the antitrust exemption could be the issue of franchise relocation, which is one of

273. 831 F. Supp. 420 (E.D. Pa. 1993).

the major reasons that baseball owners continually lobby to maintain the sport's antitrust exemption. In defense of the exemption, Selig asserted that baseball would lose control of its teams resulting in rampant migration of teams. Even though Selig makes a valid point, and baseball's record for controlling relocation is one of the best of the four major sports leagues, the exemption only exists because of judicial and congressional inaction. A reason does not exist to maintain the near-blanket exemption when certain aspects of the sport are problematic. If *Flood* holds that the reserve clause must fall under the scope of the Sherman Act in order to control baseball more effectively, then it follows that if franchise relocation could be controlled more effectively within the scope of the Sherman Act it too should be exempt from the Sherman Act. Senator Metzenbaum stated that Congress could place franchise relocation in MLB under the scope of the Sherman Act. If Congress acts in such a manner, then MLB could still place reasonable restraints on a franchise that wishes to relocate, and, as supported by *Raiders I* and *Raiders II*, MLB could develop policy consistent with, rather than in contradiction to, the law. If MLB is truly "America's Game," then all of the cities of America should be able to at least hope that it could possibly be the home of MLB franchise without the fear of an otherwise unreasonable restraint acting as a deterrent.

Julie Dorst