Antitrust Analysis in Professional Sports Management Cases: The Public Cries "Foul!"

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THE PUBLIC INTEREST IN PROFESSIONAL SPORTS OPERATIONS

The term "sport" means different things to different people. For the weekend athlete it means an opportunity to get away from the stress of daily work life. For the professional sports fan it means a constant source of entertainment, often consuming the emotion of the loyal fan. But for those engaged in the business of professional sports, the term "sport" has a much greater meaning. For the professional athlete it means a livelihood, often short-lived. For the professional sports league franchise owner it means a major financial investment and an ongoing business interest.

Whether one has a personal interest in professional sports or not, professional sports operations affect all members of the community. Professional sports play a major role in interstate commerce by providing a mechanism for the development of service industries. It was estimated over fifteen years ago that the San Francisco Giants baseball club generated more than $325 million in commerce in one year in the city of San Francisco.[1] The general public has a further interest in the operation of professional sports franchises. Professional sports franchises are often the beneficiaries of extensive public funding, usually in the form of public bonds for the construction of stadiums and arenas.[2]

This Note focuses on the legal relationships in the management of professional sports operations as they relate to the public interest, particu-

1. *See* FACTS, BASEBALL IN THE COMMUNITY C3 (1965). Using an even more conservative evaluation method, it was determined that $15 million in out of town commerce was brought to Minneapolis by the Minnesota Twins baseball club. *Id.* The impact of professional sports operations has increased since the 1965 report. Since 1965, professional football has added 18 franchises; professional basketball, 14 franchises; and major league baseball, six franchises.

2. Privately-owned stadiums are uncommon in professional sports operations. *See* Okner, *Subsidies of Stadiums and Arenas*, in GOVERNMENT AND THE SPORTS BUSINESS 325-30 (R. Noll ed. 1974). It is a common practice for the community supporting the franchise to finance stadium construction. In financing these stadiums, the cities undertake a multimillion dollar investment, often taxing the public treasury for many years. For example, construction of the Oakland-Alameda County Coliseum began in 1965. The Coliseum will have major unpaid debt service outstanding through the year 2005. *See* Cong. Rec. H6973 (daily ed. September 14, 1982)(statement of Cong. Stark). *See also Sports Franchises Community Assets*, Seattle Post-Intelligencer, June 28, 1982, at A8; *The Jury Goofed in the Case of Al Davis v. NFL*, The Cleveland Press, May 9, 1982 at —. Local government subsidies to professional sports franchises totaled almost $23 million per year more than a decade ago. Okner, *supra* at 345.

larly the antitrust aspects of league-imposed restraints on the operation of franchises. Initially, the Note provides a model for antitrust analysis in professional sports management cases. The Note then considers three chief restrictions on the operation of professional sports franchises: restrictions on franchise movement; restrictions on the ownership of franchises in two or more leagues (cross-ownership); and restrictions on the award of franchises.

In reviewing each restraint, the Note first focuses on the nature of the restraint and the private, league and public interests served. The Note then considers the antitrust analyses applied to these restraints by the courts and the aggregate effect of the restraints on competition. The Note further draws conclusions as to the balancing of interests reached by the courts and sets out a proposal for the protection of the public interest in the operation of professional sports.

A MODEL FOR ANTITRUST ANALYSIS IN PROFESSIONAL SPORTS MANAGEMENT CASES

The Sherman Act has been the single most influential factor in the restructuring of relationships in professional sports operations.[3] Section One of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce."[4] In the early years of enforcement of the Act, the courts strictly interpreted the language of section one, concluding that all agreements in restraint of trade were illegal.[5] The courts strictly applied the Act only briefly, however. In *Standard Oil Co. v. United States*,[6] the United States Supreme Court established the "rule of reason" as the prevailing standard of analysis. Under this standard, the court considers the effect of the restraint upon the entire industry: if the court determines that the restraint is unduly restrictive or that the dominant purpose of the agreement is the restraint of trade, the agreement will be held violative of section one. If it is determined that the restraint is supported by an overriding justification and is not anti-competitive in intent, the restraint will be held to be lawful.[7] Section one analysis is not restricted to the rule of reason, however. The United States Supreme

3. J. WEISTART & C. LOWELL, THE LAW OF SPORTS 477 (1979).

4. 15 U.S.C. § 1 (1974) provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal [and is a felony punishable by fine and/or imprisonment]. . . ."

5. Stenzel Co. v. National Window Glass Jobbers Ass'n, 152 F. 864, 868 (3d Cir. 1907). The court there stated: "Every contract or combination, therefore, *whether reasonable or unreasonable*, which directly restrains or which necessarily operates in restraint of trade or commerce among the states, is denounced and made unlawful by the Act." (Emphasis added.)

6. 221 U.S. 1 (1911).

7. Chicago Board of Trade v. United States, 246 U.S. 231 (1918), where the United States Supreme Court set forth several factors which are relevant in determining whether an activity is unreasonable under the rule of reason:

> [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. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or prob-

Court has found certain activities so contrary to the public policy favoring competition that they have been declared illegal per se.[8] Proof of the existence of such a restraint automatically constitutes a violation of section one.[9]

Section two of the Sherman Act declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize"[10] is subject to liability. Unlike section one, which prohibits restrictive activities conducted by a combination of actors, section two is directed at monopolistic activity. Such activity may be conducted by a single actor. Thus, no combination need be demonstrated in establishing a violation of section two.[11]

Courts have long recognized that professional sports leagues are unlike ordinary businesses and are unique in their basic structures.[12] Due to the unique nature of professional sports operations, a model for antitrust analysis in professional sports management cases is necessary. This model contains three levels—the first two consider the application of section one analysis and the third applies section two analysis. The first level of the model is consideration of the applicability of section one. This level focuses on the legal nature of a professional sports league. Specifically, is a professional sports league a market of competing entities, a joint venture or partnership, or a single entity? If it is determined that professional sports league operations are subject to section one scrutiny, analysis proceeds to the second level of the model. The second level is consideration of whether an agreement is lawful under section one. At this level it is determined whether an agreement is ancillary to a lawful purpose or otherwise within the rule of reason. The third level of the model is exclusive of the first two. This level involves consideration whether a league

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> able. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained, all are relevant facts.

Id. at 238.

8. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

9. *See* J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 155 (1976).

10. 15 U.S.C. § 2 (1974) provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [and is similarly punishable]. . . ."

11. Under Section One of the Sherman Act, "every contract, combination . . . , or conspiracy" which restrains trade "is . . . declared to be illegal. . . ." 15 U.S.C. § 1 (1974). This section condemns only joint action and does not seek to limit the methods of competition which are selected by a single firm. Generally, a firm acting on its own, without the voluntary involvement of others, cannot violate section one. *See, e.g.*, Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962); Whitley v. Foremost Dairies, Inc., 151 F. Supp. 914 (W.D. Ark. 1957), *aff'd* 254 F.2d 36 (8th Cir. 1958); Graham v. Hudgins, Thompson, Ball & Assoc., Inc., 319 F. Supp. 1335 (N.D. Okla. 1970); Beacon Fruit & Produce Co. v. H. Harris & Co., 152 F. Supp. 702 (D. Mass. 1957). Section two is directed at monopolization and declares that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" is subject to liability. 15 U.S.C. § 2 (1974). The requirement of duality of action is not an indispensable element of a Section Two violation. *See* E. GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 22 (1981).

12. Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1973); Flood v. Kuhn, 309 F. Supp. 793, 801 (S.D.N.Y. 1970); United States v. National Football League, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953).

practice is an attempt to monopolize or maintain a monopoly in violation of section two.

The threshold question in professional sports antitrust analysis is the determination of the legal nature of a professional sports league. Should a league be viewed as a market of competing entities, a joint venture or partnership, or a single entity? How a league is characterized will determine in large measure whether various league rules, policies and acts are viewed as restraints on competition subject to section one scrutiny. This is the first level of the model of antitrust analysis— determination of the applicability of the Sherman Act. If a professional sports league is viewed as a market of competing entities, any restraint on competition will be subject to strict Sherman Act scrutiny. At the other extreme, if a professional sports league is viewed as a single entity in which franchises do not compete with one another but rather with other entertainment media, league rules, policies and acts will not be subject to scrutiny under Section One of the Sherman Act. Under this view, section two alone will provide the standard for review.

Courts have adopted an intermediate view of professional sports leagues, universally considering them lawful joint enterprises.[13] The United States Supreme Court has held that joint ventures and partnerships may be regarded as single economic entities competing with other sellers in the market when they "pool their capital and share the risks of loss as well as the opportunities for profit."[14] The courts have yet to recognize that a professional sports league is immune from section one scrutiny under this "single entity" analysis.[15]

Indeed, it is questionable whether all leagues should be characterized as single entities. The National Football League (NFL) is a prime example of a joint enterprise that could qualify for single entity status. In the NFL, 97 percent of league revenues are shared equally.[16] While each club

13. This view was most recently reflected by Justice Rehnquist in his dissent from the denial of *certiorari* in National Football League v. North American Soccer League, 103 S. Ct. 499 (1982), where he stated that the "NFL owners are joint venturers who produce a product . . . which competes with other sports and other forms of entertainment in the entertainment market[place]." *Id.* at 500. This observation has been confirmed by virtually every court that has reviewed league activities. *E.g.*, North American Soccer League v. National Football League, 670 F.2d 1249, 1251 (2d Cir. 1982); Smith v. Pro-Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

14. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 336 (1982). The Court provided: "In such joint ventures [in which persons who otherwise would be competitors pool their capital and share the risks of loss as well as the opportunities for profit] the partnership is regarded as a single firm competing with other sellers in the market." *Id.*

15. The only case to suggest that professional sports league operations may be viewed as a single entity is North American Soccer League v. National Football League, 505 F. Supp. 659, 691 (C.D.N.Y. 1980). The district court there found that "[t]he acts of the defendants revealed by the evidence are the acts of a single economic entity, and as such fall outside the boundaries of the antitrust laws." *Id.* The appellate court never explicitly overruled the district court's conclusion that the National Football League operated as a single entity. Instead, that court held that characterization of the NFL as a single economic entity did not exempt an agreement between its members from section one scrutiny. North American Soccer League, 670 F.2d 1249, 1257 (2d Cir. 1982). This holding is untenable. Section one condemns only joint action and does not seek to limit methods of competition which are selected by a single entity. *See supra* notes 10 & 11.

16. Reply Brief in Support of Defendant National Football League's Appeal at 27, Los Angeles Memorial Coliseum Comm'n v. National Football League, Nos. 82-5572, 82-5574, 82-5664,

incurs expenses separately, any revenues enjoyed or expenses incurred by the franchises individually are directly related to League operations. Thus, where a league engages in a high degree of revenue sharing and any revenues enjoyed or expenses incurred individually by its member franchises are directly related to league operations, it should be treated as a single entity, immune from antitrust scrutiny under section one of the Sherman Act. Other professional sports leagues do not engage in a high degree of revenue sharing. Instead, each club independently markets its broadcast rights and retains a great proportion of the gate revenues from exhibitions in its home territory.[17] In such leagues, restraints on competition among franchises should be subject to section one scrutiny.

The second level of the model of antitrust analysis is determining whether an agreement is lawful under section one. Sherman Act analysis has incorporated the common law rule providing that members of joint ventures are free to limit competition among one another insofar as such limitation is ancillary to the lawful purpose of the venture.[18] This rule underlies many decisions upholding covenants not to compete on the grounds that such agreements, though ordinarily unlawful per se, are lawful when ancillary to a lawful purpose.[19] If an agreement is ancillary to a lawful purpose, it is improbable that it shall be condemned as an antitrust "conspiracy." If it is not, the "rule of reason" remains appropriate.

The third level of the model of professional sports antitrust analysis is determining whether a league practice is an attempt to monopolize or maintain a monopoly in violation of section two. The duality of action requirement of section one analysis is not an indispensable element of section two analysis. A section two violation may result from the action of a

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82-5665 (9th Cir. Feb. 28, 1984). *See* A SUMMARY OF NATIONAL FOOTBALL LEAGUE ECONOMICS 1970-1980 8 (1982).

17. This is the case in Major League Baseball, in which there is an existing network television contract for only a limited number of games. All other games are marketed independently by the member clubs. The National Football League, on the other hand, markets its games as a league. The member clubs share equally in these revenues, rather than entering into individual marketing arrangements. For a detailed discussion of professional sports broadcasting practices, see Horowitz, *Sports Broadcasting*, GOVERNMENT AND THE SPORTS BUSINESS 275-324 (R. Noll ed. 1974).

18. This was most recently recognized in Justice Rehnquist's dissent from the denial of *certiorari* in National Football League v. North American Soccer League, 103 S. Ct. 499 (1982), where he stated that "the cross-ownership rule, then, is a covenant by joint venturers who produce a single product not to compete with one another. The rule governing such agreements was set out over 80 years ago by Judge (later Chief Justice) Taft: A covenant not to compete is valid if 'it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of its fruits by the other party.'" 103 S. Ct. at 501 (*citing* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899)). The significance of the ancillarity of an agreement that does not fall into a per se category is that it increases the probability that the restraint will be found reasonable. Los Angeles Memorial Coliseum Comm'n v. National Football League, Nos. 82-5572, 82-5574, 82-5664, 82-5665 (9th Cir. Feb. 28, 1984) (*citing* Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir. 1983). *See* cases cited *infra* note 77.

19. Covenants not to compete are valid if (1) ancillary to the main business purpose of a lawful contract, and (2) necessary to protect the covenantee's legitimate property interests, which require that the covenants be as limited as is reasonable to protect the covenantee's interests. Lektro-Vend Corp. v. Vendo Co., 660 F.2d 225, 265 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982). See cases cited *infra* note 77.

single firm acting alone.[20] Section two condemns the misuse of monopoly power as well as actions undertaken to secure monopoly power.[21] In the absence of a showing of actual or attempted market dominance, section two provides a single entity greater freedom in its competitive practices than would be afforded a collection of actors acting in concert subject to section one scrutiny.[22]

In order to establish a section two violation, the plaintiff must initially establish that the defendant league is guilty of monopolization.[23] This raises the question of what constitutes monopoly power. In answering this question, the court must determine the relevant product market, the relevant geographic area, the degree of market power required to constitute a section two violation, and the appropriate measure of market power. Determination that a league enjoys a monopoly does not conclude the section two analysis.

Once the plaintiff establishes that the defendant league has established monopoly power, he must demonstrate that the defendant has misused its market position.[24] Certain business practices which adversely affect competitors are recognized as the product of legitimate business judgment.[25] Social policy supports the development of efficient practices, despite their adverse effects on competitors. What is required to establish a violation is evidence that the defendant, in engaging in a practice, had a specific intent to discourage or destroy competition.[26] Absent evidence of such intent, the court may still find a section two violation.

The standard applied in the absence of evidence of intent is elusive. Previous decisions suggest that a section two violation will be found where defendant's dominant market position is established in conjunction with actions which effectively exclude the development of competition.[27] The focus for analysis is the relative market position of the defendant and the aggressiveness of its practices.[28]

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

21. *See* J. WEISTART & C. LOWELL, *supra* note 3, at 689-90.

22. *Id.* at 691. *See e.g.*, Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 361 (4th Cir. 1974). These cases hold that a single entity may price products as it wishes, so long as its pricing policies are not an attempt to monopolize. Such price-fixing among a group of entities constitutes a per se violation of section one. *See also* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

23. *See* J. WEISTART & C. LOWELL, *supra* note 3, at 691.

24. *Id.* at 691. *See also* United States v. Griffith, 334 U.S. 100 (1948); Telex Corp. v. IBM Corp., 510 F.2d 894 (1975); American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), *aff'd* 323 F.2d 124 (4th Cir. 1963).

25. *See* J. WEISTART & C. LOWELL, *supra* note 3, at 691.

26. *Id. See also* United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conf., 155 F. Supp. 768, 813 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961).

27. *See* J. Weistart & C. Lowell, *supra* note 3, at 692. *See also* United States v. Griffith, 334 U.S. 100 (1948); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

28. *See* J. WEISTART & C. LOWELL, *supra* note 3, at 692.

RESTRICTIONS ON FRANCHISE MOVEMENT: *WISCONSIN V. MILWAUKEE BRAVES*

Professional sports leagues engage in a high degree of self-regulation. One of the chief regulations imposed by leagues are restrictions on the territorial rights and privileges of franchises in the broadcast and exhibition of games.[29] Within these restrictions are restrictions on franchise movement. In order to relocate the territory of a franchise, the approval of a super-majority, generally three-fourths, of the league membership is required.[30]

The leagues have a great interest in restrictions on the movement of franchises. Due to the high degree of financial interdependence in professional sports leagues, the stability of each franchise is important to the league's success. If franchises were permitted to move freely, a franchise could move into the market of an existing franchise, jeopardizing the economic security of the existing franchise, the relocated franchise, and the league itself.[31] Further, the stability of franchise locations is a key factor in insuring goodwill among fans and increasing gate receipts. Stability of franchise locations is also of great importance to the cities which support the franchises. Public bonds are often utilized to construct stadiums and arenas for use by professional sports franchises.[32] Of even greater significance to the cities, professional sports franchises provide a mechanism for the development of service industries.[33] While the leagues and cities have an important interest in controlling the location of franchises, investors in the franchises often have a competing interest in enjoying the greatest benefits their franchises can generate, including vast broadcast revenues.[34]

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29. National Football League Constitution arts. 4.1 and 4.3 provide for an exclusive right to exhibit football within 75 miles of the franchise's home site; National League Constitution and Rules art. 3.2 provides for a territory of 100 miles; American League Constitution article 3.2 provides a territory of ten miles; National Hockey League Constitution article 4.1(c) provides a territory of 50 miles.

30. National Football League Constitution and Bylaws, § 4.3 provides:

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

Id.

31. Recognizing the great degree of financial interdependence of franchises in professional sports leagues, such leagues have been analogized to a single firm attempting to exploit a national market:

> The most appropriate analogy for a sports league is that of a single firm attempting to exploit a national market. The firm will have to decide where to locate its various branch offices in order to maximize its economic return. The enterprise will seek to avoid competition and duplication among its various branches as this will only frustrate its effort to secure the best return in the largest market. In order to effectuate these goals, control of marketing policy will be centralized and not allocated to the various divisions, which would tend to puruse individualistic goals.

J. WEISTART & C. LOWELL, *supra* note 3, at 699-701.

32. For a discussion of public ownership of sports facilities, see Okner, *supra* note 2, at 325-45.

33. *See supra* note 1 and accompanying text.

34. Broadcast rights have been an increasingly important revenue source in professional sports, providing 43.6% of NFL revenues in 1980. A SUMMARY OF NATIONAL FOOTBALL LEAGUE ECONOMICS 1970-1980, supra note 16, at 3. Broadcast revenues provided 20.0% of Major League

The courts have been called upon recently to balance these competing interests of leagues, cities and independent franchise owners in the enforcement of restrictions upon franchise movement.[35]

The first attack on league-imposed restrictions on franchise movement occurred in 1966 in *Wisconsin v. Milwaukee Braves, Inc.*[36] The Braves franchise in the National League moved from Boston to Milwaukee in 1953 with League approval. While operating in Milwaukee, the franchise enjoyed great public support. In the early 1960s, however, attendance underwent a significant decline, parallel to the decline of the Braves in the League standings. In 1962, a new corporation took control of the Braves franchise. Two years later, the new ownership sought league approval for relocation of the franchise in Atlanta. The National League owners, in compliance with a League rule requiring the approval of three-fourths of the owners prior to relocation, approved the move.[37] An existing stadium lease, however, prevented relocation of the franchise until the close of the 1965 season.[38]

In August 1965, the state of Wisconsin brought an action to prevent the relocation of the franchise. The complaint alleged that the Braves and the League maintained monopoly power over major league baseball and that termination of the Braves' operation in Milwaukee would restrain various types of trade and commerce associated with major league baseball in Milwaukee. The state of Wisconsin sought injunctive relief, which would require the defendant League to operate a major league baseball team in Milwaukee and would restrain the Braves from playing home games outside of Milwaukee until steps had been taken to secure a substitute major league franchise.[39]

In response to this antitrust challenge, Major League Baseball argued that its "national scope and character" required a national system of regulation. Baseball further argued that its system of regulation was "neces-

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Baseball revenues for the period 1975-77. J. MARKHAM & P. TEPLITZ, BASEBALL ECONOMICS AND PUBLIC POLICY 46 (1981). The broadcast market of a franchise in the NFL is relatively insignificant, as television revenues are shared equally as part of a national television package. In baseball, however, each franchise markets its own television package, with a relatively minor national package. Thus broadcast market area is highly significant in baseball:

> New York, with a 15,000,000 potential reaching into southern New England, is the prime TV area; Houston, which has constructed a radio network, with relatively little television, over an area of hundreds of miles, because no other major-league team is geographically close, commands a million-dollar fee; but Kansas City, with St. Louis to the east, Minnesota to the north, Houston to the southeast and sparsely settled plains and mountains to the west, can get only a couple of hundred thousand. The Los Angeles Dodgers, in car-bound California, get as much for radio as Eastern teams do for television.

Davis, *Self-Regulation in Baseball*, in GOVERNMENT AND THE SPORTS BUSINESS 373 n.55 (R. Noll ed. 1974). The advent of pay television may make a franchise's broadcast market area increasingly important.

35. Los Angeles Memorial Coliseum Comm'n v. National Football League, Nos. 82-5572, 82-5572, 82-5574, 82-5664, 82-5665 (9th Cir. Feb. 28, 1984). *See infra* notes 112-23 and accompanying text.

36. 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966), *reh'g denied*, 385 U.S. 1044 (1967).

37. *Id.* at 703, 144 N.W.2d at 2.

38. *Id.*

39. *Id.*

sary and reasonable to promote and preserve the quality of playing skills among member clubs."[40] Baseball's arguments suggested that its system of self-regulation was justified by its national character, which entitled it to immunity from both federal and state antitrust laws. Alternatively, the Leagues argued that even if baseball was subject to antitrust scrutiny, such restraints on franchise movement were within the "rule of reason."[41]

The state of Wisconsin presented a novel antitrust challenge in this case. Two earlier United States Supreme Court cases established that federal antitrust laws did not apply to professional baseball, as it did not constitute interstate commerce within the meaning of the Sherman Act.[42] The Milwaukee County Circuit Court did not find these federal law cases controlling. Rather, it found that baseball was subject to Wisconsin antitrust law.[43]

While recognizing that owners "must exercise reasonable control and . . . follow reasonable procedures in the issuance of memberships in the national league . . . and in the definition of sites for baseball exhibitions and as respects the transfer of memberships," the Milwaukee County Circuit Court held that organized baseball was an illegal monopoly and, further, that it had engaged in an illegal boycott.[44] The boycott consisted of two elements—first, the agreement among the teams, set forth in the National League Constitution, to limit the number of competitors in the business and, second, the decision to allow the Braves to transfer out of Milwaukee. While the court recognized that the League could validly regulate its membership, the court found that expansion of the National League was feasible at that time and that refusal to issue a replacement franchise constituted an unreasonable exercise of the League's monopolistic control. The court stated that "even if the shutdown of baseball in Milwaukee was not intended to restrain trade, the decisions to transfer, not to expand, and to refuse to deal with the Milwaukee market would nevertheless be illegal efforts to protect and extend the power of an existing monopoly."[45] The trial court granted injunctive relief, requiring the League to facilitate the organization and operation of a major league baseball team in Milwaukee beginning in 1967. Unless and until such franchise was granted, the defendant League was enjoined from playing the Braves'

40. *Id.* at 706, 144 N.W.2d at 7. *See* ANTITRUST & TRADE REG. REP. (BNA) No. 250, A-7 (1965). A 1964 Senate Report recognized that a successful sports league must regulate itself in order to achieve its business goals:

> The uniqueness of the business of competitive team sports grows out of the public interest in teams which are as competitively equal as possible, and the responsibility of the league of teams in maintaining both competitive balance and geographic balance. Without competitive and geographic balance, the leagues and their weak teams are unable to attract and hold the public interest which is necessary for their survival.

A SUMMARY OF NATIONAL FOOTBALL LEAGUE ECONOMICS, *supra* note 16, at 10.

41. For a discussion of the "rule of reason," see *supra* note 7 and accompanying text.

42. Toolson v. New York Yankees, 346 U.S. 356 (1953); Federal Baseball Club of Baltimore v. National League, 259 U.S. 200 (1922).

43. ANTITRUST & TRADE REG. REP. (BNA) No. 205, A-7 to 8.

44. *Id.*

45. *Id.* at A-7.

home schedule anywhere other than Milwaukee County Stadium.[46]

On appeal, a 4-3 majority of the Wisconsin Supreme Court reversed the trial court, refusing to apply the state's antitrust statutes to major league baseball.[47] The supreme court held that state regulation of the operations of major league baseball would conflict with congressional policy and unreasonably burden interstate commerce. The majority opinion cited committee reports of both houses of Congress which discussed the extension of antitrust immunity to professional baseball. Upon considering these reports, the court determined that Congress would, when motivated, act in response to concern over organized professional sports, as it had done in regard to professional football.[48] In view of the commerce and supremacy clauses of the United States Constitution and the absence of congressional response to the United States Supreme Court's decisions exempting professional baseball from antitrust scrutiny, the majority concluded that there was a national policy in this segment of interstate commerce and that the Wisconsin court's application of state antitrust laws to a League decision regarding the location of a franchise would conflict with that national policy.[49] The majority further noted that although a monopoly existed, to require the Braves to maintain their operations in Milwaukee would be inconsistent with the "very policy of antitrust law," as it would maintain the monopoly at the expense of those cities which did not have major league franchises.[50]

A review of this decision makes clear the relationship among the various interests in professional sports. Where a league is permitted to enforce league-approved relocation of member franchises, the interests of the league and franchise owner will prevail at the expense of the community from which the franchise moves. League interests are likely to be served where league members must ratify relocation decisions, as one may presume that the owners of the franchises not involved in the relocation will exercise their best interests in casting their votes on the relocation decision. Similarly, the owner seeking relocation will pursue his private interest by voting for relocation.

The city from which the franchise is moved, however, has no voice in the relocation decision. While such a decision may be in the best interest of the league and franchise, nothing assures that it will be responsible with respect to the city. Milwaukee provided bonds for the construction of Milwaukee County Stadium, and the Braves set attendance records for several years during operation in that city.[51] Yet, there was no assurance that the

46. *Id.* at A-8. This requirement was stayed until May 18, 1966, provided the League submitted a satisfactory plan for expansion in 1967 by May 16, 1966.

47. Milwaukee Braves, 31 Wisc. 2d at 732, 144 N.W.2d at 18.

48. *Id.* at 725 nn.13, 14, 144 N.W.2d at 14, 15 nn.13 & 14 (citing S. REP. No. 462, 82d Cong., 2d Sess. 6 (1965); H.R. REP. No. 2002, 82d Cong., 2d Sess. 7, 230 (1965)). S. REP. No. 462 stated:

> The Congress has shown awareness of the problems created by the various decisions of the Supreme Court affecting organized professional team sports and has given consideration to their antitrust aspects for 14 years. In that time approximately 60 bills have been introduced dealing with the status of professional team sports under the antitrust laws.

49. *Id.* at 731, 144 N.W.2d at 18.

50. *Id.* at 720, 144 N.W.2d at 12.

51. *Id.* at 703, 144 N.W.2d at 2. Attendance in 1953 reached 1,826,397. In each of the next

owners would recognize these factors in the relocation vote. While it may be argued that the other league members would not find it in their best interests to approve such a move while the original host community was already providing adequate support, the Milwaukee case demonstrates that this argument does not always hold true. Thus, the league membership cannot be relied upon to adequately represent the interests of the host city in a relocation decision.

Similarly, the cities of Brooklyn and New York provided great support to their franchises prior to the relocation of the Dodgers and Giants in Los Angeles and San Francisco.[52] Each of these cases demonstrates that while a league may need to regulate franchise movement, relocation decisions must be subject to outside scrutiny when the relocation is approved. Absent such scrutiny, cities may suffer tremendous losses and will be much less inclined to make capital investments in support of professional sports franchises.

CROSS-OWNERSHIP RESTRICTIONS: *NORTH AMERICAN SOCCER LEAGUE V. NATIONAL FOOTBALL LEAGUE*

A major concern of any business venture is that its members dedicate themselves to the advancement of the venture. This concern is particularly significant in the case of a professional sports league, where each owner must make a substantial investment in his franchise in order for the league to achieve success in the aggregate.[53] To insure that its members would devote their best efforts to League affairs, the NFL established a policy prohibiting a franchise owner from maintaining an interest in a franchise in a competing league.[54] Under the NFL's policy, a "competing league"

four years, attendance was over 2,000,000. In 1958, attendance was 1,971,101. Attendance dropped each year thereafter, reaching only 1,101,441 in 1961 and 766,921 in 1962. This decline in attendance may be largely attributed to the Braves' decline in the standings. Following National League pennant winning seasons in 1957 and 1958, the Braves finished second in 1959 and 1960, fourth in 1961 and fifth in 1962. Profits before taxes for this entire period exceeded $7,500,000. Following the sale of the franchise in 1962, attendance increased to 773,018 for the 1963 season, despite further decline in the standings. In 1964 attendance again increased to 910,911. Despite this fine attendance record and consecutive years of increases in attendance, the Board of Directors voted to transfer the franchise to Atlanta. *Id.*

52. During the ten seasons prior to relocation in 1958, the Dodgers' average attendance was 1,358,683. The Giants' average attendance for that period was 1,140,566. The Dodgers' average attendance was the second best in the eight-team National League, with the Giants' a respectable fourth. RONALD ENCYCLOPEDIA OF BASEBALL (1962). In the case of the Braves, Dodgers and Giants, the relocation sites, Atlanta, Los Angeles and San Francisco each offered an entire region without major league baseball. Thus the owners' decision to allow the move was not the result of poor support in the existing site, but the result of an opportunity to tap previously untapped markets affording greater revenues.

53. It has been estimated that an investment of $40 or $50 million is required to purchase an expansion franchise in the National Football League. *The Jury Goofed in the Case of Al Davis v. NFL*, The Cleveland Press, May 9, 1982, at —. It has been reported that Robert Irsay currently seeks $50 million for 100% ownership of the Colts franchise in the NFL. Glauber, *Colts Reportedly Had Vans Ready for Move*, Arizona Daily Star, Jan. 22, 1984 at D3, col. 1.

54. North American Soccer League v. National Football League, 670 F.2d 1249, 1254-55 (2d Cir. 1982). The NFL policy, which began in the 1950s, prior to the establishment of the North American Soccer League, was put into writing in 1967. At that time a resolution was approved by the League owners calling for the drafting of amendments to the League Constitution prohibiting cross-ownership. Despite this resolution, no action was taken. In 1972 another resolution was passed providing that League owners would not acquire operating control of a franchise in a

was not limited to other professional football leagues; it extended to all professional sports leagues.

While it is clear that league owners have a significant interest in insuring the loyalty of franchise owners and protecting their capital investments, other professional sports leagues have an interest in acquiring capital and the managerial expertise of owners of existing NFL franchises. Developing professional sports leagues have a particular interest in obtaining the assistance of existing owners due to their demonstrated ability to assume the great financial risks associated with professional sports and to work compatibly.[55]

The professional sports league most greatly affected by the NFL's cross-ownership restraint was the North American Soccer League (NASL). During the last two decades the NASL has become the most successful soccer league in the United States. This success was largely due to the efforts of Lamar Hunt and Joe Robbie, two NFL owners who promoted professional soccer and provided capital for its development.[56] As the NFL began to feel increasing pressure from the rival soccer league, owners of NFL franchises sought to force Hunt and Robbie to divest themselves of their soccer holdings as a condition of retaining their interests in the NFL.[57]

Enforcement of the cross-ownership restriction would financially cripple the NASL; therefore, the NASL filed suit in federal district court, alleging that the restriction violated the Sherman Act[58] and seeking injunctive relief.[59] The starting point for the court's analysis was the recognition that the business of professional football and its cross-ownership restriction were subject to antitrust scrutiny.[60] Unlike professional baseball, professional football had previously been determined by the United States Supreme Court to be subject to antitrust scrutiny.[61]

The court then turned to the question of the appropriate standard of antitrust scrutiny. Recognizing the particular business needs of professional sports leagues, the court chose to apply the rule of reason.[62] Under

competing league. Further, the resolution provided that any member holding such a controlling interest would make his "best effort" to dispose of it. A similar resolution was passed by the League owners in each of the next five years except, through inadvertence, in 1975. In 1978 an amendment to the League Constitution was submitted which would prevent all majority owners, certain minority owners, officers and directors of League teams and certain relatives of such persons from owning any interest in a team engaged in a "major team sport." *Id.*

55. For a discussion of the professional sports capital market, see *infra* note 103.

56. *North American Soccer League*, 670 F.2d at 1253-54.

57. *Id.* at 1254-55.

58. *North American Soccer League*, 465 F. Supp. at 665.

59. *Id.* at 667.

60. *Id.* at 672.

61. Radovich v. National Football League, 352 U.S. 445 (1957).

62. *North American Soccer League*, 465 F. Supp. at 673. Due to the relationship of franchises in a professional sports league, the court rejected plaintiff's contention that the cross-ownership rule constituted a classic group boycott, per se unlawful under the Sherman Act. "The problem with applying the 'classic group boycott' label to the facts of this case lies in the peculiar relationship among the NFL and its member clubs. It is now a well-recognized principle of the relevant caselaw that the members of a professional team sports league are more like 'economic joint venturers' than competitors *inter se*." *Id.* at 673-74 (citing Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. denied*,

the rule of reason, the decisive issue is whether the challenged agreement promoted competition or suppressed it.[63] While the court failed to determine the competitive nature of the cross-ownership restriction, it noted that the case presented serious questions, forming a fair ground for litigation. As a fair ground for the litigation existed and the soccer league faced irreparable harm if the restriction was enforced, the court issued a preliminary injunction pending determination of the case restraining the National Football League from implementing its cross-ownership ban.[64]

Following argument, the district court lifted the preliminary injunction.[65] The court found that the case was beyond the boundaries of Section One of the Sherman Act, since the NFL acted as a single economic entity in the formulation of the cross-ownership restriction.[66] The court determined, further, that the true competition was between the NASL and the NFL in the entertainment industry. The court distinguished cases in which professional football operations were subjected to antitrust scrutiny, pointing out that in those cases the restrictions affected competition among league franchises for players' services and revenues. In the instant case, however, the League restriction had no effect on competition among member teams but affected only competition among professional sports leagues. Accordingly, the district court denied the injunctive relief sought by the NASL.[67]

The soccer league appealed, challenging the antitrust immunity extended to the NFL by the district court. The Second Circuit failed to make clear whether it characterized the league as a "single entity" or a "joint venture." Instead, it declared that antitrust scrutiny should apply in either case. The court of appeals held that characterization of the league as a single entity would not immunize the cross-ownership agreement from antitrust scrutiny, as the Sherman Act applied to " 'every' combination or agreement concerning trade, not just certain types."[68] The appellate court reasoned that allowing leagues antitrust immunity as single economic entities would provide a loophole for professional sports leagues to enter into agreements to shield individual franchises as discrete economic entities

434 U.S. 801 (1977); Levin v. National Basketball Ass'n, 385 F. Supp. 149 (S.D.N.Y. 1974); San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974)).

63. Standard Oil Co. v. United States, 221 U.S. 1 (1911). *See supra* text accompanying notes 6 & 7. *See also* Note, *The NFL's Final Victory Over* Smith v. Pro-Football: *Single-Entity Inter-League Economic Analysis*, 27 CLEV. ST. L. REV. 541, 544 (1978).

64. *North American Soccer League*, 465 F. Supp. at 678-79.

65. *North American Soccer League*, 505 F. Supp. at 692.

66. For a discussion of the joint action requirement of section one, see *supra* note 11 and accompanying text.

67. *North American Soccer League*, 505 F. Supp. at 677. While determining the NFL to be a single economic entity exempt from section one scrutiny, the district court failed to discuss the cross-ownership restriction under section two analysis. *See supra* note 11. The district court simply summarized its analysis as follows:

> Within the identifiable submarkets, the competition between the NASL and NFL which forms the subject matter of this action is in fact competition between two single economic entities uncomplicated by any relevant competition between the member clubs of a league. Under the *ratii decidendi* of the professional sports league antitrust cases, no antitrust implications arise.

505 F. Supp. at 685.

68. *North American Soccer League*, 670 F.2d at 1256-57.

from competition from rival leagues.[69] The appellate court noted that combinations of actors acting as "joint ventures" traditionally have been subject to antitrust scrutiny, including combinations of professional sports franchises acting as leagues.[70]

Having found the cross-ownership ban subject to Sherman Act scrutiny, the court next considered the appropriate standard of scrutiny. The North American Soccer League characterized the cross-ownership restriction as a "group boycott" and a "concerted refusal to deal" subject to invalidation under the "per se" standard of review.[71] The court rejected this characterization, as the restriction did not impede competition among member clubs but instead among rival leagues. Instead, the court chose to apply the rule of reason, examining the effect of the restriction on competition within the professional sports capital market.[72]

The Second Circuit noted that the sources of sports capital are limited and that franchise owners in existing leagues constitute a significant source of capital. The court recognized that capital is not fungible in the professional sports business. The high degree of interdependence in league operations requires that suppliers of capital be compatible with other league

69. *Id.* at 1257. The appellate court effectively disregarded the existence of revenue sharing in the National Football League. Revenue sharing is so extensive in the NFL that 97% of revenues are shared among the clubs. Reply Brief in Support of Defendant National Football League's Appeal at 27, Los Angeles Memorial Coliseum Commission v. National Football League, Nos. 82-5572, 82-5573, 82-5574, 82-5664, 82-5665 (9th Cir. Feb. 28, 1984). Further, 100% of NFL revenues are jointly earned and all NFL football is produced under the League trademark. *Id.* In a league engaged in such an extensive system of revenue sharing and total interdependence in the production of revenue, it cannot be said that individual franchises are discrete economic entities, as characterized by the appellate court. Any benefit derived from the cross-ownership ban protected the members equally, regardless of whether a North American Soccer League franchise operated in the same market as the National Football League franchise. *Cf.* United States v. Topco Assoc., 405 U.S. 596 (1972).

70. *North American Soccer League*, 670 F.2d at 1257. (*citing* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Radovich v. National Football League, 352 U.S. 445 (1957); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Los Angeles Memorial Coliseum Comm'n v. National Football League, 484 F. Supp. 1274 (C.D. Cal.), *rev'd on other grounds*, 634 F.2d 1197 (9th Cir. 1980); Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied* 441 U.S. 907 (1979); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. denied* 434 U.S.801 (1977); Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 164 (C.D. Cal. 1979); Linseman v. World Hockey Ass'n, 439 F. Supp. 815 (D. Conn. 1977); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975); Bowman v. National Football League, 402 F. Supp. 754 (D. Minn. 1975); Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972); *cf.* San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974); Levin v. National Basketball Ass'n, 385 F. Supp. 149 (S.D.N.Y. 1974)).

71. 670 F.2d at 1258. Group boycotts have traditionally been held per se violations of the Sherman Act. See United States v. Topco Assoc., 405 U.S. 596 (1972) (allocation of market between horizontal competitors); United States v. General Motors Corp., 384 U.S. 127 (1966) (conspiracy between manufacturers and distributors to eliminate price competition by discounters); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (agreement between ten competing national manufacturers and their distributors not to sell products to petitioner or to sell only at discriminatory prices of unfavorable terms); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940) (agreements between horizontal competitors to maintain the price of their product); United States v. Koppers Co., Inc., 652 F.2d 290 (2d Cir. 1981) (agreement between competitors to rig bids and allocate market territories).

72. *North American Soccer League*, 670 F.2d at 1259. For a discussion of the application of the rule of reason, see *supra* notes 6 & 7 and accompanying text.

members and have a sufficient understanding of the nature of the business of sports. Emphasizing the limited nature of the sports capital market, the court concluded that the net effect of the cross-ownership ban was substantially to restrain the function of new leagues offering competition in the professional sports entertainment market. The ban therefore, violated the rule of reason.[73]

The NFL argued that the restriction was necessary to maintain loyalty of team owners and to prevent unauthorized disclosure. The appellate court rejected this argument, noting that loyalty and confidence could be protected by less restrictive methods. The court also noted that the restriction did not insure that owners would dedicate a greater level of their resources to NFL operations.[74]

North American Soccer League marks a change in the courts' view of professional sports league operations. Previous cases had recognized the authority of a league to regulate its internal operations where the regulations did not restrain competition between member franchises or competition for player services and revenues within the league.[75] Prior to *North American Soccer League*, the courts universally accepted as valid under the antitrust laws league regulations essential to the preservation of league operations.[76] This treatment was consistent with antitrust cases outside the professional sports context, in which courts have recognized as lawful restraints on competition that are ancillary or inherent to the creation or efficient functioning of a joint venture.[77] *North American Soccer League* effectively reverses the previously accepted tenet that professional sports franchises must not compete vigorously in a business way;[78] now the league must allow its members to compete directly against other member franchises through a rival league.[79]

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73. 670 F.2d at 1261.

74. *Id.* at 1261-62.

75. Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1973); Flood v. Kuhn, 309 F. Supp. 793, 801 (S.D.N.Y. 1970); United States v. National Football League, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953).

76. The courts recognized over thirty years ago that professional sports franchises do not stand in the relationship of horizontal business competitors and that their entertainment "product" can only be produced jointly. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953). The court stated:

> Professional Teams in a league . . . must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all teams to compete as hard as they can against each other in a business way.

Id. at 323. *See* Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. ANTITRUST LAW SECTION 211, 233 (1959).

77. United States v. Penn-Olin Chem. Co., 378 U.S. 158, 169 (1964). Further, it has been held that parties may even agree as to prices where their agreement is required to produce and market a product. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, *rehg'd denied* 450 U.S. 1050 (1979); United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953). The rule also underlies other decisions in which covenants not to compete have been upheld on the rationale that such agreements, though ordinarily per se unlawful, are lawful when ancillary to a lawful purpose. United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942) *aff'd* 320 U.S. 711 (1943); Tri-Continental Financial Corp. v. Tropical Marine Enter., Inc., 265 F.2d 619 (5th Cir. 1959); Monagram Indus., Inc. v. Sar Ind., 64 Cal. App. 3d 692, 134 Cal. Rptr. 714 (1977).

78. *See supra* note 76.

79. Following the *North American Soccer League* decision, the DeBartolo family, owners of

To require that a joint venture allow its members to compete directly against it for players' services, stadium leases and fan support is beyond the intent of the antitrust laws. The antitrust laws are intended to prohibit restraints on competition, not to insure that competitors compete effectively.[80] Viewed as to its impact on the sports market in the aggregate, this decision will frustrate competition. If the sports capital market is as restricted as characterized in *North American Soccer League*,[81] the formation of new leagues is not feasible, even following the invalidation of the cross-ownership ban. While some existing owners may provide capital for the development of new leagues, few will encourage the development of franchises to compete with their existing franchises. While elimination of the cross-ownership ban will not result in the development of new leagues, it affords the existing owners a mechanism by which they can acquire a significant interest in established competing leagues, thereby limiting competition.[82] As a result, the existing owners will enjoy an even greater market concentration and will exert even greater economic leverage over the players, cities and fans.[83] More significantly, the owners may develop sufficient economic leverage to prevent those seeking to enter the sports capital market from competing.

RESTRICTIONS ON THE AWARD OF FRANCHISES: *MID-SOUTH GRIZZLIES V. NATIONAL FOOTBALL LEAGUE*

The decision to expand operations carries significant consequences for

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the NFL's San Francisco Forty-Niners, purchased the expansion Pittsburgh Maulers of the United States Football League (USFL). NFL Commissioner Rozelle conceded that the NFL could not prevent the senior DeBartolo from purchasing the Pittsburgh franchise for his daughter. But the other owners told the Forty-Niners' DeBartolo they could foresee problems if his team and the USFL franchise in Pittsburgh were competing to sign draft choices or coaches. *DeBartolo's USFL Plans Upset NFL*, The Washington Post, March 23, 1983, at D1. The NFL also indicated it would feel uncomfortable having family members privy to private information from both leagues. *Id.* On April 4, 1983 the United States Football League announced both its plans to expand and DeBartolo's ownership of the new Pittsburgh franchise, despite objections by NFL officials. *DeBartolos Pursue USFL Franchise*, The Washington Post, April 5, 1983, at D7.

80. *North American Soccer League*, 505 F. Supp. 659, 677 (1980). The court there stated:

> The distinction lies between competition and competitors. "The law is well established that it is competition, and not individual competitors that is protected by the antitrust laws." Levin v. National Basketball Ass'n, 385 F. Supp. 149, 152 (S.D.N.Y. 1974) (citing Checker Motors v. Chrysler Corp., 283 F. Supp. 876 (S.D.N.Y. 1968) *aff'd* 405 F.2d 319 (2d Cir. 1969). Economic conduct may damage competitors. Indeed, it may be specifically designed to do so. There is nothing illegal in that. Competitors compete. The disadvantaged competitor's injury is compensable under the Clayton Act, if, and only if, such injury is a particularized manifestation of that greater public injury proscribed by the Sherman Act.

Id. See Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, 903 (D.Md.), *aff'd* 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

81. *See infra* note 103.

82. *See infra* notes 104 & 107 and accompanying text.

83. The professional sports capital market is already highly centralized. Despite attempts by professional sports leagues to prevent cross-ownership, the practice is common. Prime examples are Ted Turner, owner of the Atlanta Braves of the National League and Atlanta Hawks of the National Basketball Association; Edward DeBartolo Sr. and family, owners of the San Francisco Forty-Niners of the National Football League, Pittsburgh Maulers of the United States Football League, and Pittsburgh Penguins of the National Hockey League; and Lamar Hunt, owner of the Kansas City Chiefs of the National Football League and Dallas Tornado of the North American Soccer League and a major figure in professional tennis tournaments.

any business venture, and this is particularly true for professional sports leagues. Unlike expansion of other enterprises, expansion in professional sports results in major personnel changes. In order to stock an expansion franchise, the existing franchises have to place active players into an expansion pool. These personnel changes often result in an imbalance in the quality of personnel during the years immediately following expansion.[84] This imbalance in the quality of personnel threatens fan interest and league revenues.[85] Further, the decision to expand often alters the market area on which an existing franchise may draw.[86] Finally, and possibly most important, the creation of a new franchise requires the sharing of league revenues among more interests.[87]

While professional sports leagues have a great interest in restricting the number of franchises competing in a limited professional sports entertainment market, potential franchise cities have an important interest in securing a franchise. Professional sports franchises attract and create service industries, while generating unmatched civic pride.[88] Similarly, those seeking to invest in a professional sports franchise have a great interest in being admitted into an established league, as it offers stability of investment and prestige.

In 1975, the interests of a professional sports league and its existing owners came directly into conflict with the interests of a potential owner and franchise site. At that time a Memphis, Tennessee group sought to bring an expansion National Football League franchise to that city. The NFL Constitution and Bylaws required that all persons holding an interest in an applicant for membership be approved by "not less than three-fourths or 20, whichever is greater, of the members of the League."[89] After

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84. The effect of expansion on the balance of competition throughout a professional sports league is demonstrated by the performance of the following expansion teams: Dallas Cowboys (0 wins, 11 losses, 1 tie), New York Mets (42 wins, 120 losses), and Tampa Bay Buccaneers (0 wins, 14 losses).

85. See Noll, *Attendance and Price Setting*, in GOVERNMENT AND THE SPORTS BUSINESS 115-57 (R. Noll ed. 1974).

> In baseball and hockey, sufficient variance in the closeness of championship races was present to provide a rough estimate of the importance of uncertainty of outcome for attendance. The results indicate that a league benefits from lessening the quality differences among teams. While no proof is available that the other sports are similarly affected by closeness of competition, it is reasonable to suppose that they are.

Id. at 156.

86. Expansion franchises have been awarded in the market area of several existing franchises: Los Angeles Angels (Los Angeles Dodgers), New York Mets (New York Yankees), and Tampa Bay Buccaneers (Miami Dolphins).

87. For a discussion of National Football League revenue sharing practices see *supra* text accompanying note 7. In 1975, the last season the National Football League operated with 26 franchises, the average operating profit per club was $856,000. In the expansion season of 1976, in which the Seattle and Tampa Bay franchises were added, the average operating profit per club declined to $86,000. In 1977 the League franchises suffered an average operating loss of $27,000. While this decline is attributable to factors other than expansion, including network television contracts and collective bargaining agreements, there can be no question that the addition of two franchises significantly affected League profits in the years following expansion. *See* SUMMARY OF NATIONAL FOOTBALL LEAGUE ECONOMICS 1970-1980, *supra* note 16, at 15.

88. *See supra* note 1.

89. National Football League Constitution and Bylaws § 3.3(C) provides:

> Upon receipt of any application for membership in the League, the Commissioner shall conduct such investigation thereof as he deems appropriate. Following the completion

review by the League Expansion Committee, the League passed a resolution not to approve a new franchise in any location at that time. Following the passage of this resolution, the Memphis contingent filed suit in district court. In *Mid-South Grizzlies v. National Football League*, a court was asked to determine for the first time whether a professional sports league's restriction on the approval of a new franchise in a location where no existing franchise was operating violated the Sherman Act.[90]

In considering the appropriate standard of review, the court noted the high degree of interdependence characteristic of professional sports leagues.[91] The establishment of rules, scheduling of contests, marketing of national broadcast rights, and determination of franchise ownership and territory were recognized as league functions requiring cooperation among league members. The court further recognized that while intense competition among franchise was required on the playing field, an equivalent level of business competition could ultimately undermine the success of the league. Indeed, the court noted that the business interdependence of professional sports franchise owners had become well recognized in previous sports antitrust cases.[92] Recognizing the unique nature of professional sports league structures, the court chose to apply the rule of reason.[93]

The district court looked to an earlier decision concerning league restrictions on ownership of franchises. In *Levin v. National Basketball Association*,[94] the court had considered whether a similar National Basketball Association (NBA) rule requiring the approval of three-fourths of the membership prior to consummation of the sale of any franchise violated the rule of reason. The *Levin* court granted summary judgment in favor of the NBA, holding that the exclusion from membership in the Association did not have an anti-competitive effect or adversely affect the public interest.[95]

> of such investigation, the Commissioner shall submit the application to the members for approval together with his recommendation thereon, and such information thereon that the Commissioner deems pertinent. Each proposed owner or holder of any interest in a membership, including stockholders in any corporation, members of a partnership and all other persons holding any interest in the applicant must be individually approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League.

Id.

90. Mid-South Grizzlies v. National Football League, 550 F. Supp. 558 (E.D. Pa. 1982).

91. *Mid-South Grizzlies*, 550 F. Supp. at 566 (*citing* United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953)). *See* BORK, THE ANTITRUST PARADOX 332, 337-38 (1978).

92. *Mid-South Grizzlies*, 550 F. Supp. at 566-67 (citing Brenner v. World Boxing Council, 675 F.2d 445 (2d Cir. 1982), *cert. denied* 103 S. Ct. 79 (1982); North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1982), *cert. denied* 103 S. Ct. 449 (1982); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781 (7th Cir. 1981); Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979); Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979); Mackey v. National Football League, 543 F.2d 606, 609 (8th Cir. 1976), *cert. dismissed* 434 U.S. 801 (1977); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972)).

93. *Mid-South Grizzlies*, 550 F. Supp. at 566-67.

94. 385 F. Supp. 149 (S.D.N.Y. 1974).

95. *Id.* at 152. The court there stated:

> Here the plaintiffs wanted to join with those unwilling to accept them, not to compete with them, but to be partners in the operation of a sports league for plaintiffs' profit.

The *Mid-South Grizzlies* court then applied the reasoning of *Levin* to the NFL rule. The Memphis group seeking entry into the NFL had earlier competed with the NFL through its membership in the defunct World Football League (WFL). The court noted that the contingent seeking an NFL franchise no longer sought to compete with the NFL through membership in a rival league, but sought to enjoy the benefits of the NFL's league structure and its league-imposed restrictions on competition.[96] The court rejected the Memphis group's contention that not all franchise revenues resulted from jointly earned profits, emphasizing that a franchise's ability to earn profits was an indirect benefit of its membership in the league. On this basis, the court concluded that the Memphis group was not a competitor of the NFL and had not been injured by the allegedly anti-competitive rule.[97]

The court then turned to plaintiff's assertion that the League's act constituted an unlawful act of monopolization in violation of section two of the Sherman Act.[98] After recognizing the NFL's monopoly on professional football, the court noted that possession of monopoly power alone is not enough to establish an antitrust violation. The court recognized that the law requires that a monopoly refrain from conduct designed to deter competition.[99] In this case, however, the plaintiffs were not rivals or potential rivals of the League except on the playing field. The League restriction did nothing to prevent the formation of a rival league or the creation of a team in Memphis. As the court found no monopolistic action designed to deter competition, it held as a matter of law that the plaintiff had not demonstrated a section two violation.[100]

Mid-South Grizzlies ultimately will have a procompetitive effect on all interests involved in the professional sports market. It constitutes a clear victory for professional sports leagues. The decision recognizes the authority of a league to act as a joint venture in determining with whom revenues will be shared and operations decisions entrusted. The decision

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> Further, no matter which reason one credits for the rejection, it was not an anti-competitive reason. Finally, regardless of the financial impact of this rejection upon plaintiffs, if any, the exclusion from membership in the league did not have an anti-competitive effect nor an effect upon the public interest.

Id. The NBA rule under consideration in *Levin* was directly parallel to the NFL rule. In each case, the professional sports league sought to regulate those with whom it would join in the enjoyment of league revenues and would entrust responsibility for league decisionmaking. Neither restriction prevented an independent franchise or group of franchises from exhibiting professional sports.

96. *Mid-South Grizzlies*, 550 F. Supp. at 568-69. The court stated:

> The reasoning in the *Levin* case is applicable here. They do not want to compete with the NFL. They tried that and failed. Now they seek to join the asserted antitrust violators and share all the advantages of an established organization. Plaintiffs try to eschew this obvious conclusion by emphasizing that a franchise's revenue does not come solely from jointly earned profits; some money is earned by individual promotion, for example, of team paraphernalia and from local broadcast revenues. This does not change the obvious fact that the ability to earn these individual profits is an indirect benefit of being a member of the league.

Id. at 568.

97. *Id.*

98. For a discussion of section two violations, *see supra* note 11.

99. 550 F. Supp. at 571.

100. *Id.* at 571-72.

also marks a potential victory for the cities. As a result of this decision, newcomers seeking to operate professional football franchises have been forced to form new leagues, thereby expanding the availability of limited sports capital for the development of new leagues.[101] The proliferation of leagues has afforded new cities the opportunity to enjoy the benefits of such franchises. The professional sports fan has also benefited from the expanded number of leagues, as there are now more events to enjoy. Further, the competition between leagues may ultimately benefit the fan in the form of reduced ticket prices. Perhaps the greatest beneficiary of proliferation, however, has been the athlete. The proliferation of leagues has brought with it higher salaries and jobs for those athletes who could not acquire employment in the established leagues.[102]

INTERLEAGUE V. INTRALEAGUE RESTRAINTS: AN ARTIFICIAL ANALYTICAL DISTINCTION

Discussion of *Mid-South Grizzlies* would not be complete without comparing the analysis there with the analysis in *North American Soccer League*. In *North American Soccer League*, the NFL had placed restrictions on the sources of capital for the development of a rival league marketing a different sport. Because the court viewed the sports capital market as extremely limited,[103] the restriction was deemed to have the effect of eliminating competition in the professional sports entertainment market. The restraint in question in *Mid-South Grizzlies* was clearly more directly

101. The clearest example of professional sports league's limitation on entrants resulting in the development of a rival league is the United States Football League (USFL). John Bassett, a key member of the Memphis contingent seeking to bring an NFL franchise to Memphis, later purchased the Tampa Bay franchise of the USFL. Had the *Mid-South Grizzlies* court ruled that the NFL was required to accept Memphis as an expansion site in the late 1970s, there is grave doubt that the rival league would have developed. Rather, the existing capital sources would have established franchises in the more profitable NFL.

102. In 1983, the USFL created approximately 600 positions, increasing the number of existing positions in professional football by 40%. In 1984, USFL expansion created 300 additional positions.

103. The *North American Soccer League* court characterized the sports capital and skill market as follows:

> Because of the interdependence of professional sports league members and unique nature of their business, the market for and availability of capital investment is limited. As the district court found, the economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members. Damage to or losses by any league member can adversely affect the stability, success and operations of other members. Aside from willingness to take the risk of investing in a member of a league in which members have for the most part not demonstrated a record of profits, the potential investor must be reasonably compatible with other members of the league, with a sufficient understanding of the nature of the business and interdependence of ownership to support not only his newly-acquired team but the sports league of which it is a member. As the district court further noted, these conditions have tended to attract individuals or businesses with distinct characteristics as distinguished from the much larger number of financiers of the type prevailing in most business markets. Although, as the district court observed, the boundaries of this "sport ownership capital and skill" market are not as confined as the NASL contends and not strictly limited to present major league sports owners, the sources of sports capitol are limited by the foregoing conditions and existing sports league owners constitute a significant source.

670 F.2d at 1253.

anti-competitive than that in *North American Soccer League*. The NFL in *Mid-South Grizzlies* effectively restrained direct competition in the professional football entertainment submarket through an expansion restriction. Operation of the restriction in a limited sports capital market, as characterized in *North American Soccer League*, made sufficient sports capital unavailable to aid the Memphis contingent in the establishment of a rival football league.[104]

The *Mid-South Grizzlies* court rejected the premise that the sports capital market was extremely limited[105] and instead chose to characterize the Memphis group as a non-competitive interest seeking to market professional football through the NFL structure.[106] While the Memphis contingent sought to operate through the same league structure as the existing NFL franchises, its interests were the same as those of the NASL owners. Neither the NASL owners nor the Memphis group sought to compete with the NFL for sports capital and management skill or to compete with the established league in the sports entertainment market; rather, each sought to enjoy the benefits of the vast capital and management skill accumulated by the NFL and the concomitant benefits arising from association with the League,[107] whether through shared ownership or formal membership.

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104. Following *North American Soccer League*, the Memphis contingent could have approached existing owners for the capital necessary for the formation of a new football league. This approach is not economically viable, however. It is inconceivable that existing football owners would opt for the less secure investment in a new league over expansion of the existing league. If the existing football owners view the demand for professional football to be sufficient to support another franchise, they will expand the existing league. Thus, the existing football owners will not serve as a source of capital for the formation of a new league.

Owners of franchises in other sports may provide some capital, though it is doubtful that these owners would seek to encourage competition with their existing franchises. Clearly, few existing owners seek to encourage the development of competitors, as evidenced by the NFL's attempt to prohibit cross-ownership. While cross-ownership will not provide a mechanism for the development of the capital necessary for the establishment of a new league, it serves as a mechanism for the prevention of competition between established leagues. *See infra* note 107.

105. The court rejected plaintiff's reliance on the "essential facility" doctrine, stating that the expansion restriction did not prevent the Mid-South Grizzlies from marketing professional football. 550 F. Supp. at 569-70. The court stated: "[I]t is not economically infeasible for plaintiffs to engage in professional football. Although not an easy task, plaintiffs are free to form a rival football league." *Id.* at 570 (citing Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir.), *cert. denied*, 436 U.S. 956 (1977)). This analysis demonstrates the court's presumption of the availability of capital for the formation of a new league. This presumption accounts for the differing analyses in *Mid-South Grizzlies* and *North American Soccer League*.

106. In applying the rule of reason, the court stated: "They [the Mid-South Grizzlies] do not want to compete with the NFL. They tried that and failed. Now they seek to join the asserted antitrust violators and share all the advantages of an established organization." 550 F. Supp. at 568. While the Memphis interest did not seek economic competition in its application for League membership, it sought competition in the professional football entertainment market. That is, the Grizzlies sought to expand the professional football entertainment market by requiring that the NFL share its monopoly with cities capable of supporting professional football. The court rejected plaintiffs' contention that the NFL wilfully maintained monopoly status through the expansion restriction in violation of section two of the Sherman Act. "[D]espite plaintiffs' failure to obtain a franchise, they are still free to promote a rival league. The actions plaintiffs complain of here have done nothing to prevent the formation of a rival league or the fielding of a team in Memphis, Tennessee. Thus, no Section 2 violation has been shown as a matter of law." *Id.* at 571-72.

107. The most significant benefit of association with an established league is fortification of market position within the professional sports capital and entertainment market. This fortification is the result of two factors: (1) Established leagues hold vast capital resources, thus ensuring that a newly associated league or franchise will be capable of maintaining operations through several

To distinguish the cases because one party sought formal acceptance into the league while the other sought the market advantages arising from association with the established league while retaining a separate league entity is to create an artificial distinction. In either case, the effects of invalidating the rules limiting admission to the league or limiting access to the capital and management skill accumulated by the established league are to frustrate the development of new sources of sports capital and to encourage monopolization of the professional sports capital and entertainment markets. Elimination of the rule limiting admission to the established league would result in expansion of that league and would frustrate the development of a new league relying on new capital sources. By permitting cross-ownership between the NFL and NASL, the *North American Soccer League* court effectively laid the foundation for the elimination of competition between franchises of the once-rival leagues. In a professional sports capital market in which cross-ownership is prevalent, franchise owners will make league decisions for the mutual benefit of all leagues in which they maintain an interest and will thereby eliminate competition between the leagues.

Further concentration of the already highly concentrated professional sports capital market could prove disastrous.[108] The case of Ted Turner illustrates the degree of control that can be asserted by an owner. Turner currently controls professional baseball and basketball operations in Atlanta, as well as the dominant cable television network, which is utilized to broadcast nationwide every game played by his teams. Should Turner be permitted to add an additional NFL franchise in Atlanta, he could effectively eliminate all competition in the Atlanta sports market. He would have even greater economic strength and bargaining power, allowing him to establish ticket prices at inflated rates and to negotiate favorable sta-

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years of losses. This factor is particularly significant in the case of a sport which is new to the public, such as soccer. (2) Where a high degree of capital is shared between leagues (cross-ownership) or owners entrust their capital investment in a new owner (expansion), the leagues or franchises now associated with the established league are effectively sheltered from direct competition with the established franchises which formerly served as competitors, or potential competitors in the case of expansion. As the owners in the established league now share in an interest in the success of the once potentially competitive league or franchise, they will not actively compete against it.

Admittedly, a high degree of cross-ownership must exist before owners will be able to influence league decisions for the protection of their interests in other leagues. The potential for such a high degree of cross-ownership exists where a league establishes itself as a competitive threat to an established league. In such an instance, merger and cross-ownership serve as effective methods of limiting competition. In the history of professional sports, leagues engaged in active competition have merged to limit competition within the sports capital and entertainment market, fortifying their market position and discouraging the development of new capital. Examples of such mergers include the merger of the All-America Football Conference and National Football League in the 1940s, the National and American Football League in the 1960s, and the National and American Basketball Associations in the 1970s.

Economic conditions and the existence of cross-ownership bans have limited cross-ownership in the sports capital market. Following *North American Soccer League*, cross-ownership may become more prevalent, although a high degree of cross-ownership is not foreseeable in professional soccer due to the low degree of competition exerted by NASL franchises on the NFL. The development of the United States Football League may contribute to extensive cross-ownership, however, as existing NFL and baseball owners attempt to protect their interests.

108. *See supra* note 83.

dium leases with the city. While the Turner case is admittedly extreme, elimination of the cross-ownership ban is an ominous move in that direction. Elimination of the ban encourages the very evil sought to be achieved by the *North American Soccer League* decision—the elimination of competition within the sports capital market and, in turn, competition in the sports entertainment market.

JUDICIAL DECISIONMAKING AND PROFESSIONAL SPORTS MANAGEMENT: A CONTINUING QUEST FOR BALANCE

A review of the preceding cases reveals that the courts considering antitrust challenges to league-imposed restrictions on competition have not adequately balanced the interests of fans, cities, players and owners. In *Milwaukee Braves*,[109] Major League Baseball was provided complete antitrust immunity in its decision to approve relocation of a franchise. In granting such immunity, the court failed to adequately consider the interests of the city and fans in the original site. In *North American Soccer League*,[110] the court found a restriction denying a rival league access to the sports capital and managerial skill accumulated by the NFL violative of the antitrust laws. By invalidating the cross-ownership ban, the court laid the foundation for even greater concentration of the professional sports capital market. Such concentration clearly is not in the public interest. Finally, in *Mid-South Grizzlies*,[111] the court upheld a restriction prohibiting the entrance of new franchises wishing to participate in the NFL without the approval of a super-majority of the league membership. This decision encouraged the development of new football leagues supported by new sources of capital, which would further the interests of the fans, cities, players and owners.

While the preceding cases are of great significance in the evaluation of professional sports management antitrust analysis, the Ninth Circuit Court of Appeals recently decided an appeal which may determine the future conduct of professional sports operations and the role of the public in the development of professional sports.[112] The leagues, fans, cities and players all stand to lose in the current litigation involving the Raiders franchise in the NFL. The Raiders controversy began in 1978, when the Los Angeles Rams announced that beginning in 1980 their home games would be played at Anaheim Stadium in nearby Orange County, California. The NFL approved the Rams' relocation. The Los Angeles Memorial Coliseum Commission, which had been exhibiting professional football since

109. Wisconsin v. Milwaukee Braves, 31 Wisc. 2d 699, 144 N.W.2d at 1 (1966). *See supra* notes 29-52 and accompanying text. *See also* L. SOBEL, PROFESSIONAL SPORTS & THE LAW 505-12 (1977).

110. North American Soccer League v. National Football League, 465 F. Supp. 665 (D.C.N.Y. 1978), 505 F. Supp. 659 (D.C.N.Y. 1980), 670 F.2d 1249 (2d Cir. 1982). *See supra* notes 53-83 and accompanying text.

111. Mid-South Grizzlies v. National Football League, 550 F. Supp. 558 (E.D. Pa. 1982). *See supra* notes 84-102 and accompanying text. *See also* L. SOBEL, *supra* note 109, at 501-12, 529-30.

112. Los Angeles Memorial Coliseum Comm'n v. National Football League, Nos. 82-5572, 82-5573, 82-5574, 82-5664, 82-5665 (9th Cir. Feb. 28, 1984).

1946, sought an expansion franchise to fill the vacancy created by the Rams departure. The NFL denied this request.

After failing to obtain an expansion franchise, the Coliseum Commission began negotiating with existing NFL franchises, including the Oakland Raiders. At the time, the Raiders were attempting to negotiate a new lease for their existing facility, the Oakland Coliseum. Upon reaching the realization that they could not reach a satisfactory agreement with the Oakland officials, the Raiders' management signed an agreement to play the Raiders' home games in the Los Angeles Coliseum beginning with the 1980 season. NFL Constitution and Bylaws Section 4.3 posed a barrier to the Raiders' relocation decision, however, because Section 4.3 requires the approval of three-fourths of the League membership for the transfer of a franchise's playing site to a different city.[113]

Prior to reaching agreement with Raiders' management, the Los Angeles Memorial Coliseum Commission filed suit against the NFL, alleging that the restriction on relocation of franchises posed by Section 4.3 violated the Sherman Act. This litigation delayed the Raiders' transfer to Los Angeles until the 1982 season. In May, 1982, a jury found that Section 4.3 violated the Sherman Act. Damages of $49 million were assessed against the League.[114]

In a 2-1 decision, the Ninth Circuit Court of Appeals affirmed the district court.[115] The majority rejected the characterization of the NFL as a single entity, emphasizing the absence of an individual or parent corporation setting NFL policies.[116] In applying the rule of reason, the court found that the rule "is on its face an agreement to control, if not prevent competition among teams through territorial divisions"[117] and that there was ample evidence for the jury to find that the rule "harmed competition among the 28 teams to such an extent that any benefits to the league as a whole were outweighed."[118] Further, the court noted that the rule allowed

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113. NFL Constitution and Bylaws § 4.3 provides: "No member club shall have the right to transfer its franchise or playing site to a different city . . . without prior approval by the affirmative vote of three-fourths of existing member clubs of the League."

114. *Jury Orders NFL to Pay $49 Million*, The Washington Post, April 14, 1983, at C1, col. 1. "Even with the damages verdict, the litigation in the case continues. The original verdict is on appeal and the City of Oakland has brought an eminent domain action against the Raiders seeking to force them to return there." *Id.*

115. Los Angeles Memorial Coliseum Commission v. National Football League, Nos. 82-5572, 82-5573, 82-5574, 82-5664, 82-5665 (9th Cir. Feb. 28, 1984). See Los Angeles Times, Feb. 29, 1984, Part II, at 1, col. 1.

116. See Los Angeles Times, Feb. 29, 1984, Part II, at 1, col. 1. *See supra* note 31. The absence of a formal corporate structure for the establishment of league policies is irrelevant to single entity analysis in professional sports. Adoption of a corporate structure may undermine public confidence that true competition exists on the playing field. Under a corporate structure, professional sports operations would be analogous to those of a traveling theatre company. The court should have regarded the NFL as a single entity under the rule of Arizona v. Maricopa County Medical Society, 457 U.S. at 336. *See supra* notes 14 & 16 and accompanying text.

117. Los Angeles Times, Feb. 29, 1984, Part II, at 1, col. 1.

118. *Id.* The Ninth Circuit failed to recognize that professional sports franchises, unlike other business ventures, must not actively compete in the economic marketplace, but must cooperate in a league structure for their mutual benefit. This was recognized long ago in United States v. National Football League:

> Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordi-

owners to prevent a franchise from relocating in a new market regardless of whether the market could sustain a new franchise.[119] The NFL has indicated that it will seek review by the United States Supreme Court.[120]

If the Ninth Circuit decision is affirmed, the interests of all leagues, fans, cities and players will be subject to the whim of a single franchise owner. The decision effectively denies professional sports leagues authority to establish and maintain exclusive franchise territories. Under the present ruling, open biding for franchises by cities is assured, thereby threatening league stability. Indianapolis' acquisition of the Colts franchise merely opened the bidding in the NFL franchise auction.[121] Future cable television opportunities may lead franchises currently operating in relatively small broadcast areas to relocate in major metropolitan centers, thereby threatening the franchises currently operating in the major cities.[122] Under such a chaotic system of franchising, cities will be unwilling to provide public funding for the establishment of stadiums and arenas,[123] thereby endangering the future operation of professional sports leagues.

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nary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business. Professional teams in a league, however, must not compete too well in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all teams should compete as hard as they can in business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

116 F. Supp. 319, 323 (E.D. Pa. 1953). See *supra* note 12 and accompanying text.

119. Los Angeles Times, Feb. 29, 1984, Part II, at 1, col. 1.

120. *Id.*

121. The NFL said that because of the Ninth Circuit Court of Appeals' ruling it would not challenge the relocation of the Colts. *Colts Leaving Baltimore For Indianapolis*, Arizona Daily Star, March 30, 1984, at C1, col. 1. Recognizing that the League will not challenge franchise relocations, cities seeking to acquire NFL franchises are now actively bidding on existing franchises. "Having failed to lure the Colts from Baltimore to Phoenix, the Phoenix Metropolitan Sports Foundation said yesterday that it hopes to attract the New Orleans Saints or the Miami Dolphins. 'There have been a lot of rumbles about various franchises that are unhappy with their present situations, like the lease situation with their respective stadiums,' foundation president Eddie Lynch said. 'I talked to several of those club owners at the NFL meetings in Hawaii last week. I do know that more than one was interested in talking with us, but not until the Robert Irsay [owner of the Colts] situation was resolved one way or another.' " *Id.*

122. It has been suggested that the vast cable television market of Los Angeles motivated Raiders managing partner Al Davis to leave Oakland, despite average home attendance there of 98% of capacity. *The Jury Goofed in the Case of Al Davis vs. NFL*, The Cleveland Press, May 9, 1982, at —.

123. Local governments presently provide direct subsidies to professional sports franchises operating in their area. *See supra* note 2. In the absence of assurances that the franchise will not leave the community, taxpayers will be unwilling to undertake the burden of financing stadium construction and other subsidies afforded the franchises. Thus, professional sports leagues will be required to make up the difference. Such additional costs will result in elimination of franchises which are less profitable, thus crippling several leagues (e.g., Major Indoor Soccer League). As an alternative to placing the burden of financing operations on private owners, the cities may choose to purchase the franchise to ensure this continued operation in the community. This alternative would require amendment of league rules prohibiting public ownership.

A Proposal for Reform in Professional Sports Management Antitrust Analysis

The failure of the courts in previous cases to adequately balance the competing interests in professional sports and the current litigation involving the Raiders have created a situation which calls for legislative action, to ensure that the public interest will be served in all future professional sports management cases. In response to the lack of protection of the cities' interests, Senators DeConcini, Heflin, Simpson, Huddleston and Bentsen introduced in 1982 the "Major League Sports Community Protection Act."[124] This bill provides antitrust immunity for league rules requiring approval by a super-majority prior to relocation of an existing franchise and for rules providing for the division of league revenues to promote comparable economic opportunities for member clubs. Due to the political sensitivity surrounding an antitrust exemption and the opposition of organized labor, the bill failed in the 97th Congress. The bill faces similar opposition in the present Congress and does not appear to have garnered the requisite support in either house.

A review of the model of antitrust analysis,[125] reveals that such immunity from judicial review is inappropriate in the case of a joint venture which does not engage in a sharing of capital and does not share the risk of loss and opportunities for profit.[126] The purposes sought to be served by the "Major League Sports Community Protection Act" can be served by a much less politically sensitive approach that acts within the existing model of antitrust analysis. Congress should enact a general declaration of rules deemed inherent to the operation of a professional sports league and presumed reasonable to protect the public interest. Included in this declaration should be:

1. League rules designed to preserve stability in the relationship be-

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124. The Senate version of the "Major League Sports Community Protection Act," S.2784, was introduced July 28, 1982. The relevant sections of this bill provided:

> (1). It shall not be unlawful by reason of any provision of the antitrust laws for a professional team sports league and its member clubs—
>
> (a) to enforce rules or agreements authorizing the membership of the league to decide that a member club of such league shall *not* be relocated.
>
> (b) to enforce rules and agreements for the division of league or member club revenues that tend to promote comparable economic opportunities for the member clubs of such a league.

This language parallels the language of the House version, H.R. 6467. Following the bill's failure to gain passage in the 97th Congress, the Senate version was reintroduced and numbered S.1036. At this writing six other bills affecting the application of the Sherman Act to professional sports operations have been introduced in Congress: S.1078, a bill to establish conditions for the relocation of professional sports teams, to clarify the application of the antitrust laws and to require notification to affected communities and employees of relocation of professional sports teams; S.2050, a bill to provide local communities with a right of first refusal to purchase a major league baseball franchise for sale to prospective purchasers who intend to move such franchise to another community; H.R. 2041, a bill to protect the public interest in maintaining the stability of professional sports; H.R.. 3094, a bill to repeal baseball's antitrust exemption; H.R. 3841, a bill to restrict the relocation of professional sports teams, to require that certain local governments be notified of such relocation, and to clarify the application of the antitrust laws; and, H.R. 3944, a bill to protect the public interest in maintaining the stability of professional sports.

125. *See supra* notes 3-11 and accompanying text.

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

tween professional sports teams and the communities in which they operate. A specific exclusion should be provided where a league permits a franchise to relocate; in such instance, the relocation restriction should not enjoy the protection of a declaration of ancillarity. These provisions will afford protection to league rules requiring approval by a super-majority of league owners before a franchise is permitted to relocate. Requiring such a super-majority will enhance the stability of franchises and thereby protect the cities' interests as well as those of the other franchise owners.

2. League rules encouraging professional team sports leagues to promote economic stability of their member clubs. This provision will protect revenue sharing arrangements, thereby ensuring that smaller cities can maintain their franchises. This protection is particularly significant with the advent of cable television, as franchises will be lured to the larger cable television markets in the absence of revenue sharing.

3. League rules designed to maintain loyalty among owners and dedication to the advancement of the league, including rules not to compete with the league through a rival league. This provision will protect league rules prohibiting cross-ownership and thereby ensure that no owner will monopolize a particular sports community market and enjoy the economic strength of such a monopoly.

4. League rules designed to preserve the existing sports capital market and to encourage the formation of new sports capital and competition among professional sports leagues. Such a provision will protect league rules restricting cross-ownership and requiring approval by existing owners of individuals seeking to enter the league ownership. Such rules serve to ensure that the league membership will be compatible and will compete actively with other leagues in the sports entertainment market.

5. League rules limiting the number of franchises operating within the league and the entry of new franchises. This provision serves to protect existing franchise owners and to stimulate the development of new leagues and franchises in cities which have not previously had professional sports franchises.

These declarations are not intended to be exhaustive, and a clause providing that the declarations are not intended to alter existing labor or broadcasting laws is essential. Additionally, the bill should provide for elimination of baseball's judicially created antitrust exemption.[127]

Adoption of such a bill would constitute a conscious balancing of the interests of the cities, fans, players and owners, without departing from the existing model of antitrust analysis. Further, it lacks the political sensitivity of a blanket antitrust exemption and thus stands a better chance of adoption. For these reasons, it is the best available means of ensuring that the operation of professional sports shall serve the public interest.

127. Toolson v. New York Yankees Baseball Club, 346 U.S. 356 (1953); Federal Baseball Club of Baltimore v. National League, 259 U.S. 200 (1922).