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LEAD ARTICLE

THE EFFECT OF REPEAL OF THE BASEBALL ANTITRUST EXEMPTION ON FRANCHISE RELOCATIONS

*Thomas R. Hurst**
and
*Jeffrey M. McFarland***

ABSTRACT

For seven decades since the Supreme Court's decision in *Federal Baseball Club of Baltimore v. National League*, Major League Baseball has been exempt from antitrust attack under the federal antitrust laws. This exemption has, among other things, enabled the owners of baseball teams, through concerted action, to control the relocation of baseball franchises from one city to another to a degree which would be impossible for other businesses not enjoying an exemption from the antitrust laws. This article first reviews the history of baseball's antitrust exemption. It then proceeds to examine judicial treatment of horizontal market restraints under the Sherman Act in both non-sports cases and in cases involving sports other than baseball which do not enjoy an antitrust exemption. The article then proceeds to examine baseball's current rules governing franchise relocation. Finally, the article examines whether baseball's current regulatory scheme

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could withstand judicial scrutiny if baseball's antitrust exemption were revoked.

I. INTRODUCTION

For over 70 years Major League Baseball has been exempt from antitrust attack under the Sherman Act.¹ On numerous occasions in that time period legislators, courts, economists, and fans have called for the abolition of baseball's exemption.² The complaints from fans grew louder after the San Francisco Giants failed to move to St. Petersburg in 1992.³ Franchise movement has both emotional effects and economic effects.⁴ Much of the complaining is done, however, without an analysis of how a repeal⁵ of the antitrust exemption would affect relocation of baseball franchises. Instead, the antitrust laws are viewed as a "cure-all" for many of

1.. See *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); Sherman Act §§1-8 (1890) (current version at 15 U.S.C. §§ 1-8 (1993)).

2.. For a chronology of the San Francisco Giants proposed relocation to St. Petersburg, See M. Juarez, *Baseball's Antitrust Exemption*, 17 *Hastings Comm/Ent L.J.* (1994) at 743-44.

3.. There have been numerous efforts in Congress over the years to modify or repeal baseball's antitrust exemption. Following the 1994 strike, Senator Howard Metzenbaum introduced the Baseball Fans Protection Act, S. 2380, 103rd Cong. 2nd Sess (1994) which would have partially repealed baseball's antitrust exemption. Efforts at modification or repeal have continued in both the House and Senate in the current legislative session. See, e.g., Curt Flood Act of 1997, S.53, 105th Cong., 1st Sess. (1997); Baseball Fans and Communities Protection Act of 1997, H.R. 21, 105th Cong., 1st Sess. (1997); Major League Baseball Antitrust Reform Act of 1997, H.R. 704, 105th Cong., 1st Sess. (1997); Freedom of Movement for Baseball Teams Act of 1997, H.R. 1744, 105th Cong. 1st Sess. (1997).

4.. Teams become such a part of a community that some psychologists have likened the loss of a sports team to the trauma of losing a relative. CHARLES C. EUCHNER, *PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM* 5 (1993).

5.. Although the term "repeal" is most often used in the context of a codified law, the term "repeal" as used in this paper will refer to the denial of the exemption by either the courts or the legislature.

the problems baseball has experienced in the 1980s and 1990s.

This paper attempts to explore the effect a repeal of baseball's antitrust exemption would have on franchise relocations. Without attempting to resolve the reasoning, part II gives a brief history of the Supreme Court's opinions which form the basis for baseball's exemption. Part III delves into the Sherman Act's prohibition of horizontal market divisions and examines both non-sports and sports-related cases to determine trends in the decisions. Finally, part IV takes the trends in the decisions and applies them to baseball's current relocation rules to determine whether a repeal of the antitrust exemption would result in a mass exodus of teams to other cities.⁶

II. BASEBALL'S ANTITRUST EXEMPTION: A BRIEF HISTORY

Movement of teams from one city to another in professional baseball and other sports has taken place throughout the history of organized sports. As long ago as 1882, the Troy Haymakers baseball team moved to New York City and was renamed "the Giants."⁷ In the pre-World War II era franchise relocations were primarily motivated by the desire to increase gate receipts, as opposed to television and radio broadcast revenues.⁸ In the Post-War Era, franchise relocations came to be motivated primarily by the increased revenue potential of expanding into new geographical areas rather than by failure of fan support in the old location. The 1953 move of the Boston Braves to Milwaukee was the first of the

6. In addition to the antitrust implications, some have suggested that regulation of franchise movement by the sports leagues interferes with the constitutional right to travel. WARREN FREEDMAN, *PROFESSIONAL SPORTS AND ANTITRUST* 78 (1987).

7. See "Outside the Laws: Brownout in Cleveland" (ESPN cable television broadcast, Dec. 15, 1995).

8. Glenn Wong, "Of Franchise Relocation, Expansion and Competition in Professional Sports Teams: The Ultimate Political Football?", 9 *Seton Hall Legis. J.* 7 at 22-24 (1985).

modern era moves. Even more dramatic was the simultaneous move in 1957 by the Brooklyn Dodgers and New York Giants to Los Angeles and San Francisco, respectively. The advent of jet air travel made expansion to the West Coast feasible for the first time and the large, untapped television and radio markets in the West, rather than lack of fan support in New York, were the primary factors behind these moves.⁹ The relocation of the Milwaukee Braves Franchise to Atlanta in the mid-1960's which enabled the franchise to tap the vast television market in the Southeast, underscored the increasing significance of television revenues as an incentive for relocation.¹⁰ Although national television revenues are shared among teams throughout the league, individual franchises are entitled to keep revenues from local radio and television contracts, concession revenues and luxury skybox rentals.¹¹ Thus the owners have an inherent incentive to play one city off against another by bargaining for lucrative stadium leases at nominal rentals and large shares of the revenues from parking, concessions and luxury boxes with the threat of a move always lurking in the background.¹²

Overall, Major League Baseball and other professional leagues have not made vigorous efforts to prevent the relocation of franchises.¹³ One study reports that between 1950 and 1982, seventy eight franchise movements occurred in the four major league sports.¹⁴ Most efforts to block relocation appear to have been directed at unpopular or "maverick" owners such as Charles Finley of the Kansas City (later Oakland) Athletics and the late Bill Veeck of the Chicago White Sox.¹⁵ These efforts appear to have been

9. *See generally*, Charles C. Euchler, *Playing the Field* (1993).

10. *Id.*

11. *See generally*, Kenneth L. Shropshire, *The Sports Franchise Game: Cities in Pursuit of Sports Franchises, Events, Stadiums and Arenas* at 10 (1995).

12. *See* Peter King, *Down...and Out*, *Sports Illus.*, Nov. 13, 1995 at 28, available in 1995 WL 12559615.

13. *See* James Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 *Law and Contemp. Probs.* at 48-52.

14. John Wunderli, *Squeeze Play: The Game of Owners, Cities, Leagues and Congress*, 5 *Marq. Sports L.J.* at 90 (1994).

15. *Id.*

motivated more by personality conflicts than by a genuine desire to protect the interests of the host city or of the league in general.¹⁶ According to one study, the average value of all sports franchises has increased at an annual rate of twenty per cent per year during the late 1980's.¹⁷ To the extent that this increase results from bidding wars among cities for major league franchises, the owners' self interest clearly favors a laissez faire attitude towards franchise relocation.

The genesis of the antitrust exemption for baseball can be traced to a New York trial court opinion in 1914.¹⁸ In *American League Baseball Club v. Chase*, the New York court stated in dictum that baseball was subject only to the civil and criminal laws of the states, and not federal legislation, because baseball was not an instrument of interstate commerce.¹⁹ The factual basis for the *Chase* suit was escalating player salaries.²⁰ Those same "salary wars" set the stage for the United States Supreme Court's first encounter with baseball and the antitrust laws.

*A. Federal Baseball Club of Baltimore v. National League*²¹

In *Federal Baseball*, the Baltimore Terrapins of the Federal League charged the National League with violating the antitrust laws²² when the National League allegedly conspired to deny the

16. See Steven Ross, *Monopoly Sports Leagues*, 73 Minn. L. Rev. 643 at 653 (1989).

17. Kevin E. Martens, *Fair or Foul? The Survival of Small Market Teams in Major League Baseball*, 4 Marq. Sports L.J. 323 (1994).

18. *American League Baseball Club v. Chase*, 149 N.Y.S. 6 (1914).

19. *Id.* at 17. The court referred to baseball as "an amusement, a sport, [and] a game...not a commodity or an article of merchandise subject to the regulation of Congress on the theory it is interstate commerce." *Id.* This may explain the commonly held notion that baseball is exempt from the antitrust laws because it is a sport, not a business. In fact, neither *Chase* nor *Federal Baseball* so holds.

20. ANDREW S. ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 9 (1992).

21. 259 U.S. 200 (1922).

22. The opinion is unclear on which section of the "Anti-Trust Acts" the suit relied on. See *Id.*

Federal League access to players.²³ After briefly describing the way baseball clubs compete in the major leagues, Justice Holmes held that the business of giving exhibitions of baseball is for regulation only by the states.²⁴ Although teams from different states compete against each other, Holmes said the personal efforts involved in the playing of baseball could not be considered interstate commerce.²⁵ Since the Sherman Act applies only to “commerce among the several states,” a finding that baseball was not interstate commerce was fatal to the Terrapin’s antitrust attack.²⁶ Thus, in short order, the Supreme Court fashioned baseball’s exemption from the antitrust laws.

23. *Id.* at 201. The Federal League originally brought suit in federal district court in Illinois alleging that Major League Baseball denied them access to the player market. ZIMBALIST, *supra* note 7, at 9. In November 1915, the suit was settled and the Federal League ended after only two seasons. *Id.* However, one of the plaintiffs in the suit, the Baltimore Terrapins, was given unfavorable treatment in the settlement. *Id.* This unfavorable treatment was a reflection of the other owners’ opinions that Baltimore was really a “minor league city.” *Id.* As a result, the Terrapins club rejected its part of the settlement and instead filed suit on antitrust grounds in 1916. *Id.* at 9-10. The case eventually made it to the Indiana Supreme Court where the Terrapins recovered treble damages of \$240,000. *Federal Baseball*, 259 U.S. at 208. The decision was reversed by the United States Court of Appeals for the District of Columbia and the appeal from that decision formed the basis for the Supreme Court’s holding in *Federal Baseball*. *Id.*

The Baltimore Terrapins brought its individual suit in Indiana because the Federal League was incorporated under the laws of Indiana. *Id.* at 207.

24. *Id.* at 208.

25. *See Id.* at 209. The Court said that the fact the players had to travel across state lines was not enough to make baseball a commodity of interstate commerce. *See Id.* The travel was “a mere incident, not the essential thing.” *Id.* Holmes analogized the baseball situation to a firm of lawyers sending an attorney to another state to argue a case. *Id.*

Contrary to popular thought, Holmes never held that baseball was exempt from the Sherman Act on grounds that it is a sport, not a business. *See supra*, note 6. If the Court had so held, it is not at all clear that the “sport” theory would be grounds for an exemption from the Sherman Act since the statutes do not require a “business,” but only “commerce.” *See Sherman Act* §§ 1-8 (current version at 15 U.S.C. §§ 1-8).

26. *See, e.g., Sherman Act* § 1 (current version at 15 U.S.C. § 1).

*B. Toolson v. New York Yankees*²⁷

Thirty-one years later, the Supreme Court was confronted again with an antitrust attack on Major League Baseball. In *Toolson*, players brought suit under § 1 of the Sherman Act on grounds they were damaged by baseball's reserve clause.²⁸ The Court declined to examine the issue, however.²⁹ Instead, the Court issued a one paragraph per curiam opinion in which it held that the federal antitrust laws did not apply to baseball.³⁰ In so doing, it relied entirely on the result in *Federal Baseball* and stated that if Congress disagreed with the ruling in *Federal Baseball* it had the opportunity to bring baseball within the scope of the antitrust laws.³¹ The Court said since baseball was allowed to develop for thirty-one years on the assumption it was exempt, Congressional legislation was necessary before the exemption would be destroyed.³²

*C. Flood v. Kuhn*³³

The Supreme Court's most recent pronouncement on the viability of baseball's antitrust exemption came in 1972 when Curt

27. 346 U.S. 356 (1953) (per curiam).

28. *Toolson*, 346 U.S. at 362 (Burton, J., dissenting).

29. *Toolson*, 346 U.S. at 357.

30. *Id.*

31. *Id.*

32. *Id.* Justice Burton's dissent argued at length that baseball was clearly engaged in interstate commerce. *Toolson*, 346 U.S. at 357-58 (Burton, J., dissenting). Much of his focus was on the increased use of radio and television to broadcast the games. *Id.* at 359. In addition, the dissent argued that Congressional inaction was not a reason to uphold *Federal Baseball*. *Id.* at 364.

Instead, the dissent argued that since the case law did not support an exemption where baseball is interstate commerce, Congressional inaction indicated that no exemption ever existed in the first place. *See Id.*

33. 407 U.S. 258 (1972).

Flood challenged Major League Baseball's reserve system.³⁴ The Court wrote at length about the cherished history of baseball³⁵ and canvassed the facts and holdings of its prior decisions in *Federal Baseball* and *Toolson* as well as decisions ruling on the status of other major league sports under the antitrust laws.³⁶ The result was a finding that baseball was engaged in interstate commerce and that *Federal Baseball* and *Toolson* were "aberration[s] confined to baseball."³⁷ Nevertheless, because of the unique characteristics and needs of baseball, the Court upheld baseball's antitrust exemption.³⁸ The Court emphasized that it was unwilling to overturn *Federal Baseball* and *Toolson* when Congress "by positive inaction" allowed the decisions to stand.³⁹

34. *Id.* at 259. Footnote 1 of the opinion explains baseball's reserve system in detail. *Id.* at 259 n. 1.

35. *Id.* at 260-61. Justice Blackmun authored the majority opinion. *Id.*

36. *Id.* at 269-82.

37. *Id.* at 282. In a concurring opinion to the decision from which Flood appealed, Judge Moore wrote

[w]e freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days...While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy dispatch.

Id. at 268 n. 9. Another court referred to *Federal Baseball* as an "impotent zombie." BOWIE KUHN, *HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER* 19 (1987).

38. *Id.*

39. *Id.* at 283-84. The appellate court said "[b]aseball's...future should not be for politically insulated interpreters of technical antitrust statutes, but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the Congressman...face the consequences of his baseball voting record." In his concurrence, Chief Justice Burger stated that while congressional inaction was not a "solid base" for the decision, it was the least undesirable course to let Congress resolve the issue. *Id.* at 286 (Burger, C.J., concurring).

Justice Douglas authored a dissenting opinion which Justice Brennan joined. Douglas said that if the Court were writing on a clean slate, baseball would not be exempt. *Id.* at 288 (Douglas, J., dissenting). Douglas added "[t]he unbroken silence of Congress should not prevent us from correcting our own mistakes." *Id.* Justice Marshall also filed a dissent which, because of its

There have been a number of attempts by Congress to abolish, either partially or completely, baseball's antitrust exemption over the past decade. Following the San Francisco Giants abortive move to St. Petersburg, Congress held hearings to consider whether baseball's antitrust exemption should be changed.⁴⁰ Also, the 1994 Major League Players' Association strike led to serious threats of Congressional intervention, including possible modification of the antitrust exemption.⁴¹ However, none of these efforts has thusfar ever been reported out of Committee and had a serious chance of being approved by Congress.

III. OVERVIEW OF § 1 OF THE SHERMAN ACT

The general objective of the Sherman Act is to preserve free competition and curb business restraints that restrict production, raise prices, or otherwise introduce artificial elements into the market to the detriment of consumers.⁴² Under § 1 of the Sherman Act, these goals are promoted through the prohibition of contracts that restrain trade in interstate commerce.⁴³ A violation of § 1 contains three separate elements:

extensive factual discussion of the case, may have been the original majority opinion. *Id.* at 288 (Marshall, J., dissenting). Marshall argued that since baseball players lacked the numbers to form a sufficient lobby, it was a mistake for the Court to assume that Congressional silence meant approval. *Id.* at 292 (Marshall, J., dissenting).

40. Hearings Before Subcomm. on Economic and Commercial Laws of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 6 (1993).

41. Proposed legislation prompted by the strike included "The Baseball Fans and Communities Protection Act of 1994," HR 4994, 103rd Cong. 2nd Sess. (1994) and "The Baseball Fans Protection Act of 1994," S.2380, 103rd Cong. 2nd Sess. (1994).

42. *See, e.g.,* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940).

43. Sherman Act §1 (current version at 15 U.S.C. §1). Section 1 of the Sherman Act provides, in relevant part, that "[e]very contract, combination...or conspiracy, in restraint of trade or commerce among the several states...is hereby declared illegal." *Id.*

- 1) a “contract, combination...or conspiracy”;
- 2) “restraint of trade”; and
- 3) interstate commerce.⁴⁴

Given the expansive reach of the interstate commerce concept, the third element under § 1 is rarely at issue anymore.⁴⁵ As a result, the first two elements now form the crux of a § 1 action.

The first element is commonly referred to as the “concerted action” element.⁴⁶ For a violation of § 1, there must be more than unilateral action by a single entity.⁴⁷ The policy reasons behind requiring concerted action are that when two entities combine, the risks are higher that they will work towards monopoly status.⁴⁸ In essence, it expands the market power of the conspirators at the

44. *Id.* Although the language of § 1 only contains three separate elements, the courts also require the plaintiff to have standing to sue. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). This element derives from § 4 of the Clayton Act which allows a person to sue if the person is “...injured in his business or property by reason of anything forbidden in the antitrust laws....” Clayton Act §4 (1914) (current version at 15 U.S.C. § 15 (1993)). Generally, this element involves showing two things. First, the plaintiff must be the proper plaintiff and show that the injury is not too remote. *See Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Second, the plaintiff must show that its injury is the type the antitrust laws were designed to protect and that its injuries flow from a violation. *Brunswick*, 429 U.S. at 489. This second element is commonly referred to as “antitrust injury.” As a result, § 4 of the Clayton Act imposes an additional element in proving a violation of § 1 of the Sherman Act.

45. *See* ANTITRUST ADVISER §1.08 (Carla A. Hills ed., 2d ed. 1985). Note, this was the element of the Sherman Act that originally was not met by the plaintiffs in *Federal Baseball*. However, the *Flood* decision undermined the reasoning of *Federal Baseball* which is in accord with the current broad definition of interstate commerce.

46. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS §4.15 (2d ed. 1994). The “concerted action” element can be broken into two parts. The first part requires two actors. *See supra* notes 32-39 and accompanying text. The second part requires an agreement between those two actors. *See Monsanto Co. V. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Because Major League Baseball teams clearly have an agreement, the second part of the concerted action element is not at issue in this paper.

47. ANTITRUST ADVISER, *supra* note 30, at § 1.06.

48. SULLIVAN & HARRISON, *supra* note 31, at §4.15.

expense of other competitors.⁴⁹

The most important recent case that bears on the issue of whether two entities are involved is *Copperweld Corp. v. Independence Tube Corp.*⁵⁰ In *Copperweld*, the Supreme Court held that a parent corporation and its wholly-owned subsidiary are a single entity for purposes of § 1 analysis.⁵¹ Since both the parent and subsidiary have a complete unity of interest, their actions are decided by a single corporate consciousness.⁵² As a result, they act for the benefit of each other and cannot be considered separate entities under the meaning of the Sherman Act.⁵³ The Court said it was concerned only where there was a “sudden joining of two independent sources of economic power previously pursuing separate interests.”⁵⁴

In addition to requiring some agreement between two separate entities, the agreement must be in restraint of trade.⁵⁵ Originally, the Supreme Court took this language literally until it realized that virtually all business contracts would be declared illegal under that standard.⁵⁶ As a result, the Court declared that only unreasonable restraints of trade were illegal under the Sherman Act.⁵⁷ From this declaration two blurry lines of analysis arose.

Under a “rule of reason” analysis, the courts weigh the procompetitive effects of the restraint against the anticompetitive effects of the restraint.⁵⁸ This involves an examination of the facts peculiar to the line of business, the nature of the market, and the

49. *Id.*

50. 467 U.S. 752 (1984).

51. *Id.* at 777.

52. *Id.* at 771.

53. *Id.* The Court analogized a parent and subsidiary to “...a multiple team of horses drawing a vehicle under the control of a single-driver.” *Id.*

54. *Id.* at 771. The Court wrote “[a] business entity should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.” *Id.* at 773

55. Sherman Act § 1 (current version at 15 U.S.C. § 1).

56. ANTITRUST ADVISER, *supra* note 30, at § 1.05.

57. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

58. *See Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

reasons for adopting the restraint.⁵⁹ A prerequisite to determining reasonableness is defining the relevant market. The relevant product market is determined by examining whether other products are “reasonably interchangeable.”⁶⁰ The relevant geographic market is also a part of the overall relevant market, though rules for determining the geographic market are virtually impossible to lay down because it is so bound up with the product market determination.⁶¹ The very nature of the “rule of reason” is that there are no hard and fast rules for determining which restraints violate § 1.

The second line of analysis is not really an analysis at all. A restraint will get “per se” treatment if it is so unreasonable on its face, or has historically been so unreasonable, that there is no need to inquire further into the actual effects the restraint has on the market.⁶² Such a restraint is “per se” unlawful under § 1. However, recent Supreme Court decisions cast doubt on when the per se rule should be applied. In general, the courts are reluctant to label something “per se” without at least entertaining the defendant’s arguments that a restraint is procompetitive in some way.⁶³

IV. HORIZONTAL MARKET DIVISIONS UNDER § 1 OF THE SHERMAN ACT

In essence, each major sports league has rules that restrict franchise movement. Each of the rules is based on the idea that franchises have a “home territory” in which they have exclusive rights. This territorial allocation is a division of the United States’

59. *Id.* at 238.

60. *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956).

61. SULLIVAN & HARRISON, *supra* note 31, at § 6.04[A][4].

62. *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

63. *See Id.*

markets by the sports leagues. Section 1 of the Sherman Act reaches agreements that allocate specific territories to individual entities.⁶⁴ Currently, baseball's relocation rules are exempt from attack under the trilogy of Supreme Court cases granting baseball an antitrust exemption.⁶⁵ However, as is evident from the reasoning in those cases, the exemption is on shaky ground. If the antitrust exemption is taken away, then § 1's prohibition of horizontal market divisions may affect the relocation rules of Major League Baseball.

Obviously, because of baseball's long-standing exemption, there are no baseball cases on horizontal market divisions to lend guidance. However, there is a long line of non-sports cases in which the parameters of the § 1 prohibitions have been examined.⁶⁶ In addition, because the National Football League, National Hockey League, and National Basketball Association are not exempt from the antitrust laws,⁶⁷ there is a line of sports cases that may indicate what effect a repeal of the baseball exemption would have on baseball franchise relocations.⁶⁸

64. *See, e.g.*, *United States v. Sealy*, 388 U.S. 350 (1967). Agreements that divide up markets are designed to control participation in certain markets. SULLIVAN & HARRISON, *supra* note 31, at § 4.14. When competition is reduced in this manner, the participants in that market no longer need to compete at any level. *Id.* Some consider horizontal market divisions more dangerous than price fixing because with horizontal market divisions, there is no competition for any facet of the product. *See Id.*

65. *See supra* part II.

66. *See infra* part IV[A].

67. *See Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (football); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974) (hockey); *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971) (basketball). *See also North American Soccer League v. National Football League*, 465 F.Supp. 665 (S.D. N.Y. 1979) (soccer).

68. Note, this is an entirely different issue than whether a sports league has the right to deny ownership to a group attempting to buy an existing team. *See Levin v. National Basketball Association*, 385 F.Supp. 149 (S.D. N.Y. 1974); *Piazza v. Major League Baseball*, 831 F.Supp. 420 (E.D. Penn. 1993). It is also a different issue than the granting of expansion franchises. *See Mid-South Grizzlies v. National Football League*, 550 F.Supp. 558 (E.D. Penn. 1982) *affirmed* 720 F.2d 772 (3d Cir. 1983).

A. Non-Sports Cases

The courts have on many occasions addressed § 1's treatment of horizontal market divisions. The cases before 1978 tend to apply § 1 more strictly,⁶⁹ whereas the trend since 1978 has been to adopt a reasonableness approach for all but the most pernicious violations.⁷⁰ One of the pre-1978 cases was *United States v. Topco Associates*, in which the Supreme Court ruled that horizontal agreements to divide markets are per se violations of § 1 of the Sherman Act.⁷¹ While the post-1978 cases appeared to cut back on the harshness of the *Topco* approach, the Court has since revived *Topco's* per se stance as recently as 1990.⁷² As a result, it is dangerous to assume that any one standard can be applied to horizontal market divisions.

Probably the pre-1978 case that most resembles baseball's territorial allocations is *United States v. Sealy*.⁷³ In *Sealy* individual mattress manufacturers came together to form a corporation known as Sealy.⁷⁴ Sealy, as a corporation, then provided each of the businesses with a license to sell mattresses only in a specified geographic area.⁷⁵ Apparently this structure was designed to avoid per se treatment under § 1 by disguising a horizontal market division in the form of a vertical market division.⁷⁶ The Court pierced the form and decided the case as a

69. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

70. See, e.g., *Polk Bros., Inc. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985).

71. *Topco*, 405 U.S. at 608.

72. *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990).

73. *United States v. Sealy*, 388 U.S. 350 (1967).

74. *Id.* at 351.

75. *Id.*

76. See *Id.* at 354. Vertical market divisions are also subject to § 1's reach. However, vertical market divisions had long been dealt with under a rule of reason analysis, which is obviously more favorable for defendants than per se treatment is. *White Motor Co. v. United States*, 372 U.S. 253 (1967). Note, however, that in the same year *Sealy* was decided, the Supreme Court ruled that vertical territorial restraints can be per se unlawful. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). *Schwinn* has since been overruled and

horizontal market division case.⁷⁷ The Court said the corporation was a mere instrumentality because the individual licensees were in complete control of Sealy as joint venturers.⁷⁸ In the end, the Court found a per se violation of § 1.⁷⁹

The analogy between *Sealy* and baseball should be clear. Like *Sealy*, major league baseball teams came together to form a larger organization: Major League Baseball. Major League Baseball then granted each of the teams a license to operate exclusively in a particular market of the United States. In accord with the Court's analysis in *Sealy*, the individual licensees in baseball were in complete control of Major League Baseball as joint venturers.⁸⁰

The similarity between *Sealy* and the organizational structure of Major League Baseball would make it appear that a repeal of baseball's antitrust exemption would doom baseball's relocation rules.⁸¹ However, since 1978, the Court has been more willing to listen to defendants' procompetitive justifications for horizontal market divisions. As a result, just because Major League Baseball is organized similarly to *Sealy* does not necessarily mean that its relocation rules would constitute a per se violation under § 1.

The first case to clearly cut back on per se treatment for

vertical market divisions once again receive rule of reason treatment. *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977). The Supreme Court's decision in *State Oil Co. v. Kahn*, 118 Sup. Ct. 275, 139 L. Ed. 2d 199 (1996) overruling *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 Sup. Ct. 869 and holding that vertical agreements fixing maximum retail prices are to be judged under the rule of reason makes complete the Court's philosophy of treating vertical restraints under the rule of reason. However, these cases do not seem relevant to MLB's system of exclusive territorial restraints which are, in essence, horizontal.

77. *Sealy*, 388 U.S. at 354.

78. *Id.*

79. *See Id.* at 357-58. The court's application of the per se "analysis" was further bolstered by the price-fixing aspects of the *Sealy* arrangement. *Id.*

80. *See Id.*

81. Again, however, it should be noted that baseball does not appear to have any of the price-fixing characteristics that underscored the per se treatment in *Sealy*. *See supra* note 64. In fact, once ticket prices are adjusted for inflation, it can be seen that the cost of a general admission ticket was lower in 1990 than in 1950. ZIMBALIST, *supra* note 7, at 51.

horizontal market divisions was *Broadcast Music v. CBS (BMI)*.⁸² In *BMI*, individual composers gave non-exclusive licenses to BMI, who then sold blanket licenses to businesses who wanted to use the music.⁸³ The amount received on the sale was divided among all composers but each individual composer remained free to sell on her own.⁸⁴ The Supreme Court declined to apply a per se analysis and listened to BMI's procompetitive justifications.⁸⁵

BMI argued that given the number of compositions a composer develops, it is impossible for an individual composer to police all of her own copyrights.⁸⁶ BMI argued that a middleman was necessary to keep transaction costs down.⁸⁷ The Court accepted these justifications as procompetitive and remanded the case on orders to apply a rule of reason analysis.⁸⁸ On remand, the Second Circuit weighed the anticompetitive effects of the arrangement and the procompetitive effects of the arrangement before ruling for BMI.⁸⁹ Essentially, the procompetitive effect was that a blanket license provided by BMI was an entirely different product than the product the composers produced individually.⁹⁰ Creation of a new product is on its face procompetitive.⁹¹ On the other hand, there was nothing anticompetitive about the arrangement because individual composers remain free to sell their compositions on their own.⁹² Thus, the *BMI* case represents the Court's acknowledgment that it would entertain procompetitive arguments before striking down a horizontal restraint.

The Supreme Court reinforced its position in *BMI* five years

82. *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979).

83. *See Id.* at 5

84. *See Id.* at 11

85. *See Id.* at 18.

86. *Id.* at 20.

87. *Id.*

88. *Id.* at 24-25.

89. *Columbia Broadcasting System v. American Soc'y of Composers and Publishers*, 620 F.2d 930, 939 (2d Cir. 1980).

90. *Broadcast Music*, 441 U.S. at 21-22.

91. *Id.*

92. *See Id.* at 23-24

later. In *NCAA v. Board of Regents*,⁹³ the Court addressed the NCAA's television plan. Under the plan, the members of the NCAA joint venture agreed on how they would sell television rights.⁹⁴ Under the agreement, the networks were limited in the games they could show.⁹⁵ As a result, many of the smaller schools were left out.⁹⁶ Instead of giving the arrangement per se treatment, the Court recognized that some type of horizontal agreement had to exist in order for college football to exist as an entertainment product.⁹⁷ This recognition meant that the NCAA's arrangement would be analyzed under the rule of reason.⁹⁸

As is evident from the *BMI* and *NCAA* cases, the harshness of the per se rule is tempered where a horizontal agreement is necessary to create a new product. However, the Court has not abandoned per se treatment of horizontal market divisions entirely.⁹⁹ Therefore, it is crucial that Major League Baseball be able to argue that its agreements are necessary to create a new product.

B. *Sports Cases*

Presumably if the baseball exemption was taken away, baseball would be treated similarly to the other major professional sports, which have no antitrust exemption.¹⁰⁰ The cases that analyze

93. 468 U.S. 85 (1984).

94. *Id.* at 92.

95. *Id.* at 92-93.

96. *See Id.* at 99.

97. *Id.* at 101-02.

98. *Id.* at 103. While the rule of reason is the favored analysis from a defendant's perspective, it is not a guaranteed win. In *NCAA*, the defendants asserted enough procompetitive justifications to get out of a per se violation. *See Id.* However, once the rule of reason was applied, the defendants could not come up with enough evidence of procompetitive *effects* to outweigh the anticompetitive effects of the arrangement. *Id.* at 104-05. As a result, the NCAA lost the case. *Id.* at 120.

99. *See Palmer v. BRG of Georgia*, 498 U.S. 46 (1990).

100. *See supra* note 52.

horizontal market divisions in a sports context bear out the *BMI* and *NCAA* defenses to per se treatment under § 1. Uniformly the courts hold that sports leagues are subject to a rule of reason analysis because of the unique characteristics of the sports industry.¹⁰¹

The earliest important relocation case involved an attempt by the San Francisco Seals of the NHL to move to Vancouver.¹⁰² Rule 4.1(c) of the NHL's constitution provided that each club had exclusive territorial rights in its home city and within 50 miles of the city limits.¹⁰³ Rule 4.2 provided that no member could transfer its franchise to a different city without consent of three-fourths of league members.¹⁰⁴ The Seals formally applied for the right to relocate to Vancouver and were denied.¹⁰⁵ The Seals then brought suit under § 1 of the Sherman Act.¹⁰⁶

The *Seals* opinion first deals with whether the NHL is a single entity for purposes of analysis under § 1. The court found that individual teams acted together as a single business enterprise and that the teams are not competitors in the economic sense.¹⁰⁷ Although the court does not appear to say this takes the NHL out of the reach of § 1, its argument that the NHL is a single entity would preclude a § 1 violation.¹⁰⁸

101. *See, e.g.,* Mid-South Grizzlies v. National Football League, 550 F.Supp. 558, 566 (E.D. Penn. 1982) *affirmed* 720 F.2d 772 (3d Cir. 1983)

102. San Francisco Seals, Ltd. v. National Hockey League, 379 F.Supp. 966 (C.D. Cal. 1974).

103. *Id.* at 967.

104. *Id.* at 968.

105. *Id.*

106. *See Id.* The plaintiffs also claimed a § 2 violation but the court ruled they did not have standing to sue under that section. *Id.* at 971.

107. *Id.* at 969.

108. Whether a sports league is a single entity is the source of much commentary and litigation. Several important cases deal with this issue in a context outside of the relocation question. *See, e.g.,* North American Soccer League v. National Football League, 670 F.2d 1249, 1252 (2d Cir. 1982) (holding that the NFL is not a single economic entity); Mid-South Grizzlies v. National Football League, 720 F.2d 772, 786 (3d Cir. 1983) (holding the NFL is a single entity at least where the new franchise would not share a geographic market with another franchise); Chicago Professional Sports Ltd. v. National

Although the plaintiffs attempted to rely on *Topco* for per se treatment, the court instead applied a rule of reason analysis, although it did not label its analysis as such.¹⁰⁹ The court first defined the relevant market as professional hockey games in front of live audiences in the United States and Canada.¹¹⁰ The court then said that the organizational structure of the NHL did not impose any restraints in the relevant market, “but rather makes possible a segment of commercial activity which could hardly exist without it.”¹¹¹ Thus, the court set forth a *BMI*-type rationale five years before *BMI* was decided by the Supreme Court. In the end, the court concluded that the NHL’s rules did not violate § 1 because the parties were not economic competitors and the territorial restraints had no anticompetitive effect on the relevant market.¹¹²

The *Seals* opinion has been overshadowed, however, in the wake of the litigation allowing the NFL’s Raiders to move from Oakland to Los Angeles. There are six reported opinions in connection with the Raiders litigation, including the 1984 decision of the 9th Circuit to allow the move.¹¹³ The dispute arose after the Los

Basketball Ass’n, 961 F.2d 667 (7th Cir. 1992) (suggesting that the NBA is a single-entity for some purposes but not others). For a comprehensive discussion on the single-entity theory, See Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991).

109. See *Id.* at 970.

110. *Id.* at 969.

111. *Id.*

112. *Id.* at 970. It is difficult to tell exactly what the *Seals* holding rests on. On the one hand, its single-entity argument would preclude a § 1 violation altogether. On the other hand, the court goes on to find that the arrangement creates a new product. It uses both of these arguments to defeat plaintiff’s *Topco* analogy but essentially rules for defendant because of the absence of anticompetitive effects.

113. Los Angeles Memorial Coliseum Comm’n v. National Football League, 468 F.Supp. 154 (C.D. Cal. 1979) (granting NFL’s motion to dismiss with leave to amend the complaint); Los Angeles Memorial Coliseum Comm’n v. National Football League, 484 F.Supp. 1274 (C.D. Cal. 1980) (granting Raiders motion for preliminary injunction) *rev’d*, 634 F.2d 1197 (9th Cir. 1980); Los Angeles Memorial Coliseum Comm’n v. National Football League, 519 F.Supp. 581

Angeles Rams decided to play in Anaheim beginning in the 1980-81 season.¹¹⁴ This left the Los Angeles Coliseum without a team.¹¹⁵ The Coliseum began courting Al Davis, the owner of the Oakland Raiders, in the hope of bringing the Raiders to Los Angeles.¹¹⁶

The primary obstacle to the move was NFL Rule 4.3 which provided that unanimous approval was required for a franchise to move into the home territory of another franchise.¹¹⁷ Rule 4.1 defines “home territory” as the city in which another team is located and within 75 miles of all directions of the city limits.¹¹⁸ The Coliseum brought suit under § 1 of the Sherman Act but the suit was dismissed because no NFL team was committed to moving to Los Angeles.¹¹⁹ Despite the dismissal, the NFL got nervous and amended Rule 4.3 to require only three-fourths approval.¹²⁰ Once the discussions with Al Davis became more concrete, the Coliseum renewed its suit.¹²¹ The NFL then voted

(C.D. Cal. 1981) (granting directed verdict for Raiders on single-entity issue); Los Angeles Memorial Coliseum Comm’n v. National Football League (“Raiders I”), 726 F.2d 1381 (9th Cir. 1984) (affirming Raiders victory on liability issue); Los Angeles Memorial Coliseum Comm’n v. National Football League (“Raiders II”), 791 F.2d 1356 (9th Cir. 1986) (affirming treble damages for the Coliseum but vacating the damage award for the Raiders).

114. *Raiders I*, 726 F.2d at 1384. Interestingly, the Rams are currently attempting to find a new stadium to play in. Associated Press, *Rams on the Verge of St. Louis Lease*, THE GAINESVILLE SUN, December 14, 1994, at 3C. The city of St. Louis is wooing them and the Rams appear poised to move if the NFL does not agree to build a football-only stadium in Los Angeles. *Id.*

115. *Id.*

116. *Id.* at 1384. Davis’ lease with the Oakland Coliseum expired in 1978. *Id.* After unsuccessful negotiations with the Oakland Coliseum to improve the facility, Davis entered into discussions with the Los Angeles Coliseum. *Id.*

117. *Id.*

118. *Id.* Even though the Rams had moved to Anaheim, they were still within 75 miles of the Los Angeles Coliseum. *Id.* at 1385.

119. *Id.* The court found there was no justiciable controversy. *Id.*

120. *Id.* The original version of Rule 4.3 only required a three-fourths vote if a team was requesting a move to an unoccupied city. *Id.* The amendment reduced the vote from 100% to 75% when a team was requesting a move into the home territory of another team.

121. *Id.*

22-0 to block the move.¹²²

The 9th Circuit's *Raiders I* opinion thoroughly addressed the two elements of § 1 that were at issue: the concerted action element¹²³ and the unreasonable restraint element.¹²⁴ As to the concerted action element, the court acknowledged that the NFL was a joint venture and that some cooperation is necessary to maintain the league.¹²⁵ However, it offered three reasons for not considering the NFL a single-entity:

1. If the NFL were a single-entity, it would make it impossible for the NFL to ever violate § 1;¹²⁶
2. Other unitary organizations that were just as dependent on cooperation had been found to violate § 1;¹²⁷ and
3. The NFL clubs are separate business entities.¹²⁸

The court analogized the NFL structure to the structure in *Sealy* and concluded that the NFL was not a single-entity and was subject to § 1.¹²⁹

As for its analysis of the reasonableness of the rule, the court rejected a per se approach because it realized that some agreements between members of a joint venture are necessary.¹³⁰ In applying the rule of reason, the court first attempted to determine the relevant market.¹³¹ The *Raiders* said the relevant market was NFL

122. *Id.* There were five abstentions. *Id.*

123. *Id.* at 1387. The lower court granted a directed verdict for plaintiffs on the concerted action issue. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 519 F.Supp. 581 (C.D. Cal. 1981)

124. *Raiders I*, 726 F.2d at 1390.

125. *Id.* at 1387-88.

126. *Id.* at 1388.

127. *Id.*

128. *Id.* at 1388-89. The court said the clubs are independently owned, have independent value, and although revenues are shared, profits and losses are not. *Id.* at 1389. In addition, the clubs compete with one another off the field to acquire players, coaches, and management personnel. *Id.* at 1390.

129. *Id.* The court noted that *Seals* had reached the opposite conclusion. *Id.* at 1390 n. 4. However, the court decided against the *Seals* approach on grounds that the competitive harms and benefits of Rule 4.3 should be analyzed under the rule of reason, and should not be given blanket immunity. *Id.*

130. *Id.* at 1387-88.

131. *Id.* at 1392.

football in the Southern California area.¹³² The Coliseum said the relevant market was stadiums offering facilities to NFL teams in the entire United States.¹³³ The NFL said, in an attempt to define the market as broadly as possible so as to reduce the chances of anticompetitive effects, that the relevant market was all forms of entertainment in the United States.¹³⁴ But after devoting two full pages of the opinion to the parties' arguments, the court determined that the relevant market was not the issue.¹³⁵ Instead, the court said the focus should be on whether Rule 4.3 reasonably served the League's interest in producing its product.¹³⁶

In its reasonableness analysis, the court found two primary anticompetitive effects inherent in Rule 4.3. First, the court said the exclusive territories prevent competition within the NFL market, allowing teams to set monopoly prices in their territories.¹³⁷ Second, the exclusive territories prevent stadiums from luring other teams to their facilities.¹³⁸ On the procompetitive side, the NFL argued that Rule 4.3 promoted regional balance, aided financial stability,¹³⁹ ensured parity in the league, and fostered fan loyalty.¹⁴⁰ In addition, the NFL argued that it prevented transfers before local governments could recoup their investments.¹⁴¹ The court, however, ruled against the NFL because Rule 4.3 contained no requirements to ensure that those

132. *Id.* at 1393.

133. *Id.*

134. *Id.*

135. *Id.* at 1394. The court stated that the "exceptional nature of the industry makes precise market definition especially difficult. [B]ecause of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's [sic] market definitions."

136. *Id.*

137. *Id.* at 1395.

138. *Id.*

139. While there is a large amount of financial interdependence in the NFL, the success of the league ultimately depends on the stability of each franchise. FREEDMAN, *supra* note 4, at 78. As a result, relocation restrictions are necessary to maintain the success of the league. *Id.*

140. *Id.* at 1396.

141. *Id.* at 1396.

procompetitive effects were factors in the NFL's decisions.¹⁴² The court suggested that if Rule 4.3 contained some objective guidelines and procedural safeguards, it would be on a surer antitrust footing.¹⁴³

Judge Williams filed a lengthy separate opinion in *Raiders I* which focused primarily on the court's single-entity ruling.¹⁴⁴ He argued vigorously that the NFL teams cannot truly be separated from the league and that they do not compete in any economic sense.¹⁴⁵ However, the gist of this theory appears to be that the NFL clubs should be considered a single-entity for some of their activities, but independent actors for others.¹⁴⁶

Raiders I appeared to invalidate the NFL's Rule 4.3 under § 1 of the Sherman Act. However, in the course of deciding the damages appeal in *Raiders II*, the 9th Circuit backed off from that reading of the case.¹⁴⁷ Instead, the court made clear that its finding in *Raiders I* was that Rule 4.3 was invalid only *as applied*, not invalid on its face.¹⁴⁸ If Rule 4.3 had been found facially invalid, then part of the Raiders' damage award would have been offset by the fact that they were members of the NFL, the entity that promulgated the

142. *Id.*

143. *Id.* at 1397.

144. *Id.* at 1401 (Williams, J., concurring in part and dissenting in part).

145. *Id.* at 1404.

146. *Id.* at 1405. Those activities for which the teams should be considered a single-entity are labeled "downstream output" by Judge Williams. *Id.* at 1406. "Downstream output" includes all day-to-day decisions regarding the production of professional football—the collectively produced product. *Id.* Included in this "downstream output" are franchise relocation decisions because the Executive Committee's consensus is always a result of the collective interest of the NFL. *Id.*

On the other hand, the activities for which the teams should not be considered a single-entity are labeled "upstream flow" by Judge Williams. *Id.* This term applies to the services of players and coaches, television services and other aspects of each member club's independent identity. *Id.* Williams argues that § 1 of the Sherman Act should be applied to the "upstream flow" of products and services.

147. *Los Angeles Memorial Coliseum Comm'n v. National Football League* ("Raiders II"), 791 F.2d 1356 (9th Cir. 1986)

148. *Id.* at 1375.

rule.¹⁴⁹ On the other hand, if Rule 4.3 was only invalid as applied, the damages would not be offset because the Raiders did not participate in the application of the rule.¹⁵⁰ The court said *Raiders I* found for the Raiders only after examining the conduct and markets involved in the Raiders' move.¹⁵¹ As a result, *Raiders I* only invalidated Rule 4.3 as applied.¹⁵²

If there was any question as to whether the 9th Circuit meant what it said in *Raiders II*, that question was answered in *NBA v. SDC Basketball Club*.¹⁵³ In *SDC*, the San Diego Clippers franchise wanted to move from San Diego to Los Angeles.¹⁵⁴ The club started to move but the NBA threatened suit under an article of the NBA Constitution which prevented franchise moves without league approval.¹⁵⁵ The Clippers abandoned the idea.¹⁵⁶ However, the day after *Raiders I* was decided, the similarity of the NBA's rule to the NFL's rule caused the Clippers to announce the move again.¹⁵⁷ This time when the NBA threatened suit, the Clippers

149. *Id.* at 1369.

150. *See Id.*

151. *Id.*

152. *Id.* at 1375.

153. *National Basketball Ass'n v. SDC Basketball Club*, 815 F.2d 562 (9th Cir. 1987), *cert. dismissed*, *Los Angeles Memorial Coliseum Comm'n v. Nat'l Basketball Ass'n*, 484 U.S. 960 (1987).

154. *Id.* at 564.

155. *Id.* Article 9 of the NBA Constitution provided that no team could move into the home territory of another team without that team's approval. *Id.* The Clippers met this requirement because the Los Angeles Lakers had executed a waiver. *Id.* However, the NBA argued that the league as a whole must be permitted to approve of the move because it was the only way to enforce other articles of the NBA Constitution providing for exclusive territories. *Id.* The NBA then adopted Article 9A which set forth this practice explicitly. *Id.* The Clippers argued that 9A could not be considered for purposes of the litigation because 9A was an amendment to the NBA Constitution and required unanimous approval. *Id.* The Clippers had not voted for the amendment. *Id.* Since the court only ruled on the correctness of the summary judgment ordered by the district court, it never decided whether 9A was in effect for the purposes of the litigation. *See Id.* at 565.

156. *Id.* at 564.

157. *Id.*

countered with threats of antitrust litigation.¹⁵⁸ The NBA backed off, scheduled the Clippers' games in Los Angeles, and then brought an action for declaratory relief.¹⁵⁹

The district court granted summary judgment for the Clippers on the basis of the holding in *Raiders I*.¹⁶⁰ The 9th Circuit reversed, reiterating its position in *Raiders II* that the NFL rule was invalid only as applied.¹⁶¹ The court said nothing in *Raiders I* should be read to mean that a franchise movement rule is facially invalid under § 1 of the Sherman Act.¹⁶² The Clippers noted the absence of "objective factors" and procedural safeguards in the NBA's franchise movement rule.¹⁶³ However, the court said that the objective factors suggested in *Raiders I* are not requirements, but rather, are "well-advised."¹⁶⁴ As a result, the case was reversed and remanded for trial.¹⁶⁵

V. BASEBALL'S RELOCATION POLICY

Having set the stage with both non-sports and sports horizontal market division cases, the trends in the decisions can be analyzed and applied to baseball's franchise relocation rules. At the outset, it should be noted that baseball's relocation rules vary from those of the NHL, NFL, and NBA. As a result, the outcomes in the cases in part IV might be different had they construed baseball's

158. *Id.*

159. *Id.* The NBA sought an order that the league could consider the Clippers move and sanction the Clippers for not submitting the move to league approval. *Id.* at 564-65.

160. *Id.* at 565.

161. *Id.* at 567.

162. *Id.*

163. *Id.* at 568.

164. *Id.*

165. *Id.* at 570. There is no reported decision on the remand to the trial court but the Clippers appealed to the United States Supreme Court from the 9th Circuit's decision. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Basketball Ass'n*, 484 U.S. 960 (1987). The Supreme Court dismissed certiorari. *Id.*

relocation rules.

A. The Current Rules

The National League and American League began as separate entities: the National League in 1876 and the American League in 1900.¹⁶⁶ In 1902 the two leagues entered into an agreement by which they would operate as separate but equal leagues bound by the same playing rules, schedules, and player contracts.¹⁶⁷ However, as separate leagues, they were allowed to develop their own internal governance rules. As a result, the current “home territory” rules differ between the American and National Leagues.

In the National League, a franchise has exclusive rights in its home city within the city limits plus 10 miles in all directions of the city limits.¹⁶⁸ In the American League, a franchise has exclusive rights within 100 miles of its ballpark.¹⁶⁹ As a result, no team in either league may move into the home territory of a preexisting team from the same league. To move to any currently unoccupied city with a population under 2.4 million requires the approval of three-fourths of the teams.¹⁷⁰ If the unoccupied city has a population over 2.4 million, no approval appears to be required.¹⁷¹ As for interleague moves, a franchise from one league can move into a city already occupied by a team from the other league as long as its ballpark is at least five miles away from the

166. David Q. Voit, *The History of Major League Baseball*, in TOTAL BASEBALL 7, 10& 15 (John Thorn & Pete Palmer eds., 1989). The American League grew out of the Western League, which was begun in 1894. *Id.* at 15.

167. *Id.*

168. JESSE W. MARKHAM & PAUL V. TEPLITZ, *BASEBALL ECONOMICS AND PUBLIC POLICY* 108 (1981).

169. *See Id.*

170. *Id.*

171. *Id.* Based on 1994 population figures, none of the currently unoccupied cities or metropolitan areas have a population exceeding 2.4 million. U.S. Bureau of the Census, *Statistical Abstract of the United States* 42, Table no. 43 (116th ed., 1996).

preexisting team's ballpark.¹⁷² However, if the already-occupied city has a population of less than 2.4 million, three-fourths of the teams must approve.¹⁷³

B. The Future of Baseball's Relocation Limitations

The § 1 cases in a sports context point out several trends in determining the effect a repeal of baseball's antitrust exemption would have on franchise relocations in Major League Baseball. The most noticeable trend is the rule of reason treatment that is uniformly given to sports leagues because of the unique product created by their joint efforts.¹⁷⁴ This is consistent with the "new product defense" first encountered in *BMI* and *NCAA*.¹⁷⁵ However, in terms of results of the reasonableness analysis, the teams seem to get different treatment depending on whether they attempt to move to an unoccupied city or whether they attempt to move to an already-occupied city.¹⁷⁶ Similarly, the courts uniformly grapple with whether sports leagues are a single-entity for § 1 purposes.¹⁷⁷ However, the trend is found only in the attempt to analyze the problem, not in the results. Nevertheless, an examination of the

172. MARKHAM & TEPLITZ, *supra* note 153, at 109.

173. *Id.* No approval is necessary for interleague moves to cities with a population greater than 2.4 million. *Id.* Although this would appear to make larger cities susceptible to three major league teams, this is not an economically attractive alternative. Even when New York had three teams annual attendance at Giants and Dodgers games steadily declined. *Id.* at 108.

174. *See supra* part IV[B]. A baseball club cannot produce absent cooperation with its on-the-field competitors because of league scheduling, some revenue sharing, and post-season arrangements. MARKHAM & TEPLITZ, *supra* note 153, at 19. In addition, the quality of the baseball games cannot be determined by any one team. *Id.* at 21. As a result, the agreements between Major League Baseball teams create a product that could not otherwise exist absent the agreements.

175. *See supra* notes 67-84 and accompanying text.

176. *See San Francisco Seals, Ltd. v. National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974); *Los Angeles Memorial Coliseum v. National Football League ("Raiders I")*, 726 F.2d 1381 (9th Cir. 1984).

177. *See supra* notes 92-93, 110-114 and accompanying text.

case law on these two fundamental factors of § 1 jurisprudence should lend some guidance as to the future of baseball's relocation rules.

1. *Single-Entity Theory*

The struggle to categorize sports leagues as single-entities or independent actors is a result of the unique structure of sports leagues.¹⁷⁸ For example, in baseball, the individual clubs control certain aspects of the game like personnel decisions, ticket prices, and local television agreements¹⁷⁹. On the other hand, the league controls other aspects of the game like playing rules, national television contracts, and expansion and relocation.¹⁸⁰ Because of this unique structure, three distinct viewpoints have developed on the single-entity issue.

First, there is the idea that sports leagues are single-entities for all purposes. The *Seals* decision seems to fall into this category. The court in *Seals* said that because the teams do not compete economically, the NHL is a single-entity.¹⁸¹ However, there are some flaws with this reasoning. To begin with, the teams still compete for players, managers, and in some cases, fans. The *Seals* reasoning presupposes that antitrust laws are blind to non-economic competition. In addition, the *Seals* reasoning is most applicable where an existing team wishes to move to an unoccupied city. Where an existing team wishes to move into the

178. Some commentators curiously maintain the unique nature of sports leagues but nevertheless say that sports leagues are not single-entities when compared to normal business practices. For example, one commentator has written that “[w]hen the partners in a law...firm collectively decide where to locate their offices, nobody in his right mind thinks the decision should be considered a conspiracy and tested for reasonableness by some judge or lay jury.” Gary R. Roberts, *Professional Sports and the Antitrust Laws*, in *THE BUSINESS OF PROFESSIONAL SPORTS* 135, 142 (Paul D. Staudohar & James A. Mangan eds., 1991).

179. See *Ralders I*, 726 F.2d at 1406 (Williams, J., concurring in part and dissenting in part).

180. See *Id.*

181. *Seals*, 379 F.Supp. at 969.

home territory of another team, the *Seals* argument that the teams do not compete economically falls apart.

The second viewpoint on the single-entity issue is the polar opposite of the *Seals* approach. In *Raiders I*, the majority seemed to say that since the NFL competes for players and coaches, and since each NFL team is literally a separate business, the NFL could never be considered a single-entity.¹⁸² Although some of the *Raiders I* reasoning is weakened by the death of the intracorporate conspiracy doctrine,¹⁸³ the court is correct in noting that single-entity status would deny application of § 1 altogether.¹⁸⁴ The logical extension of single-entity status for a sports league could be that all joint ventures, because they need cooperative agreements, would be exempt from § 1.¹⁸⁵ This is not consistent with case law such as *Sealy*, which involved a structure similar to that of all sports leagues.¹⁸⁶ It should also be noted that because the Raiders were attempting to move to another team's home territory, Rule 4.3 as applied had a more obvious anticompetitive effect that cried out for § 1 protection.

The third viewpoint is the idea set forth in the dissent of *Raiders I*. The dissent argued that the NFL could be a single-entity for some purposes but not for others.¹⁸⁷ In recognition that the teams compete for players, equipment, and fans, the dissent argued the NFL should not be granted single-entity status when antitrust questions arise in those contexts.¹⁸⁸ On the other hand, since teams act in concert to make day-to-day decisions, the NFL should be a single-entity when dealing with antitrust questions in that context.¹⁸⁹ This viewpoint is more consistent with the unique structure of the sports leagues. However, it is too difficult to pigeon-hole some of the NFL's activities into categories of "league

182. *Raiders I*, 726 F.2d at 1388.

183. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

184. *Raiders I*, 726 F.2d at 1388.

185. *See Id.*

186. *See supra* notes 58-65 and accompanying text.

187. *See supra* notes 129-31 and accompanying text.

188. *See supra* note 131.

189. *See supra* note 131.

decisions” and “team decisions” since every league decision is made upon a vote of individual teams. It also seems to be a false distinction: the joint decisions of the teams are either concerted action, or they are not.

The most interesting development surrounding § 1’s concerted action element was the 1984 Supreme Court decision of *Copperweld Corp. v. Independence Tube* in which the Court reexamined the intracorporate conspiracy doctrine.¹⁹⁰ *Copperweld* held that a parent corporation and its wholly-owned subsidiary corporation are a single-entity.¹⁹¹ The Court said there is unilateral action when the actors have a preexisting unity of economic interest.¹⁹²

Had *Copperweld* been decided a year earlier, *Raiders I* might have turned out differently. Much of the *Raiders I* reasoning seems to be built around the intracorporate conspiracy doctrine because the court rejects the notion that separately-owned entities can be a unilateral actor under § 1.¹⁹³ With that notion dispelled in *Copperweld*, the *Raiders I* rationale for denial of single-entity status to the NFL has been undermined to some degree. Nevertheless, *Copperweld* does not appear to hold that all parent-subsidary agreements are shielded from § 1.¹⁹⁴ In addition, a strong argument remains that granting a sports league single-entity status would inappropriately provide a blanket exemption from the

190. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

191. *Id.* at 777.

192. *Id.* at 771. An example of *not* having unity of economic interest can be found in the following hypothetical: Suppose the Minnesota Timberwolves of the NBA are generating \$60 million in revenues per year in Minneapolis, but for whatever reasons, are losing \$10 million per year. The Timberwolves then decide to relocate to New Orleans where they project revenues of only \$50 million but project a \$5 million profit per year. For the Timberwolves, it is a sound financial move. For the league, there is \$10 million less revenue to be thrown into the revenue-sharing pot. As a result, a vote on the Timberwolves relocation would not be based on unity of economic interest, and under *Copperweld*, § 1’s plurality requirement would be met.

193. *Raiders I*, 726 F.2d at 1388.

194. See *Copperweld*, 467 U.S. at 772 n.18.

application of § 1.¹⁹⁵

While *Copperweld* is the most recent pronouncement on the concerted action element of § 1, it will not necessarily be followed to the letter in the sports context. The difficulty of applying *Copperweld* to sports league situations is that it presumes that a relocation vote would be based entirely on financial concerns.¹⁹⁶ However, the less revenue sharing involved in a sports league, the more intangible factors will come into play in a relocation vote. Depending on the weight given to those intangible factors, *Copperweld's* focus may be misplaced if applied to sports league situations.

How does this all play out in the Major League Baseball context? If the *Seals* reasoning prevailed, Major League Baseball would be considered a single-entity, at least where a team seeks to move to an unoccupied city.¹⁹⁷ Where a team seeks to move to an already-occupied city, however, *Seals* is of little help. If the *Raiders I* reasoning prevailed, Major League Baseball would never be a single-entity because the individual teams compete for players, managers and fans.¹⁹⁸ While this appears to be a harsh view, it is difficult to dispute when a team seeks to move to an already-occupied city. In that situation, there is clearly economic competition as well. If the reasoning from the dissent in *Raiders I* prevailed, Major League Baseball would be a single-entity for some purposes, but not others.¹⁹⁹ The dissent's viewpoint appears to be a happy compromise, but deciding when the league is a

195. See *supra* notes 111, 169-70 and accompanying text.

196. Well-known sportswriter Leonard Koppett has put forth the argument that Major League Baseball club owners are not in the business for profit. MARKHAM & TEPLITZ, *supra* note 153, at 27. Koppett suggests that if the owners were *Seeking* profit, there are better dollar-for-dollar investments. *Id.* Instead, owners are in the game for the social prestige, which means that all of their decisions will not be based on an ordinary businessman's model. *Id.*

197. See *supra* text accompanying note 166. Markham and Teplitz noted that from 1974-78 two of every three baseball teams lost money. MARKHAM & TEPLITZ, *supra* note 153, at 101. As a result, they argue that this financial performance is inconsistent with cartel behavior. *Id.* at 101-02.

198. See *supra* text accompanying note 167.

199. See *supra* text accompanying notes 172-74.

single-entity and when it is not would introduce a whole new level of confusion into the issue. In the end, however, these three viewpoints probably do not survive the *Copperweld* decision.²⁰⁰

Under *Copperweld*, to be treated as a single-entity, Major League Baseball would have to demonstrate a unity of economic interest between the league and the individual teams.²⁰¹ This might be an easier task for baseball than it would be for some other sports. Because baseball has less revenue sharing than some other major sports,²⁰² it is reasonable to suppose that relocation votes are based less on the financial rewards to the league as a whole, and more on the intangible factors such as regional balance and maintaining rivalries. As a result, it is easier to see a unity of economic interest between Major League Baseball and its member teams.

As we move into the future, however, this argument will be tougher to make. In 1981 approximately 13% of all revenues were shared by Major League Baseball teams.²⁰³ In 1991, that figure has grown to approximately 39%.²⁰⁴ In the midst of a player strike in which small-market teams complain they cannot handle the high player salaries, one of the possible solutions would be increased revenue sharing among the teams.²⁰⁵ While this might help resolve the strike, it would probably preclude any solid arguments under *Copperweld* that Major League Baseball is a single-entity for purposes of § 1 analysis.

If baseball were found to be a single entity, it would still face a possible charge of monopolizing or attempting to monopolize under Sherman Act Section 2.²⁰⁶ However, establishing a violation

200. See *supra* text accompanying notes 172-74.

201. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

202. MARKHAM & TEPLITZ, *supra* note 153, at 46.

203. *Id.*

204. ZIMBALIST, *supra* note 7, at 58.

205. As of 1991, the players' salaries took up approximately 43% of team revenue. ZIMBALIST, *supra* note 7, at 59.

206. 15 U.S.C. section 2 (1997).

under Section 2 would difficult, at best.²⁰⁷ The Supreme Court has consistently held that a monopolist has no general duty to deal with all prospective customers; thus, a refusal to award a city a new franchise, or to discontinue a franchise with an existing city would not, without more, constitute a violation of section 2.²⁰⁸

In fact, *Seattle Totems Hockey Club, Inc. v. National Hockey League* held that the denial of an application for an expansion franchise did not violate section 2.²⁰⁹ The court found that refusal to award the new franchise did not reduce competition among existing teams, nor did it exclude competition among existing teams because the proposed franchise wanted to join the league, not compete with it.²¹⁰ *Seattle Totems* seems to indicate that a suit by a competing baseball league complaining of unfair exclusionary practices would present a more serious section 2 claim against Major League Baseball than would any action based on a franchise relocation.

2. Rule of Reason

While the single-entity argument is attractive because it would allow Major League Baseball a successful motion to dismiss, it is not the strongest argument available. The cases establish that sports leagues receive treatment under the rule of reason because of the unique product the joint ventures produce.²¹¹ As to what constitutes reasonableness, two distinct lines appear. The *Seals* approach applies to teams which seek to relocate to an unoccupied city.²¹² The *Raiders I* approach applies to teams which seek to

207. *United States v. Grinnell Corp.*, 384 U.S. 563 at 570-71, holding that in order to establish a violation of Sherman Act section 2, it must be shown that defendant possessed monopoly power in a relevant product and geographic market and that defendant has willfully exercised or used that power to maintain its monopoly status.

208. *See United States v. Colgate* 250 U.S. 300 (1919).

209. 283 F2d 1347 (9th Cir., 1986).

210. *Id.* at 1350.

211. *See supra*, part IV[B].

212. *See supra*, notes 94-97 and accompanying text.

relocate into the home territory of another team.²¹³ Each of these reasonableness approaches will be examined in turn.

In *Seals*, the court found there was nothing anticompetitive in denying the Seals a chance to relocate from San Francisco to Vancouver.²¹⁴ While an argument exists that denying the Seals a chance to participate in the Vancouver market is anticompetitive in itself, the anticompetitive effects were outweighed by procompetitive considerations.²¹⁵ The *Seals* reasoning would apply in a baseball context because the rules regarding moves to unoccupied cities require a three-fourths vote, just like the NHL's rule in *Seals*.²¹⁶ Thus, in a baseball context, if the Pittsburgh Pirates tried to move the team to St. Petersburg, the Pirates could argue that it is anticompetitive to deny them participation in the St. Petersburg market. However, from a consumer (i.e., fan) point-of-view, it is just as anticompetitive to let the team leave Pittsburgh. In addition, any anticompetitive effects may be outweighed by the goals of regional balance, fan loyalty, and team rivalries.²¹⁷

As for teams who seek to move to cities already occupied by a Major League Baseball team, the *Raiders I* reasoning would apply. In *Raiders I* the court found that preventing local competition between the Raiders and Rams in Los Angeles was patently anticompetitive and was not outweighed by any of the NFL's procompetitive justifications.²¹⁸ *Raiders I* is directly applicable to Major League Baseball where an interleague move is proposed. Although the team need only stay five miles away from the preexisting team's ballpark, if the city has less than 2.4 million people, three-fourths of the preexisting team's league must

213. *See supra*, notes 115-31 and accompanying text.

214. *San Francisco Seals, Ltd., v. National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974).

215. *Id.* at 970.

216. *See supra*, text accompanying note 89.

217. These procompetitive arguments are not as strong if a team like the Seattle Mariners tried to move to a currently unoccupied city. It would be difficult for Major League Baseball to make a fan loyalty argument or team rivalry argument for a franchise, such as Seattle, which has a history of losing and is less than 20 years old.

218. *See supra*, notes 115-31 and accompanying text.

approve.²¹⁹ It is thus similar to the NFL's three-fourths rule and presumably would receive the same treatment that the NFL rule received. However, baseball's rule could be seen as more reasonable than the NFL rule because Major League Baseball historically has been more willing to allow multi-team cities where the circumstances are appropriate.²²⁰ On the other hand, there appears to be an absolute prohibition on allowing a baseball team to move into the home territory of another team from the same league. This is more patently anticompetitive than the NFL's three-fourths rule in *Raiders I* and presumably would fare no better than the NFL's rule.

The important thing to remember when analyzing *Raiders I* is that the 9th Circuit did not invalidate the relocation rule on its face, only as applied.²²¹ As a result, there are some relocation situations in Major League Baseball that might pass the reasonableness test. Unfortunately, there are no cases to give us guidance on what those situations are. Because of this lack of guidance, the safe and practical course for Major League Baseball is to follow the *Raiders I* court's advice and incorporate some objective factors and procedural safeguards into their relocation rules.²²²

First, Major League Baseball might consider relaxing the vote requirements. The absolute prohibition on intraleague moves to currently-occupied cities should probably be reduced to a vote. In addition, the three-fourths vote requirement for other moves could be relaxed. In the 1980 Raiders district court case, the court said that a three-fourths rule was more restrictive than necessary and that a majority vote might be appropriate.²²³ While reducing the

219. See *supra*, note 155 and accompanying text.

220. Currently three cities have more than one Major League Baseball team: New York, Chicago, and San Francisco-Oakland. Only one city in the National Football League has more than one team, New York, and the NFL has never had more than three such cities. The NHL only has one multi-team city and the NBA two, if New York and New Jersey are treated as one.

221. See *supra*, notes 132-37 and accompanying text.

222. See *supra*, notes 127-28 and accompanying text.

223. Los Angeles Memorial Coliseum Comm'n v. National Football League, 484 F.Supp. 1274, 1277 (C.D. Cal. 1980).

three-fourths vote to 51% might be going too far, Major League Baseball should probably back off to at least a two-thirds rule.²²⁴

A relaxing of the vote requirements might not be necessary, however, if some objective factors were incorporated into the relocation rules. Major League Baseball can assert the same procompetitive justifications that the NFL did in *Raiders I*.²²⁵ But assertions were not enough for the court.²²⁶ The 9th Circuit suggested that some of those justifications be built into the league rules to assure they were being considered during the vote.²²⁷ Major League Baseball already incorporates a population consideration into its rules by not requiring a vote when the proposed move is to a city with greater than 2.4 million people.²²⁸ From a practical standpoint, this does not carry much weight since only one unoccupied city meets that criteria.²²⁹ However, it does show that baseball is considering population as a factor. Other factors which should be incorporated include:

- economic projections;
- regional balance;
- quality of facilities;
- fan loyalty;
- team rivalries; and
- durational limits to allow cities to recoup their losses.²³⁰

As any avid baseball fan realizes, most of these factors are considered in all league votes concerning individual teams. However, the point is not only whether the factors are considered, but whether Major League Baseball can prove to the court that they

224. In the *Raiders* litigation, if the NFL's rule had a more relaxed voting requirement, it may have been found reasonable and the *Raiders* move would have been blocked. After all, because the league voted 22-0 to block the move, any reasonable voting requirement would have kept the *Raiders* out of Los Angeles.

225. *Los Angeles Memorial Coliseum Comm'n v. National Football League* ("Raiders I"), 726 F.2d 1381, 1397 (9th Cir. 1984).

226. *Id.* at 1397.

227. *Id.*

228. *See supra*, note 155.

229. *See supra*, note 156.

230. *Raiders I*, 726 F.2d at 1397.

are considered. The only sure way to prove these factors are examined is to incorporate at least some of them into the relocation rules. Since they are being considered by the owners anyway, it does not seem like an onerous burden for the factors to be codified, however loosely.

Regardless of whether baseball loses its antitrust exemption, one threat it need not fear is suits by cities from which a franchise is being removed. A number of barriers exist which make such a suit unlikely to succeed. First, a city will usually lack standing under section 4 of the Clayton Act because it could not show that it was "...injured in its business or property by reason of anything forbidden in the antitrust laws."²³¹ This is because the courts have held that a governmental unit may not recover for general economic injury to its citizenry resulting from an antitrust violation.²³² Furthermore, even if a city did have standing, it would have difficulty satisfying the requirement that it show an "anticompetitive effect" in a relevant geographic market as a result of a team's movement.²³³ The problem is that the net effect on competition resulting from a franchise's movement from one city to another is zero; that is, the gain in consumer welfare realized by consumers in the city to which the team relocated counterbalances the loss to consumers in the city from which the franchise has moved.²³⁴ Furthermore, the very process of competitive bidding among cities, which lures a franchise to relocate, which anathema to consumers in the losing city, is exactly the type of vigorous competitive conduct which the antitrust laws are designed to encourage.²³⁵ In fact, probably the only realistic opportunity for a city to succeed in a suit against the relocating team is if the move constitutes a breach of a lease with a municipally owned stadium. Thus, in *Los Angeles Memorial Coliseum v. National Football League*, plaintiff successfully argued that it suffered an economic

231. 15 U.S.C. section 15(a) (1996).

232. *Hawaii v. Standard Oil*, 405 U.S. 251, at 263-65 (1972).

233. *Brunswick v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977).

234. *Id.* at 489.

235. *Los Angeles Memorial Coliseum v. National Football League*, 791 F2d 1356 at 1364 (1986).

loss from the NFL's efforts to prevent the Oakland Raiders from honoring its contract to play its home games in plaintiff's stadium.²³⁶

Similarly, it is unlikely that a city could successfully claim that refusal of Major League Baseball to provide a replacement team for a relocating franchise violates the Sherman Act. In *Mid-South Grizzlies v. National Football League*, the court held that the NFL's denial of an expansion franchise to Memphis, a former World Football League applicant, did not violate the antitrust laws.²³⁷ The courts pointed out that the league's refusal to admit new teams did not lessen competition among existing teams; thus it had no "anticompetitive effect."²³⁸ Indeed, the court, suggested, the action was actually pro-competitive since it left the City of Memphis available as an attractive site for a franchise to any newly formed league.²³⁹

The only decision involving baseball holding to the contrary was a Circuit Court decision in *State v. Milwaukee Braves, Inc.* in which the Circuit Court issued an injunction barring the Milwaukee Braves from moving to Atlanta unless the league provided a replacement team.²⁴⁰ However, the decision was reversed by the Wisconsin Supreme Court because it found that the Wisconsin antitrust laws, on which the Circuit Court based its decision, were pre-empted under the Supremacy Clause and Commerce Clause by the Federal Antitrust exemption.²⁴¹ However, aside from the pre-emption issue, the lower courts decision appears to be unsound. It's finding that baseball is a "quasi-public institution" in nature is questionable, at best.²⁴² Furthermore, there

236. *Id.* at 1364-65.

237. 720 F.2d 772 (1983).

238. *Id.* at 785-87.

239. *Id.* at 786. For a contrary point of view *See*, Christian M. McBurney, *The Legality of Sport's Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. Rev. 925 (1985).

240. 1966 Trade Cas. (CCH para. 71,738 (Wis. Cir.Ct.) rev'd on other grounds, 144 N.W. 1 (Wis. 1966).

241. 144 N.W. 2d 1 at 11 (1966).

242. 1966 Trade Cas. (CCH) at 82,373.

was no basis for the courts' conclusion that the move had an anticompetitive effect.

V. CONCLUSION

As things stand now, Major League Baseball need not be overly concerned about the antitrust legality of its relocation rules because it still has its antitrust exemption. However, the call is being sounded louder than ever for Congress to revoke baseball's antitrust exemption, or at least for Congress to narrow its scope.²⁴³ If the baseball exemption is revoked, it might prompt a few baseball franchises to attempt a relocation. If baseball makes some minor revisions to its relocation rules, it will be able to block the moves when necessary, reducing even further the risk that it might be found to violate § 1 of the Sherman Act. Without these revisions some danger might still exist.

From a practical point-of-view, however, even if baseball's relocation rules were found to violate § 1, team movement would be minimal. Only a few cities in the United States and Canada that currently are without a team could support even one Major League Baseball team.²⁴⁴ Indeed, the smaller markets that currently have a team (e.g., Milwaukee, Kansas City) constantly complain they are losing money.²⁴⁵ Even fewer cities could sustain multiple teams.²⁴⁶

243. Furthermore, within the past five years, two courts have explicitly questioned whether baseball's antitrust exemption should extend beyond the reserve clause. *Piazza v. Major League Baseball*, 831 F.Supp. 420 at 435-440 (E.D. Pa., 1993); *Butterworth v. National League of Professional Baseball Clubs*, 644 So.2d 1021 at 1023-4 (Fl. 1994). However, given the Supreme Court's repeated reaffirmation of the exemption, it seems unlikely that it would be modified or limited judicially.

244. As of 1975, it was estimated that a city's metropolitan population must be at least one million to sustain a team. *MARKHAM & TEPLITZ*, *supra* note 153, at 23. Given the way salaries and other costs have escalated over the past 19 years, it seems likely that a city's metropolitan population must be even higher in 1994. However, the Markham and Teplitz study acknowledges that cities have intangible factors that affect whether it can support a team. *Id.* at 68. As a result, the one million figure is not necessarily accurate. *See Id.* at 69.

245. Some commentators have suggested that the losses shown by major league teams are a reflection of the flexibility of Generally Accepted Accounting Principles. *ZIMBALIST*, *supra* note 7, at 62. However, even if

Studies show that even in those cities that *can* support two teams, each club has lower attendance than they would have in smaller unoccupied cities.²⁴⁷ So from a practical standpoint, if § 1 gave teams more freedom to relocate, or alternatively, if Major League Baseball's relocation rules were relaxed, teams would not be economically motivated to abandon their current cities *en masse*.²⁴⁸

Major League Baseball is financially healthy, it is hardly reaping the kind of profits traditionally associated with cartel behavior. *Id.* at 69.

246. *Id.* at 109-10

247. MARKHAM & TEPLITZ, *supra* note 153, at 70. For example, in the ten years before the Oakland Athletics moved into the metropolitan area, the San Francisco Giants averaged approximately 1.5 million fans per year. *Id.* After the Athletics' move, the Giants only exceeded that average in one season out of the next eleven. *Id.* In six of those years, the Giants only enjoyed half the number of fans that it averaged in the prior ten years. *Id.* at 71.

There is a limitation to this data. A team's won-loss record is always a factor in attendance. In the 10 years before the Athletics' move, the Giants averaged 88 wins per season. TOTAL BASEBALL (John Thorn & Pete Palmer eds., 1989) (figures compiled by author). In the first eleven years after the move, the Giants averaged 81 wins per season. *Id.* The Athletics experienced slightly better attendance but averaged 87 wins per season during those same eleven years, including three American League Pennants and three consecutive World Series victories. *Id.* By all indications, however, the Giants could not have approached their average attendance from the prior ten years no matter how many wins they amassed. In only three of the eleven years after the Athletics' move, did the combined attendance at Athletics and Giants games significantly exceed the Giants' average prior to the Athletics' move. MARKHAM & TEPLITZ, *supra* note 153, at 71.

248. Between 1950 and 1984, 15 football teams changed cities, 28 basketball teams changed cities, and 14 hockey teams changed cities. FREEDMAN, *supra* note 4, at 79. In that same time span, only ten baseball teams moved, and none since the Washington Senators moved to Arlington in 1972. ZIMBALIST, *supra* note 7, at 125. This may be because football, basketball, and hockey are less dependent on a continued fan base than baseball is. In 1993, the NFL drew a total regular season attendance of 14,772,000; the NBA had a total attendance of 19,117,000 million., while the NHL's total attendance was 15,714,000. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 257 Table no. 412 (1996). Major League Baseball, on the other hand, drew total regular season attendance in 1993 of 70,257,000, more than the total attendance for the other three major sports combined. *Id.* Based on the attendance figures, it appears that baseball is more dependent on fan support from its home city than are teams in other major sports.