TAKE THE MONEY AND RUN: HOW PROFESSIONAL SPORTS FRANCHISE RELOCATION HURTS A NEW CLASS OF CONSUMERS: CITIES

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To the delight of Seattle sports fans, on June 1, 1979, Brent Musberger screamed, “[f]ive, four, three, two, one. Let the celebration begin in Seattle. It is over. The Seattle Supersonics have won the NBA World Championship series in five games!” The Seattle Supersonics (“Sonics”) became the first Seattle sports franchise to win a major professional sports championship. But on July 3, 2008, the Sonics did something unprecedented; they became the first sports franchise to relocate after winning a championship. The Sonics’ move from Seattle to Oklahoma City was sudden, unexpected and left fans feeling like a major institution in their lives was forcibly ripped away. Unfortunately, the Sonics were not alone. Since 1995, ten franchises from MLB, NBA, NFL and NHL have relocated cities.

This comment explores antitrust laws application to sports franchise relocation. Part I examines the problems a plaintiff, and a sports league, have in restricting franchise relocation; and how the antitrust laws prohibit a league from preventing franchises to relocate. Part II discusses Congress’ recognition of the problems caused by franchise relocation and its many attempts to limit the harm caused by relocation. Part III analyzes why the current landscape of franchise relocation and municipal investment in stadia has dramatically changed since the seminal case of Raiders I and why a stubborn application of its rule does not serve the same

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2 1979 NBA Finals (CBS television broadcast June 1, 1979).
3 NBA, http://www.nba.com/history/finals/champions.html (last visited November 1, 2010). The major professional sports leagues consist of Major League Baseball (“MLB”), National Basketball Association (“NBA”), National Football League (“NFL”) and National Hockey League (“NHL”). To be fair, in 1917 the Seattle Metropolitans of the Pacific Coast Hockey Association won the Stanley Cup Finals. Later that year the National Hockey Association suspended and the member teams formed the NHL. No team other than the 1979 Sonics have won a professional sports championship in one of the four major leagues.
5 Galloway & Johns, supra, note 3.
purposes. Part III concludes with a revised proposal that adequately addresses the team, league, fans and communities’ interest if a franchise wishes to relocate.

I. Why Attacking a League Has Failed

A. National Hockey League

In February 1969, the owners of the San Francisco Seals ("Seals") made a formal application to the National Hockey League ("NHL") to exchanges its franchise for one in Vancouver, British Columbia. When the NHL board of governors denied the Seals request, the Seals brought suit claiming a violation of section 1 of the Sherman Act. The board based its denial of relocation on Rule 4.2 of the NHL Constitution. Rule 4.2 provides:

Territorial Rights of League. The League shall have exclusive control of the playing of hockey games by member clubs in the home territory of each member. The members shall have the right to and agree to operate professional hockey clubs and play the League schedule in their respective cities or boroughs as indicated opposite their signatures hereto. No member shall transfer its club and franchise to a different city or borough.

For the rule to violate section 1 of the Sherman Act the court must inquire into the relevant to determine whether the rule affects trade or commerce within the market. The relevant market for control of price and competition is defined by the reasonable interchangeableness of

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7 The Seals ownership was structured differently from other NHL teams. Unlike other teams who were owned by a single person or family, the Seals were owned by a partnership of more than 50 partners. None of the partners held a majority interest in the team. The team was run by General Partner Barend van Gehrig. This ownership structure was virtually unheard of in the late 1960’s, but has become more prevalent among today’s team ownership. See BRAD KURTZBERG, SHORTHANDED: THE UNTOLD STORY OF THE SEALS: HOCKEY’S MOST COLORFUL TEAM 4 (2006).
10 Rule 1 of the Sherman Act provides, “Every contract, combination in the form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .” 15 U.S.C. § 1 (2010).
13 Id. at 967.
commodities.\textsuperscript{14} The product market is the production of professional hockey games before live audiences in the United States and Canada.\textsuperscript{15}

The Seals were intent on remaining an NHL franchise and enjoying the exclusive territory benefits the NHL affords.\textsuperscript{16} The Seals would continue producing live professional hockey games to assure all members of the NHL the best financial return.\textsuperscript{17} The Seals and NHL would not be economic competitors in the production of live professional hockey.\textsuperscript{18} Both parties would be acting together as a single entity, to ensure the highest economic return against other professional sports leagues.\textsuperscript{19} The structure of the NHL made the production of live professional hockey that could hardly exist without a central league.\textsuperscript{20} The court noted the thrust of the Sherman Act was to prohibit “competitors from combining with other competitors to gain a[n] . . . advantage . . . by creating impermissible restraints upon trade or commerce.”\textsuperscript{21}

The court found the Seals reliance on \textit{United States v. Topco Associates, Inc.}\textsuperscript{22} to be misplaced. In \textit{Topco} the court found a per se violation of section 1 in an agreement between

\textsuperscript{14} \textit{Id}. at 968. \textit{See} United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956). This inquiry determines the outer boundaries of the product market. The interchangeability is the cross-elasticity of demand between the product and reasonable substitutes for it. Within a broad market there exists well-defined submarkets, which constitute product markets for antitrust purposes.


\textsuperscript{16} \textit{Id}. The Seals did not challenge Rule 4.1(c) of the NHL Constitution on antitrust grounds. Rule 4.1(c) provides that, “[e]ach Member Club shall have exclusive territorial rights in the city in which it is located and within fifty miles of that city’s corporate limits. National Hockey League Constitution, Art. IV, § 4.1(c) (1975). The Seals sought relocation of the their franchise and fully expected the protections afforded by Rule 4.1(c).

\textsuperscript{17} \textit{Id}.

\textsuperscript{18} \textit{Id}.

\textsuperscript{19} \textit{Id}. at 970.

\textsuperscript{20} \textit{Id}.

\textsuperscript{21} \textit{Id}. at 969. Therefore it is fundamental for there to be a Rule 1 violation that there are two independent business entities combining to unreasonably restrain trade. \textit{See} \textit{Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.}, 365 F.2d 478, 484 (5th Cir. 1966).

\textsuperscript{22} \textit{United States v. Topco Associates, Inc.}, 405 U.S. 596 (1972).
competitors to allocate territories in order to minimize competition. However, Topco was factually distinguishable because it dealt with independent business enterprises in direct economic competition with each other. The member teams of the NHL were not in direct economic competition with each other; thus, the court deemed the NHL a single entity. Section 1 only concerns itself with contracts, conspiracies and combinations of at least two parties to unreasonable restrain trade. Since the NHL was a single entity it was not found to be in violation of section 1 of the Sherman Act.

While this appeared to be an early victory granting leagues the unfettered power to control team relocations, finding sports leagues to single entities would be eroded by the following decisions involving Major League Baseball (“MLB”), National Basketball Association (“NBA”) and National Football League (“NFL”).

**B. National Football League**

The NFL used the ruling in *San Francisco Seals* to its advantage by including a “Home Territory” and “Voting” clause to its constitution. Los Angeles Rams owner Carroll

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25 *Id.* at 971. The court reasoned that while the member teams of the NHL were in competition for recognition and accolades, but this did not rise to the level of economic competitors. This reason is at best specious. The competition for professional standing and recognition determines which teams are more successful and popular. Assuming team owners are rational actors, the owners are engaged in the business of maximizing profits from providing live professional hockey. The best way for the owners to increase profits is to produce the best hockey by engaging in what the court terms non-economic competition.

26 *Id.*

27 However, if a league were able to convince the court that *San Francisco Seals* was decided correctly leagues internal decision making procedures would not be subject to antitrust regulation. While this approach would give leagues the ability to regulate team relocation, the court’s analysis of the NHL as a single entity is flawed.

28 National Football League Constitution and By-Laws, Art. IV, § 4.1 (1978). Rule 4.1 provides: Home Territory’ with respect to any club means the city in which such club is located and for which it holds a franchise and plays its home games and includes the surrounding
Rosenbloom’s decision to move the franchise to Anaheim left the Los Angeles Coliseum vacant.  In 1979, Los Angeles Memorial Coliseum Com. v. National Football League (“Raiders I”) determined that competition for players and fans suggests teams are economic competitors. The Coliseum’s reliance on Topco’s application of a “per se” rule of illegality was misguided. The member teams must cooperate for professional football to exist. The court determined Rule 4.3 actually engenders competition because it determines where games are played, “thereby making it possible for the sports events to take place.” However, Raiders I did not foreclose professional league relocation rules to antitrust attack under a rule of reason analysis. Rule 4.3 territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . .

29 National Football League Constitution and By-Laws, Art. IV, § 4.3 (1978). Rule 4.3 provides:

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

Prior to 1978, Rule 4.3 required a unanimous vote of the member clubs in order for a club to relocate within the territory of an already existing club. Rule 4.3 was amended because of a previous antitrust suit against the NFL. Los Angeles Memorial Coliseum Com. v. National Football League, 468 F. Supp. 154 (C.D. Cal. 1979). Los Angeles Memorial Coliseum Com. v. National Football League, 468 F. Supp. 154, 157 (C.D. Cal. 1979). The decision to play in Anaheim left the Los Angeles Coliseum without a team for the first time since 1946. The Coliseum brought the suit challenging Rule 4.3 on antitrust grounds. The NFL moved to dismiss because the Coliseum lacked a justiciable case or controversy and did not have standing to maintain the suit. The district court found that the Coliseum’s alleged injuries were too remote. Id. at 166. The court reconciled its holding with San Francisco Seals, LTD. v. National Hockey League by stating, “[San Francisco Seals] merely held that the actions complained of did not have any anticompetitive effect . . . .” Id. at 164 n.12.

31 Id. at 159. While it would not be impossible for competition to exist without an organized league, the history of professional sports suggests, “that professional teams, with rare-exceptions (such as the Harlem Globetrotters), exist only in the context of a league structure.” Id. at 166 n.15.

34 Id. at 166. In order for a per se rule to be applied against § 4.3 it must have a “pernicious effect on competition” or lack “any redeeming virtue.” Id. (citing Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958)).

35 The court declined to find whether § 4.3 was anticompetitive under a rule of reason analysis because the Coliseum lacked standing to bring such a claim. Id. at 168.
would face a rule of reason antitrust attack when Al Davis\textsuperscript{36} sought to relocate the Oakland Raiders to Los Angeles in January 1980.

On March 1, 1980, Al Davis entered into an agreement with the Los Angeles Coliseum detailing the Oakland Raiders’ relocation to Los Angeles.\textsuperscript{37} The member teams voted against the move, pursuant to Rule 4.3, by a unanimous vote.\textsuperscript{38} As a result of the denial, the Los Angeles Memorial Coliseum Commission renewed its action against the NFL.\textsuperscript{39} The Ninth Circuit analyzed Rule 4.3 under the rule of reason to determine, “whether under all the circumstances. . . the agreement imposes an unreasonable restraint on competition.”\textsuperscript{40} The NFL challenged the lower court’s judgment finding section 1 liability on two grounds: (1) that the NFL is a single entity incapable of conspiring to restrain competition; and (2) Rule 4.3 is not an unreasonable restraint on trade.\textsuperscript{41}

The district court rejected the NFL’s argument that it was a single entity, similar to a partnership or joint venture of teams.\textsuperscript{42} The Ninth Circuit upheld the district court’s determination on three grounds. First, NFL policies are set by individual member teams acting

\textsuperscript{36} Al Davis was, and currently is, the managing general partner of the Oakland Raiders. Current estimates value Davis’ ownership as approximately 47%, while the descendents of the remaining eight partners comprise the remainder of the ownership. Mark Zeigler, \textit{Silence of Elders Tells on Raiders}, SAN FRANCISCO UNION-TRIBUNE, October 31, 2009.

\textsuperscript{37} Los Angeles Memorial Coliseum Com. v. National Football League, 726 F.2d 1381, 1385 (9th Cir. 1984).

\textsuperscript{38} \textit{Id.} The team representatives voted 22-0 against the move, with five teams abstaining. Rule 4.3 required at least twenty-one teams to approve the move.

\textsuperscript{39} \textit{Id.} The previous action was dismissed with leave to amend the complaint to state an actionable claim. Los Angeles Memorial Coliseum Com. v. National Football League, 468 F. Supp. 154, 167 (C.D. Cal. 1979).

\textsuperscript{40} \textit{Id.} at 1386. The district court judge determined a per se analysis would be inappropriate to analyze the unique nature of the business of professional football. \textit{Id.} at 1387.

\textsuperscript{41} \textit{Id.} at 1387.

\textsuperscript{42} \textit{Id.} The district court gave three reasons why it rejected the NFL’s argument. First, the courts in \textit{Smith v. Pro Football, Inc., Mackey v. NFL, Kapp v. NFL} have held the NFL violated Rule 1 in other areas. \textit{Id.} at 1388. Second, organizations whose product was “just as unitary . . . and require[d] the same kind of cooperation from [its] members” have been found to violate Rule 1. \textit{Id.} Third, the court did not believe the NFL’s argument that “clubs are not separate business entities whose products have an independent value.” \textit{Id.}
together, even though teams have various common purposes.\textsuperscript{43} Second, it is unpersuasive that member teams have the same interests and the league, because that concurrence exists in every cartel.\textsuperscript{44} Finally, the association of teams are “sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 . . . .”\textsuperscript{45} While almost 90% of league revenue is shared amongst the member teams, each team’s profit and losses are not shared, which is common amongst single entities.\textsuperscript{46} The teams compete for higher profits, in acquiring players and coaches, media revenues and fan support in locations where teams are in close proximity of each other.\textsuperscript{47} While the NFL was determined not to be single entity, its singular nature is a relevant factor in evaluating the reasonableness of the restriction on team movement.\textsuperscript{48}

Under the rule of reason analysis the court examined whether Rule 4.3 reasonably served the collective objectives of the owners or permitted them to earn excess profits at the expense of the consumers.\textsuperscript{49} Defining the relevant market provides the basis on which the competitive harms and benefits can be weighed.\textsuperscript{50} The relevant market encompasses both the product market\textsuperscript{51} and geographic market.\textsuperscript{52}

\begin{footnotesize}
\textsuperscript{43} \textit{Id.} at 1388-1389.
\textsuperscript{44} \textit{Id.} at 1389.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 1390. The court noted, “[t]he disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.” \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 1392.
\textsuperscript{51} The two test used to determine the product market are: (1) the reasonable interchangeability of similar uses; and (2) the cross-elasticity of demand, which describes how the sale of one product affects the price of another. Los Angeles Memorial Coliseum Com. v. National Football League, 726 F.2d 1381, 1393 (9th Cir. 1984).
\textsuperscript{52} \textit{Id.} at 1392. The party claiming a § 1 violation wants the market to be defined narrowly to exemplify the restraint on trade; while, the party defending wants the market defined broadly to show the
\end{footnotesize}
of the product and geographic market. However, the narrow definition of the market was not the sole factor used to determine the reasonableness of restricting team relocation. The nature of the NFL provides a valuable glimpse into the purpose behind the restraint. The NFL’s procompetitive rationale, allowing league placement of teams to ensure a diverse group of markets, was vastly outweighed by the anticompetitive effect that exclusive territories allow teams to set monopolistic prices. The court decided that while market is helpful in determining whether the NFL is a single entity or a collection of twenty-eight separate teams, it is no dispositive of the issue.

For Rule 4.3 to be violative of section 1 it must actually harm competition and such harm must outweigh the procompetitive rationale for the rule. In order to survive a rule of reason analysis, the benefits must outweigh the harms to competition and Rule 4.3 must be the least restrictive means for achieving its aims. The court found the harms of Rule 4.3 would allow teams to set monopolistic prices and effectively foreclose competition among stadia wishing to

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53 Id. at 1394. The parties stipulated not to introduce expert testimony regarding market definition. Id. at 1393. Pete Rozelle and George Frontierre, owner of the Los Angeles Rams, testified that NFL teams compete with all businesses engaged in network television entertainment. Id. Al Davis testified that NFL teams within close geographic proximity compete for fan attendance and local television ratings. Id. at 1393.

54 Id. at 1395-1396.

55 Id. at 1394.

56 Id. at 1395.

57 Id. If the restraint is merely ancillary, “it increases the probability that the restraint will be found reasonable.” Id. (citing Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir. 1983)).
secure an NFL franchise. This would prevent NFL franchises, such as Raiders and the Rams, from competing to the benefit of all consumers of the NFL in the Los Angeles area. The benefits consisted of ensuring new franchise financial stability, protecting the large investments of owners and protecting the substantial investments local governments have made in stadia and other facilities. Despite the existence of both harmful and beneficial effects, the court concluded that requirement of three-fourths approval of the owners to approve relocation was not the least restrictive means. In affirming the decision, the Ninth Circuit noted that “some sort of procedural mechanism” was necessary for Rule 4.3 to be the least restrictive means. Unfortunately, the Ninth Circuit did not elaborate on what kind of procedural safeguard would save Rule 4.3.

After the Raiders I decision the NFL experienced a myriad of franchise relocations. In an attempt to curb the growing trend of franchise relocation the NFL augmented Rule 4.3 in 1996. The new policy required teams seeking relocation to submit a proposal that includes:

59 Id.
60 Id.
61 Id. at 1396. This last benefit of Rule 4.3 (and similar rules of the NHL, NBA and MLB) will be the focus for this articles premise that either a change in the application of antitrust law or a statutory exemption from franchise relocation rules is necessary. Raiders I was decided in 1984 when the construction of a football stadium was significantly less than today. As a point of comparison the Hubert H. Humphrey Metrodome in Minneapolis was constructed in 1982 for a cost of $55 million while Cowboys Stadium in Arlington, Texas was constructed in 2009 costing nearly $1.15 billion. http://www.football.ballparks.com.
62 Id. The court determined that since an owner opposing a proposed move would only need to muster seven votes to prevent a relocation it could lead to owners from restricting a move for personal reasons. Id. Because Al Davis was greatly disliked by Commissioner Rozelle and several other owners the court discounted the NFL’s argument that its owners would vote in the best interests of the league as a whole. Id. at 1397.
63 Id.
64 The NFL saw only one team relocate from 1947 until 1981, the Chicago Cardinals moved to St. Louis in 1960. http://nfl.com/history. After Raiders I was decided in 1982 until 1995, the NFL saw Baltimore Colts move to Indianapolis, the St. Louis Cardinals move to Phoenix, the Los Angeles Raiders move back to Oakland, the Los Angeles Rams move to St. Louis, the planned moves of Cleveland Browns to Baltimore and the Houston Oilers to Nashville. http://nfl.com/history.
1. A copy of the club’s existing lease and any other agreements relating to its use of the stadium;
2. An audited financial statement for the last four years;
3. Assessment of the present stadium along with possible costs of improvements and progress of negotiations to so improve the stadium;
4. A description of the projected lease and operating terms available at the new location;
5. A description of the lease and operating terms available at the old location; and
6. A budget statement projecting profits and losses for the first three (3) years at the new stadium.\(^ {66} \)

Member clubs must then consider nine guidelines concerning how to best advance their collective interests:

1. The adequacy of the stadium in which the team played its home games in the previous season, and the willingness of the stadium or arena authority to remedy any deficiencies in such facility;
2. The extent to which fan loyalty to and support for the team has been demonstrated during the team’s tenure in the existing community;
3. The extent to which the team, directly or indirectly, received public financial support by means of any publicly financed playing facility, special tax treatment and any other form of public financial support;
4. The degree to which the ownership or management of the team has contributed to any circumstances that might otherwise demonstrate the need for such relocation;
5. Whether the team has incurred net operating losses, exclusive of depreciation and amortization, sufficient to threaten the continued viability of the team;
6. The degree to which the team has engaged in good faith negotiations with appropriate persons concerning terms and conditions under which the team would continue to play its games in such community or elsewhere within its current home territory;
7. Whether any other team in the League is located in the community in which the team is currently located;
8. Whether the team proposed to relocate to a community in which no other team in the League is located; and
9. Whether the stadium authority, if public, is not opposed to such relocation.\(^ {67} \)


\(^ {67} \) GREENBERG, supra note 66, at § 23:13 (citing Procedures For Proposed Franchise Relocations, National Football League, February 14, 1996, Art. 5). The current guidelines Member Clubs must consider has grown to twelve, with the eight from 1996 remaining the same in effect and the ninth omitted. The four new guidelines are:
Since the NFL implemented the augmented requirements to Rule 4.3 there have been no franchise relocations. But because the court in Raiders I remained silent as to what procedures would be required to remove Rule 4.3 from section 1 liability, the new NFL rules could be subject to antitrust liability.

C. National Basketball Association

Following the holding in Raiders I, the San Diego Clippers ("Clippers"), through their president Alan Rothenberg, notified the NBA of their intention to move to Los Angeles. After an initial attempt to investigate the viability of such a move, the NBA scheduled Clippers games in Los Angeles and did not sanction the club to avoid potential antitrust liability. Before the move was complete the NBA voided Article 9 of its constitution and adapted Article 9A in its

9. The extent to which the club has satisfied, particularly in the last four years, its principal obligation of effectively representing the NFL and serving the fans in its current community; whether the club has previously relocated and the circumstances of such prior relocation;
10. The degree to which the interests reflected in the League’s collectively negotiated contracts and obligations (e.g., labor agreements, broadcast agreements) might be advanced or adversely affected by the proposed relocation, either standing alone or considered on a cumulative basis with other completed or proposed relocations;
11. The effect of the proposed relocation on NFL scheduling patterns, travel requirements, divisional alignments, traditional rivalries, and fan and public perceptions of the NFL and its member clubs; and
12. Whether the proposed relocation, for example, from a larger to smaller television market, would adversely affect a current or anticipated League revenue or expense stream (for example, network television) and, if so, the extent to which the club proposing to transfer is prepared to remedy that adverse effect.


68 National Basketball Ass’n v. SDC Basketball Club, Inc., 815 F.2d 562, 564 (9th Cir. 1987).
69 National Basketball Ass’n v. SDC Basketball Club, Inc., 815 F.2d at 564.
70 Id. Article 9, which governed franchise relocation, was substantially similar to NFL Rule 4.3 before Raiders I. Article 9A was adopted in an attempt to comply with the nebulous guidelines proffered by the court in Raiders I in an attempt to have a franchise relocation rule that did not violate antitrust laws. Id. at 564-565.
place to govern franchise relocation.\textsuperscript{71} The Clippers argued that NBA Article 9A, among numerous other guidelines required a three-fourths approval of all relocation attempts, violated the holding of \textit{Raiders I} as a matter of law.\textsuperscript{72} The court determined the Clippers belief that Article 9A violated section 1 because it must be closely tailored was mistaken.\textsuperscript{73} \textit{Raiders I} determined that a league rule restricting franchise relocation must be narrowly tailored and based on objective factors and procedures.\textsuperscript{74}

The Ninth Circuit reversed the lower court’s grant of summary judgment for the Clippers.\textsuperscript{75} The district court improperly relied on the holding of \textit{Raiders I} because, as the NBA correctly argued, the issue of whether a requirement that a team seek approval by a league before it relocate is different from the reasonableness of a rule restricting team relocation.\textsuperscript{76} \textit{National Basketball Ass’n v. SDC Basketball Club, Inc.} explained that \textit{Raiders I}\textsuperscript{77} was inapplicable because the mere existence of Article 9A’s requirement that member clubs seek NBA approval before franchise relocation cannot violate antitrust law.\textsuperscript{78}

\textbf{D. Major League Baseball}

\textsuperscript{71} \textit{Id.} at 564. The Clippers asserted that Article 9A was an amendment to Article 9. However, the NBA contended that Article 9 was voided and Article 9A was adapted in its place. If the court determined Article 9A was an amendment it would not be operative against the Clippers because the NBA Constitution requires unanimous approval of amendments to the Association’s Constitution. Despite the Clippers protest, the Ninth Circuit agreed with the NBA because Article 9A was carefully drafted in an attempt to comply with the guidance of \textit{Raiders I}. \textit{Id.} at 565-566.

\textsuperscript{72} \textit{Id.} at 567.

\textsuperscript{73} \textit{Id.} The court recognized that the Clippers and many commentators misperceived the holding of \textit{Raiders I} as effectively banning a league from preventing franchise relocation. \textit{Id.} at 568 n. 3.

\textsuperscript{74} \textit{Id.} at 568.

\textsuperscript{75} \textit{Id.} at 570. The appellate court reversed because antitrust analysis of a case similar to \textit{Raiders I} requires a factual analysis of the reasonableness of franchise relocations. \textit{Id.} at 568.

\textsuperscript{76} \textit{Id.} at 568.

\textsuperscript{77} \textit{Raiders I} rejected a per se analysis of the NFL Rule 4.3 and found there were genuine issues of material fact regarding the reasonableness of the restraint. Los Angeles Memorial Coliseum Com. v. National Football League, 726 F.2d 1381 (9th Cir. 1984). \textit{Raiders II} determined that NFL Rule 4.3, as applied to the Oakland Raiders plan for relocation violated antitrust law. Los Angeles Memorial Coliseum Com. v. National Football League, 791 F.2d 1356 (N.D. Ca. 1986).

\textsuperscript{78} \textit{National Basketball Ass’n v. SDC Basketball Club, Inc.}, 815 F.2d at 568.
Professional baseball ("baseball") enjoys an antitrust exemption that was established through a trilogy of Supreme Court cases: *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*\(^7\), *Toolson v. New York Yankees, Inc.*\(^8\), and *Flood v. Kuhn*.\(^8\) In *Flood* the Court detailed why baseball, and only baseball, enjoyed an antitrust exemption. The lawsuit arose when St. Louis Cardinals outfielder, Curt Flood, challenged MLB’s reserve clause as violative of the Sherman Act.\(^8\) The Court accepted Flood’s argument that the *Federal Baseball* Court was incorrect in labeling baseball as not interstate commerce; but, the Court held baseball retained its antitrust exemption because of stare decisis.\(^8\) The *Flood* Court concluded, “what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.”\(^8\)

It appeared bleak for any plaintiff to challenge baseball on antitrust grounds after the *Flood* Court proclaimed that any challenge of baseball’s antitrust exemption must be made in Congress. However, in *Piazza v. Major League Baseball*\(^8\) the Eastern District of Pennsylvania weakened the seemingly impenetrable shield of baseball’s antitrust exemption. Bob Lurie, the owner of the San Francisco Giants ("Giants"), was actively shopping the Giants for sale and reached an agreement with the Piazza group, chaired by Vincent Piazza.\(^8\) Vincent Piazza\(^8\)

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79 259 U.S. 200 (1922).  
82 Flood v. Kuhn, 407 U.S. at 266.  
83 *Id.* at 284-285.  
84 *Id.*  
brought suit after the other National League owners voted to decline Piazza’s proposed
relocation of the Giants to Florida and Bob Lurie decided to sell the Giants to another ownership
group.  

The Piazza court held that the Flood decision, “stripped from Federal Baseball and
Toolson any precedential value those cases may have had beyond the particular facts there
involved, i.e. the reserve system.”  The Piazza court reasoned that baseball’s reserve system
was immune from antitrust laws; but baseball as a whole was not.  

Baseball’s internal rules on franchise relocation are remarkably similar to those of the
NFL and NBA. Between 1953 and 1972 baseball had ten franchises relocate cities.  Of those

88 Piazza v. Major League Baseball, 831 F. Supp. at 422-423. The Piazza group alleged that Baseball
illegally operated a monopoly market for franchises and violated section 1 of the Sherman Act. Id.
89 Id. at 436.
90 Id. at 438. The district court distinguished the holdings of Federal Baseball and Toolson based on
different interpretations of stare decisis:

[B]efore Flood, lower courts were bound by both the rule of Federal Baseball and
Toolson (that the business of baseball is not interstate commerce and thus not within the
Sherman Act) and the result of those decisions (that baseball’s reserve system is exempt
from the antitrust laws). The Court's decision in Flood, however, effectively created the
circumstance referred to by the Third Circuit as “result stare decisis,” from the English
system. In Flood, the Supreme Court exercised its discretion to invalidate the rule of
Federal Baseball and Toolson. Thus no rule from those cases binds the lower courts as a
matter of stare decisis. The only aspect of Federal Baseball and Toolson that remains to
be followed is the result or disposition based upon the facts there involved, which the
Court in Flood determined to be the exemption of the reserve system from the antitrust
laws.

Id.
the Major League Clubs shall be required for the approval of any of the following: . . . The relocation of
any Major League Club.”
92 Sports Business News, Welcome To Franchise Hell,
February 20, 2011). The Boston Braves moved to Milwaukee (1953); the St. Louis Browns moved to
Baltimore (1954); the Philadelphia Athletics moved to Kansas City (1955); the Brooklyn Dodgers moved
to Los Angeles (1958); the New York Giants moved to San Francisco (1958); the Washington Senators
moved to Minneapolis-St. Paul (1961); the Milwaukee Braves moved to Atlanta (1966); the Kansas City
Athletics moved to Oakland (1968); the Seattle Pilots moved to Milwaukee after just one season in
Seattle (1970); and, the second franchise called the Washington Senators to Arlington (1972).
franchises to relocate, the Athletics and Braves moved twice. The Athletics were originally in Philadelphia, then moved to Kansas City, and about a decade later moved to Oakland. The Braves moved from Boston to Milwaukee, and also a decade later moved to Atlanta. Today there is a team in eight of the nine cities that had a team leave and relocate elsewhere.

The only franchise to relocate since 1972 have been the Montreal Expos, who moved to Washington D.C. The Washington Nationals relocated because the ownership group became insolvent and the team was purchased by Major League Baseball; thus the Washington Nationals are not an example of a franchise holding a city hostage. A team has not seriously attempted to relocate since the early 1970’s, which might indicate that baseball’s antitrust exemption is a strong deterrent. However, the Piazza case, is highly persuasive and best represents the attitude of the courts when it comes to a league attempting to prevent a franchises relocation. The holding of Piazza and the recent litigation involving the other three major professional sports leagues provides instructive in advising all professional sports leagues that franchise relocation rules will be subject a section 1 Sherman Antitrust claim.

II. Why Proposed Antitrust Legislation Has Failed

A. Professional Football Stabilization Act of 1985

Following the Raiders I case communities with sports teams, facility lessors and sports leagues attempted to minimize franchise relocation. Even though the NFL and NBA reconstructed their franchise relocation rules, Judge Anderson’s words at the end of the Raiders I

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96 Sports Business News, supra note 92. This is a strong indication that the relocation of said teams were for reasons other than the cities they initially were home to are incapable of supporting a MLB franchise.
opinion loomed large, “[t]o the extent the NFL finds the law inadequate, it must look to Congress for relief.”

In 1984 when Leonard Tose, owner of the Philadelphia Eagles, announced his intention to move the Eagles Phoenix it spurned congressional action. Senator Arlen Specter introduced “The Professional Football Stabilization Act of 1985” with the aim of preventing NFL owners from selling their franchise if it were to be moved out of the franchise’s home territory. The proposal attempted to minimize professional football franchise relocation by making it illegal to move a franchise from its home territory unless certain conditions were met. While this attempt to minimize franchise relocation appeared to be a solution for professional, it failed for many reasons. First, municipalities would be denied their right of first refusal to purchase the team if the team owners moved the team before selling it. Second, the antitrust exemption granted by the bill would only extend to the sale of a franchise, not its actual relocation. Finally, even if bill achieved everything it promised, it would only grant professional football an antitrust exemption.

B. Professional Sports Franchise Relocation Act

101 Professional Football Stabilization Act of 1985, 1985 S. 172, 99th Cong., 1st Sess. (1985). A franchise would be permitted to relocate if: (1) a party to the lease materially breached the lease, which threatened the profitability of the franchise; (2) the stadium was deemed inadequate and improvements were not made; and (3) the franchise had suffered net losses in three consecutive years or the continued profitability was endangered.
102 Professional Football Stabilization Act of 1985, 1985 S. 172, 99th Cong., 1st Sess. (1985). This deficiency would have no practical effect in minimizing franchise relocation because an owner could just move the team himself and then sell to a potential buyer.
103 Professional Football Stabilization Act of 1985, 1985 S. 172, 99th Cong., 1st Sess. (1985). Under this bill the NFL could only restrict franchise relocations if the current owner intended to sell the franchise to a buyer who had the intention of moving the franchise. However, the NFL attempted to restrict a team’s relocation if there was no sale, the League would still be subject to potential antitrust liability.
104 Professional Football Stabilization Act of 1985, 1985 S. 172, 99th Cong., 1st Sess. (1985). While the bill might be a step in the right direction, it would seem redundant to require the NBA, MLB and any other professional sports league to find support for a separate bill to protect their leagues.
A few weeks later Congressman Ron Dellums introduced “The Professional Sports Relocation Act” in an attempt to cure the deficiencies of Professional Football Stabilization Act.\(^{105}\) As the name suggests, this act covered all professional sports leagues. The act allowed a professional sports franchise to relocate if it satisfied one of three conditions.\(^{106}\) A sports franchise may relocate if: (1) a stadium operator materially breaches the stadium lease; (2) the stadium is thus deemed inadequate; or (3) the team incurred three consecutive years of financial losses.\(^{107}\) The bill did grant the community the right of first refusal before a franchise could relocate.\(^{108}\) This bill did address one of the major loopholes of “The Professional Football Stabilization Act.” The community could exercise its right of first refusal if the franchise decided to relocation or if the franchise was sold.\(^{109}\) Despite the attempt to correct the deficiencies inherent in Senator Specter’s bill, this act failed for a couple of reasons. The impetus for the act\(^{110}\) would be one its problems. The act allowed for communities to

\(^{107}\) Professional Sports Franchise Relocation Act, 1985 H.R. 785, 99th Cong., 1st Sess. (1985); see also H. R. 3944, 98th Cong., 1st Sess. (1983). The three conditions were substantially similar to Senator Arlen Specter’s bill, but it appeased a larger constituency by protecting all professional sports leagues. This bill further strengthened the leagues’ interest in minimizing franchise relocation by requiring three consecutive years of financial loss, instead of allowing relocation after only one year of loss that might endangered continued profitability.  
\(^{109}\) Professional Sports Franchise Relocation Act, 1985 H.R. 785, 99th Cong., 1st Sess. (1985); see also H. R. 3944, 98th Cong., 1st Sess. (1983). Allowing the community to exercise its right of first refusal in either situation cured one of the major loopholes of “The Professional Football Stabilization Act.” An owner could no longer move and then sell the team to side step the community’s right of first refusal. The right of first refusal allowed the community to match the offer price if it were for sale or pay fair market value if the team was relocating. Professional Sports Franchise Relocation Act, 1985 H.R. 785, 99th Cong., 1st Sess. (1985); see also H. R. 3944, 98th Cong., 1st Sess. (1983).  
\(^{110}\) Congressman Dellums represented Oakland, and introduced the act to bring the then Los Angeles Raiders back to Oakland. York, supra note 105 at 360.
retroactively exercise its right of first refusal on teams that moved after 1979.\textsuperscript{111} Also, this act failed to address the professional sports leagues’ greatest concern; that the leagues’ not individual cities would be able to enforce franchise relocation rules.\textsuperscript{112} This would continue to grant the individual leagues’ power to control the geographical composition of themselves, while only promising them the ability to persuade communities to be their “enforcers.”\textsuperscript{113}

\textbf{C. Professional Sports Community Protection Act}

The same year, a third, yet equally flawed act was proposed to minimize the “problem of franchise relocation.” Senator Dennis DeConcini clumsily attempted to give the leagues the power to restrict franchise relocation.\textsuperscript{114} The “Professional Sports Community Protection Act” did not grant the leagues antitrust immunity in all franchise relocation decisions, it merely granted them immunity should the leagues decide to prevent a proposed franchise from relocating.\textsuperscript{115} This act would mandate that before the league could decide on whether a team could relocation \textit{all interested parties} had an opportunity to be heard.\textsuperscript{116} This act appeared doomed from the beginning because it was supported by conflicting rationales.\textsuperscript{117} The act proposed to protect communities and their fans from capricious decisions by greedy owners,

\textsuperscript{111} Professional Sports Franchise Relocation Act, 1985 H.R. 785, 99th Cong., 1st Sess. (1985); \textit{see also} H. R. 3944, 98th Cong., 1st Sess. (1983). It seems apparent that since no other professional sports franchise relocated between 1980 and 1984 that this act was drafted with the intent for the City of Oakland to bring the Raiders back.


\textsuperscript{115} Professional Sports Team Community Protection Act, 133 Cong. Rec. S. 3510 § 5 (1987). All this does is force the leagues to continually deny proposed franchise relocation regardless of whether relocation would be beneficial to the member club or the league.

\textsuperscript{116} Professional Sports Team Community Protection Act, 133 Cong. Rec. S. 3510 § 5 (1987). Again, while this provision sounds like it will protect competing interests, “all interested parties” is an unspecified term subject to many interpretations. Is the community an interested party? What about an employee of the team? A fan? A homeless person who panhandles outside the arena?

\textsuperscript{117} York, \textit{supra} note 105 at 362.
while really only giving leagues the power to categorically deny every relocation attempt.\textsuperscript{118} Despite the “Professional Sports Community Protection Act” failing in many respects, it did provide leagues with a framework to more closely tailor their relocation rules.\textsuperscript{119} Nearly a decade later Senator John Glenn would base his act on the policy of protecting the fans.

\textbf{D. Fans Rights Act of 1995}

Senator John Glenn and Representative Louis Stokes introduced the “Fans Rights Act of 1995” in an attempt to cure the defects in several previous bills that would minimize franchise relocation.\textsuperscript{120} The purpose of this act was to grant major professional sports\textsuperscript{121} a limited antitrust exemption in matters of team relocation.\textsuperscript{122} In addition to league control of franchise relocation, the “Fans Rights Act of 1995” would also grant communities the right of first refusal to purchase franchises that a league permitted to relocate.\textsuperscript{123} The “Fans Rights Act of 1995” took a major step forward by granting the leagues a limited antitrust exemption and giving communities a check on league relocation power. Section five of this act provided that teams attempting to

\begin{itemize}
  \item \textsuperscript{118}York, \textit{supra} note 105 at 362.
  \item \textsuperscript{119}Professional Sports Team Community Protection Act, 133 Cong. Rec. S. 3510 § 6(b) (1987). Section 6(b) provided twelve factors, many of which are similar to the NFL’s new Rule 4.3, leagues should consider: (1) the adequacy of the stadium; (2) the adequacy of facilities surrounding the stadium; (3) the ability and desire of the owner of the stadium to remedy inadequacies; (4) the amount of public funding that went into construction of the stadium; (5) change in the contractual arrangements; (6) the extent of the owners contribution to the situation causing the need for relocation; (7) the revenue of the team as compared with the median average of the league over the last three years; (8) the extent of any financial losses over the last three years; (9) the fan support for the team, demonstrated by attendance and ticket sales; (10) the number of teams competing in the same sport in the home territory; (11) any bona fide purchase offer to keep the team in the home territory; and (12) the extent to which all parties have engaged in good faith negotiations to keep the team in the home territory.
  \item \textsuperscript{120}GREENBERG, \textit{supra} note 66 at § 23:24.
  \item \textsuperscript{121}Fans Rights Act of 1995 at § 3(6) (defines a major professional sports league as an association that is composed of at least two teams and has been engaged in competition for more than 7 years). This alleviated the broad reaching provisions of the “Professional Sports Franchise Relocation Act” because smaller, less established leagues need the ability to relocate franchises in order to solidify its financial viability.
  \item \textsuperscript{122}Fans Rights Act of 1995.
  \item \textsuperscript{123}Fans Rights Act of 1995 at § 6. Section 6 further provided that league rules that forbid a community to own a franchise would be declared void. GREENBERG, \textit{supra} note 66 at § 23:24.
\end{itemize}
relocate must deliver and publish notice to the community 180 days prior to the start of the upcoming season. The notice provision was intended to provide communities with the best opportunity to either prepare a plan to purchase the franchise and locate investors.

Section 4 provides several factors leagues must consider prior to any decision approving or denying a proposed franchise relocation. Indicative of this acts title; the first factor leagues must take into account is fan loyalty and support for the team. The league must also consider the degree to which the franchise engaged in good faith negotiations to remain in the home territory. A league will also need to consider the financial circumstances of the team and whether it is reasonable to continue operations in the current facility. If the stadium is adequate and the stadium authority is willing to make necessary improvements the league must consider whether there are bona fide investors offering fair market for the franchise. Finally, leagues must consider either the absence or presence of a team in the proposed market.

E. The Stadium and Franchise Relocation Act of 1999

There were a few other attempts at addressing the problems of franchise relocation after the Fans Rights Act of 1995, but they all failed to achieve any meaningful impact. Senator Mike Dewine and John Glenn introduced the “Team Relocation Taxpayer Protection Act.” This bill dealt exclusively with the team relocation in the NFL and attempted to curb the growing trend of relocation by prohibiting the use of federal funds to support relocation efforts. Team Relocation Taxpayer Protection Act, 1996 S. 1529; 104 S. 1529 (1996). Later in 1996, Senator Strom Thurmond introduced the “Professional Sports Antitrust Clarification Act,”
Arlen Specter introduced “The Stadium and Franchise Relocation Act of 1999” possibly in response to the Pennsylvania legislature approving nearly an $800 million package to provide public assistance for four professional sports stadium renovations. The Act attempted to prevent professional sports franchises from relocating and limit the amount of public assistance to financing sports stadia. The Act would extend the antitrust exemptions provided to MLB and NFL under the Sports Broadcasting Act so long as the leagues created a trust fund; whereby ten percent of the revenue received from the sale or transfer of broadcasting rights would be deposited.

The assets of the trust fund could only be used to finance the construction or renovation of stadia. If a city or state was willing to contribute funds towards the construction or renovation of a sports facility the trust fund would match such government funds at a two to one ratio. Despite extending a new antitrust exemption to MLB and NFL that would allow the leagues to deny a franchise’s proposed relocation, this act was fraught with flaws. Like previous acts, this Act would only provide a limited antitrust exemption if the league decided to deny a proposed relocation. Also, Senator Specter’s novel idea of creating a trust from the

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133 GREENBERG, supra note 66 at § 23:28.
137 Thus, for every $1 the government contributed, the trust fund would contribute $2. Stadium Financing and Franchise Relocation Act of 1999; Hearings on S. 952 Before the Senate Comm. On the Judiciary, 106th Cong. (1999).
138 If a league chose to support a franchise’s relocation it could still be subject to antitrust attack; possibly from a city or state, assuming the entity bring such a case would have standing. Stadium Financing and Franchise Relocation Act of 1999; Hearings on S. 952 Before the Senate Comm. On the Judiciary, 106th Cong. (1999).
broadcasting licenses would be intruding too much on how the leagues decided to allocate their assets.

**F. Eminent Domain**

The power of eminent domain allows both federal and state governments to take private property for public use so long as just compensation is paid.\(^{139}\) When the Oakland Raiders attempted to move to Los Angeles, the City of Oakland instituted an action to acquire all rights of the Raiders through eminent domain.\(^{140}\) The trial court granted the Raiders’ motion for summary judgment because eminent domain did not permit the taking of intangible property not connected to real property and taking contemplated by the City of Oakland was not intended for the public use.\(^{141}\) However, the California Supreme Court reversed, holding that the power of eminent domain has never restricted the taking of intangible property not connected to realty and the trial court was incorrect to determine, absent extensive fact finding, the taking would not be for public use.\(^{142}\) The claim eventually failed because condemning the Oakland Raiders would violate the Commerce Clause by imposing a burden on interstate commerce that would outweigh any public benefit.\(^{143}\)

**III. The Current Problems of the Stadium Financing**

The central tenant of antitrust law is that society is better off if markets behave competitively.\(^{144}\) But a rigid application of antitrust laws to the world of sports can be an imprudent exercise. Senator Orrin G. Hatch summed up the inherent problems of analyzing the

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\(^{139}\) See Black’s Law Dictionary (9th ed.) p. 562.


\(^{142}\) City of Oakland v. Oakland Raiders, Ltd., 32 Cal.3d 60 (1982).


business of professional sports as any other ordinary business in his statement before the Subcommittee on Antitrust, Business Rights, and Competition:

Professional sports are unlike most other industries. Few other businesses achieve their success or failure by weaving their identity into the identity of their home cities or states. Few businesses claim the privilege of wearing a community’s name and bearing its banner in competition against other similar businesses from other communities. And few other industries depend upon a customer loyalty that is not a simple preference, but is “fanatical”—the word that gave us the modern term “fan.”

The definition of consumer in the sports franchise context has grown beyond the typical fan, there has been an emerging trend of cities purchasing the services of sports franchises. Since the Raiders I court stated that league relocation rules must be narrowly tailored and based on objective standards, professional sports leagues relocations rules have been untested. Before the same Subcommittee on Antitrust, Business Rights, and Competition that Senator Orrin G. Hatch chaired, then NFL commissioner, Paul Tagliabue testified that the current state of antitrust laws make it impractical for a sports league to function in a “responsible and predictable manner” when a league cannot restrict the “vagaries of individual team decisions.”

A. A Brief History of Stadiums Financed by the Public

For the first half of the twentieth century the majority of sports stadia were financed by private parties and constructed for multiple purposes. Prior to the 1960’s there were some

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146 This is not to say that teams have tried to relocate since Raiders I, but the individual leagues have not tried to stop those moves.
148 Roger G. Noll & Andrew Zimbalist, Build the Stadium—Create the Jobs, in Sports, Jobs, and Taxes 1, 2 (Roger G. Noll & Andrew Zimbalist eds., 1997) (but even accounting for inflation these stadia were relatively inexpensive compared to modern, multi-billion facilities such as Cowboys Stadium and Yankee Stadium). See Logan E. Gans, Take Me Out to the Ball Game, But Should the Crowd’s Taxes Pay For It?, 29 VA. TAX REV. 751, 754 (2010).
stadiums, such as Baltimore Memorial Stadium and Cleveland Municipal Stadium, that were publicly financed. 149 New stadiums of the 1960’s and 1970’s, such as Riverfront Stadium in Cincinnati and Three Rivers Stadium in Pittsburg, were not even close to the modern temples of sport; instead, they were described as “cookie-cutter, concrete-slab, multipurpose facilit[ies].” 150 These stadiums lacked the modern conveniences of ample concession stands, lavish restaurants, spacious concourses, and state-of-the-art luxury and press boxes necessary under the current sports franchise business model. 151 However, these “cookie-cutter” stadia were relatively cheap to build, ranging from thirty to fifty million dollars. 152

Today’s modern stadiums are built in the design of Camden Yards in Baltimore. 153 The entire $110,000,000 construction costs was financed by public funds. 154 This ushered in a new era when an increasing number of football franchises no longer had to share a facility with a baseball franchise. Despite the recent trend for stadia to be constructed mostly with public funds, the following parks were built with at least fifty percent private finances: Fenway Park, Wrigley Field, Comerica Park, Sun Life Stadium, Dodgers Stadium, Citi Field, Yankees

149 Roger G. Noll & Andrew Zimbalist, Build the Stadium—Create the Jobs, in Sports, Jobs, and Taxes 1, 2 (Roger G. Noll & Andrew Zimbalist eds., 1997). See Gans, supra note 148 at 754.

150 Roger G. Noll & Andrew Zimbalist, Sports, Jobs and Taxes: Are New Stadiums Worth the Cost?, 494 (Brookings 1997) (both stadiums were home to baseball and football teams).


Stadium, Citizens Bank Park, AT&T Park, and Busch Stadium. Citi Field and AT&T Park are examples that disprove any sentiment that sports franchises cannot afford their own stadia. The New York Mets were able to contribute $619 million of the $688 million construction cost of Citi Field by issuing tax-exempt bonds. This allowed the City of New York and State of New York to make combined financial contributions of approximately $150 million to improve the infrastructure around Citi Field. But what the San Francisco Giants did with AT&T Park was simply amazing. AT&T Park cost $325 million to construct and was completely financed by the private funds. Not only was AT&T Park constructed for relatively cheap and solely by private funding, but it is widely regarded as the best stadium in Major League Baseball. And the expected increase in revenue the Giants expect in 2011 does not come from competition with other neighboring cities, as some owners may believe, but from competition with people’s leisure time. San Francisco Giants have proved to the sports franchise community that it is not

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155 See Sports Facility Reports, supra note 154. Numerous of these stadia were constructed entirely with private money: Fenway Park in Boston ($450,000 in 1912), Wrigley Field in Chicago ($250,000 in 1914), Sun Life Stadium in Miami ($115,000,000 in 1987), Dodgers Stadium in Los Angeles ($18,000,000 in 1962), and AT&T Park in San Francisco ($325,000,000 in 2000). Sports Facility Reports, supra note 154.

156 See Sports Facility Reports, supra note 154.


158 See Sports Facility Reports, supra note 154. The stadium was financed with $121 million from a naming rights deal and other sponsorships, selling concession rights, selling charter seats, a $170 million loan secured by the Giants, and $15 million in tax increment financing by the city's redevelopment agency.

159 Zack O’Malley Greenberg, America’s Best Baseball Stadiums, Forbes Magazine, April 14, 2009. Cory Suppes, co-founder of Ballparks.com, said, “AT&T Park really got it right. Besides the park itself, which they did a fabulous job on, they listened to the fans and improved it over time. Thos guys went around to all the stadiums and picked up a little here and there and brought back the best.” Id.

160 Markham & Tepitz, Baseball Economics and Public Policy, 23-24 (1981). Professor Markham urged that on-field competition was the competition that ultimately led to increases in revenue:

The revenues earned by a club for any given home game are determined much more by its own league standing and its relative standing with the visiting team than by any independent competitive commercial strategy it may adopt against other teams in its league. Even if it reduces its admission prices for home games, the Boston Red Sox organization will not substantially affect the attendance at Wrigley Field in Chicago. In
only possible to privately fund a stadium without having to sacrifice the stadium’s amenities or fan enjoyment.

**B. Race to the Bottom . . . Or to the Top?**

When franchises are allowed to operate on the free market without regulation they are allowed to relocate and set prices at their whim. If professional sports leagues are not able to curb the recent trend of franchise relocation, franchises can demand exorbitant terms and pit cities against each other. While this might be done with the intent of increasing team profits and the welfare of fans; it would actually hurt fans and cities. A franchise merry-go-round system would inevitably lead to a “race to the bottom.” The “race to the bottom” theory is an economic policy whereby the cities that compete will continually lower prices (or increase relocation package offers) to teams in order to try and underbid the other cities. Each city would lower its taxes, spending, and regulation in order to make itself more attractive and lure a professional sports team. This problem was experienced recently when the Seattle Sonics were sold to a

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_economic terms, the price cross-elasticity of demand among games played in different home parks is extremely low—in fact, in most cases it is virtually zero._


162 Schram, _supra_ note 161. _See* Louis K. Ligget Co. v. Lee, 288 U.S. 517, 558 (1933). Associate Justice Brandeis gives a particularly poignant example of how a race to the bottom, or as he coined it, a race not of diligence but of laxity, affected New York corporations laws in the early twentieth century:

The history of the changes made by New York is illustrative. The New York revision of 1890, which eliminated the maximum limitation on authorized capital, and permitted intercorporate stockholding in a limited class of cases, was passed after a migration of incorporation from New York, attracted by the more liberal incorporation laws of New Jersey. But the changes made by New York in 1890 were not sufficient to stem the tide. In 1892, the Governor of New York approved a special charter for the General Electric Company, modelled upon the New Jersey act, on the ground that otherwise the enterprise would secure a New Jersey charter. Later in the same year the New York corporation law was again revised, allowing the holding of stock in other corporations. But the New Jersey law still continued to be more attractive to incorporators. By specifically providing that corporations might be formed in New Jersey to do all their business
new ownership group in July of 2006.\textsuperscript{163} The Sonics demanded a new $500 million stadium from the either the city of Seattle or state of Washington, and if their demand were not met they would move the team to the Oklahoma City.\textsuperscript{164} During negotiations with the city of Seattle, Clay Bennett, threatened the team could move to Oklahoma City, Kansas City, Las Vegas or San Jose.\textsuperscript{165}

A “race to the bottom” amongst cities is imperative to avoid because the large investment required by cities to construct stadia takes decades to pay off, and most cities are now on an extremely tight budget. In Houston, the Astrodome, also referred to as the “Eighth Wonder of the World” when it was constructed, is a perfect example of the financial hardships stadia place on a municipality. The Astrodome was constructed in 1965 for $35 million dollars that was largely paid off via tax bonds in 2001.\textsuperscript{166} But in 1987 the Harris County Commissioners

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\textsuperscript{163} Angella Galloway & Phuong Cat Le, \textit{Sonics Sold to Ownership Group From Oklahoma City}, \textsc{Seattle Post Intelligencer}, July 19, 2006.

\textsuperscript{164} Percy Allen, \textit{NBA Approves Sonics’ Move to Oklahoma City}, \textsc{Seattle Times}, April 18, 2008.


\textsuperscript{166} Chris Moran, \textit{A Costly Wonder: Dome Debt Likely to Haunt Harris County}, \textsc{Houston Chronicle}, April 12, 2010.
approved a $60 million restoration project that would add 10,000 seats and 75 luxury boxes.\textsuperscript{167} The restoration project was an attempt to keep Houston Oilers owner Bud Adams from relocating the Oilers and leave the Astrodome without a football tenant.\textsuperscript{168} The Harris County Commissioners plan worked, but only briefly. Bud Adams did not move the Oilers to Nashville as he threatened to do in the 1980’s, but in 1996 he eventually moved the team to Nashville; and now the Houston Oilers are the Tennessee Titans.\textsuperscript{169} The Astrodome became tenant-less in 2000 when the Astros moved into newly built Minute Maid Park.\textsuperscript{170}

The problem the Astrodome poses to Harris County is that it still has approximately $32 million in outstanding debt to repay, but no tenant to generate any income.\textsuperscript{171} Harris County executives project that it will take another twenty-two years and approximately $48 million to pay off the remaining debt.\textsuperscript{172} In 2010, Harris County had to make a $2.4 million payment on the debt, despite not having a clear plan on where the money was to come from.\textsuperscript{173} The Astrodome’s debt is currently serviced by increases in hotel and rental car taxes, parking fees and concessions.\textsuperscript{174} Adding salt to the wound of a beleaguered tourist market, Sports Economics Professor Craig Depken of the University of North Carolina-Charlotte noted that without the

\textsuperscript{167} Moran, supra note 166.
\textsuperscript{168} Moran, supra note 166. The Astrodome still had the Houston Astros as a tenant, but many multipurpose stadia prior to 2000 were built with the premise of being home to both a baseball and football franchise. Moran, supra note 166.
\textsuperscript{169} Moran, supra note 166.
\textsuperscript{170} http://mlb.mlb.com/hou/ballpark/information/index.jsp?content=facts_figures (last visited February 22, 2011).
\textsuperscript{171} Moran, supra note 166.
\textsuperscript{172} Moran, supra note 166. Moran notes that, “Harris County is unusual but not unique in being saddled with debt for an unused stadium. Olympic Stadium in Montreal was not paid off until two years after the Expos left for Washington D.C. Three Rivers Stadium in Pittsburgh still was carrying $45 million in debt at the time of its demolition in 2001. Seattle's Kingdome was razed in 2000, and King County is scheduled to finish paying off its debt in five years.” It would quite difficult to find any economist or lay person that would argue that a city paying off debt for ten, maybe twenty years, on an unused stadium is a positive asset of the city.
\textsuperscript{173} Moran, supra note 166.
\textsuperscript{174} Moran, supra note 166.
Astrodome debt, the taxes on hotels would be lower and encourage more tourism and engage more people to come to Houston.175

C. Problems Arising Out of the Florida Marlins Stadium Funding

In March 2009, the Florida Marlins secured funding for a new stadium by negotiating a deal for a combination of public and private financing from the Miami-Dade County Commission.176 The new Florida Marlins stadium will cost $642 million, with the public supplying $487 million and the Marlins supplying only $155 million.177 This might not seem like such a radical split from the norm, but in late August 2009, the Florida Marlins’ financial statements were inadvertently leaked to the public.178 The Marlins’ financial statements showed the team reported an operating income of $52 million.179 This created a sense of outrage amongst the public and the Miami-Dade Commissioners who voted to approve financing such a large percentage of the Marlins’ new stadium.180 While negotiating how much of the stadium the Marlins would pay for, the team was steadfast in its resolve to not show Miami-Dade County its accounting books.181 Florida Marlins owner, Jeffrey Loria, and its president, David Samson, argued that the information was proprietary and the County did not need to see such information to negotiate a stadium financing deal.182

175 Moran, supra note 166.
177 Rabin & Beasley, supra note 176. However, of the $155 million the Marlins are to pay, the county will grant the Marlins a $35 million dollar loan. Therefore the Marlins initial capital contributions will only be $120 million or approximately 18%. Rabin & Beasley, supra note 176.
178 Rabin & Beasley, supra note 176. Deadspin.com also published financial statements of the Tampa Bay Rays, Pittsburgh Pirates, Seattle Mariners, Los Angeles Angels of Anaheim and the Texas Rangers.
179 Rabin & Beasley, supra note 176.
180 Rabin & Beasley, supra note 176.
181 Rabin & Beasley, supra note 176.
182 Rabin & Beasley, supra note 176. However, President Samson stated that he would allow the County Commissioners to “speak with the Marlins’ bankers.” Rabin & Beasley, supra note 176.
The Marlins were so secretive with their accounting records that the team threatened to leave town if it could not procure they funding deal they wanted. Now that the public has access to the Marlins’ financial statements, members of the Miami-Dade County Commission have expressed their displeasure with the deal. Commissioner Rebecca Sosa has urged Miami Mayor Carlos Alvarez to “explore alternatives to the possibility of securing a greater financial contribution from the Marlins towards the stadium construction.” Miami-Dade Commissioners do not want to cut ties with the Florida Marlins forever, they merely want to negotiate a deal that would better serve their constituents. Commissioner Sosa wants to renegotiate the deal to give the taxpayers a better alternative, while still supporting keeping the Marlins in Miami and funding construction of a new stadium. The $487 million Miami-Dade County has agreed to supply towards the stadium’s construction will end up costing approximately $2.4 billion. Adding insult to injury, all revenue that is collected during the stadiums operation will go solely to the Florida Marlins.

The Marlins are in an enviable position compared to other Major League Baseball Clubs; they claim poverty when it comes to improving the teams’ personnel and contribution to new stadium funding, but carry at two-year $52 million operating income. The Florida Marlins were the largest recipient of Major League Baseball’s revenue sharing program, raking in over $90

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184 Kephart, supra note 183.
185 Kephart, supra note 183.
186 Jeff Passan, Marlins’ Profits Came at Taxpayer Expense, August 24, 2010, http://sports.yahoo.com/mlb/news?slug=jp=marlinsfinancials. Miami-Dade County agreed to take $409 million in balloon payment loans with long grace periods to finance the stadium; with the debt finally coming due in 2049. According to the Miami Herald, J.P. Morgan Chase gave a $91 million dollar loan that from 2041 until 2047 will costs $118 million per year.
187 Passan, supra note 186.
million over the same two-years. The Marlins have repeatedly argued that the relatively high operating income in relation to the large amount of financial assistance it receives from other clubs was to make its balance sheets attractive in order for banks to lend them the money needed to finance the new stadium. But, by not disclosing the franchise’s accounting books to the Miami-Dade Commission the team was able keep its appearance of relative poverty.

D. Why Modern Stadium Funding Issues Are Dramatically Different From the Past

In Raiders I, the court noted that the market would deter unwise moves by franchises; thus, a team will not lightly give up an established base of support in search of another.

However, the Raiders I rationale for why the NFL was ill-suited to be the protectorate of cities was flawed. Raiders I held:

The NFL’s professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments ought to be able to protect their investment through the leases they negotiate with the teams for the used of their stadia. Second, the NFL’s interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give them the leverage in lease negotiations.

The Raiders I first reason why the NFL’s interest is undercut is flawed as demonstrated by cities such as Seattle, Houston and Florida’s recent inability to protect themselves from grossly inequitable stadium renegotiations. The second basis for finding the NFL was ill-suited to protect municipal investments and be an additional body capable of restricting franchise

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188 Florida Marlins, L.P. and Subsidiaries Consolidated Statements of Operations, Year Ending October 31, 2009, pg. 3. The revenue sharing system, adopted during the 1996 collective bargaining negotiations, was drafted in very broad language to allow a team “to improve its performance on the field.” Rabin & Beasley, supra note 176.
189 Rabin & Beasley, supra note 176. While this strategy is not expressly forbidden by the language of the revenue sharing system, it would appear to conflict with the general objective of the plan: to encourage a greater competitive balance amongst the teams. ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY, (Brookings Institute Press, 2003).
190 Los Angeles Memorial Coliseum Com. v. National Football League, 726 F.2d 1381 (9th Cir. 1984).
relocation is an exercise of tortured logic. By the *Raiders I* rationale, because the NFL has allowed teams to threaten relocation, possibly in necessary situations, it should never be allowed to restrict a franchises attempt to relocate. What if a team threatens to relocate, which would harm the league? Or if a franchise relocates for non-business reasons? Or if relocation would alter the geographic structure of the league? Simply put, this reasoning does not hold up considering how the economics of sports and sports stadia has changed in the thirty years after *Raiders I*.

---

192 In *Raiders I* the court hinted at a method for how professional sports leagues would be able to defend an antitrust attack and possibly suggest that *Raiders I* is distinguishable on its facts. The court states:

> Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders’ move could have been motivated by animosity rather than business judgment.

Id. In their Spring 2000 symposium on the economics of sports leagues and relocation, Franklin Fischer, Christopher Maxwell and Even Schouten succinctly defined why the nature of the NFL’s product dictates why it exercise more control of franchise movement:

> [T]he League's product must be produced by the League as a whole. The NFL as a whole works to ensure that the quality of NFL football generates fan interest. To this end, the NFL works to attract the highest quality football players and to arrange for an organized and efficient method for the even distribution of these players to all of the NFL teams. Relative competitive balance is a critical component to the NFL’s (or any league's) popularity. Fans must believe that their team is a potential champion--i.e., that their team has a reasonable opportunity to win each game and also to compete for the championship. Team standings, winning streaks, rivalries, playoffs, championships, and the like also are a very important part of what makes NFL football such a successful entertainment product. Among the various methods the NFL has established to achieve its goal of reasonable competitive balance among the member teams is revenue sharing. For example, the NFL negotiates national television contracts on behalf of all of the member teams, with revenues shared equally among all of the teams. In this way, all NFL member teams have the resources to field a competitive team.

The reality is that more stadia have been built for considerably higher costs in the past ten years than in the ten years preceding Raiders I.\textsuperscript{193} The following table details every stadia still in use constructed ten years preceding Raiders I.\textsuperscript{194}

<table>
<thead>
<tr>
<th>League</th>
<th>Team</th>
<th>Stadium</th>
<th>Year Built</th>
<th>Cost (in $ millions)</th>
<th>Cost Adjusted for Inflation in 2010 (in $ millions)\textsuperscript{195}</th>
<th>Percentage of Public Funds</th>
</tr>
</thead>
<tbody>
<tr>
<td>MLB</td>
<td>Kansas City Royals</td>
<td>Kauffman Stadium</td>
<td>1973</td>
<td>43</td>
<td>211.18</td>
<td>100</td>
</tr>
<tr>
<td>NFL</td>
<td>Buffalo Bills</td>
<td>Ralph Wilson Stadium</td>
<td>1973</td>
<td>22</td>
<td>108.05</td>
<td>100</td>
</tr>
<tr>
<td>NFL</td>
<td>Kansas City Chiefs</td>
<td>Arrowhead Stadium</td>
<td>1972</td>
<td>53</td>
<td>276.48</td>
<td>100</td>
</tr>
<tr>
<td>NFL</td>
<td>Minnesota Vikings</td>
<td>Hubert H. Humphrey Metrodome</td>
<td>1982</td>
<td>68</td>
<td>153.66</td>
<td>81</td>
</tr>
<tr>
<td>NFL</td>
<td>New Orleans Saints</td>
<td>Louisiana Superdome</td>
<td>1975</td>
<td>134</td>
<td>543.11</td>
<td>100</td>
</tr>
<tr>
<td>NHL</td>
<td>Calgary Flames</td>
<td>Pengrowth Saddledome</td>
<td>1983</td>
<td>166</td>
<td>363.43</td>
<td>100</td>
</tr>
<tr>
<td>NHL</td>
<td>Detroit Redwings</td>
<td>Joe Louis Arena</td>
<td>1979</td>
<td>57</td>
<td>171.2</td>
<td>100</td>
</tr>
<tr>
<td>NHL</td>
<td>Edmonton Oilers</td>
<td>Rexall Place</td>
<td>1974</td>
<td>62.4</td>
<td>276</td>
<td>Unknown</td>
</tr>
<tr>
<td>NHL</td>
<td>New York Islanders</td>
<td>Nassau Veterans Memorial Coliseum</td>
<td>1972</td>
<td>31.3</td>
<td>163.28</td>
<td>100</td>
</tr>
</tbody>
</table>

Compared with the costs of stadia in the ten previous years:

\textsuperscript{193} The following is a list of stadia currently in use that were built between 1974 and 1984:

\textsuperscript{194} See Sports Facility Reports, supra note 154.

\textsuperscript{195} Adjusting for inflation using the CPI inflation calculator. See http://146.142.4.24/cgi-bin/cpicalc.pl (last visited February 22, 2011).
<table>
<thead>
<tr>
<th>League</th>
<th>Teamagem</th>
<th>Stadium</th>
<th>Year</th>
<th>Seats</th>
<th>Revenue</th>
<th>Inflation Factor</th>
<th>City</th>
</tr>
</thead>
<tbody>
<tr>
<td>MLB</td>
<td>Cincinnati Reds</td>
<td>Great American Ballpark</td>
<td>2003</td>
<td>291</td>
<td>344.86</td>
<td>96</td>
<td>Cincinnati</td>
</tr>
<tr>
<td>MLB</td>
<td>Detroit Tigers</td>
<td>Comerica Park</td>
<td>2000</td>
<td>361</td>
<td>457.13</td>
<td>38</td>
<td>Detroit</td>
</tr>
<tr>
<td>MLB</td>
<td>Houston Astros</td>
<td>Minute Maid Park</td>
<td>2000</td>
<td>265</td>
<td>335.57</td>
<td>68</td>
<td>Houston</td>
</tr>
<tr>
<td>MLB</td>
<td>Milwaukee Brewers</td>
<td>Miller Park</td>
<td>2001</td>
<td>414</td>
<td>509.74</td>
<td>71</td>
<td>Milwaukee</td>
</tr>
<tr>
<td>MLB</td>
<td>Minnesota Twins</td>
<td>Target Field</td>
<td>2010</td>
<td>545</td>
<td>545</td>
<td>72</td>
<td>Minneapolis</td>
</tr>
<tr>
<td>MLB</td>
<td>New York Mets</td>
<td>Citi Field</td>
<td>2009</td>
<td>688</td>
<td>699.29</td>
<td>19</td>
<td>New York</td>
</tr>
<tr>
<td>MLB</td>
<td>New York Yankees</td>
<td>Yankee Stadium</td>
<td>2009</td>
<td>1,100</td>
<td>1,118.04</td>
<td>32</td>
<td>New York</td>
</tr>
<tr>
<td>MLB</td>
<td>Philadelphia Phillies</td>
<td>Citizens Bank Park</td>
<td>2004</td>
<td>346</td>
<td>399.4</td>
<td>50</td>
<td>Philadelphia</td>
</tr>
<tr>
<td>MLB</td>
<td>Pittsburg Pirates</td>
<td>PNC Park</td>
<td>2001</td>
<td>237</td>
<td>291.81</td>
<td>85</td>
<td>Pittsburgh</td>
</tr>
<tr>
<td>MLB</td>
<td>San Diego Padres</td>
<td>PETCO Park</td>
<td>2004</td>
<td>285</td>
<td>328.99</td>
<td>66</td>
<td>San Diego</td>
</tr>
<tr>
<td>MLB</td>
<td>San Francisco Giants</td>
<td>AT&amp;T Park</td>
<td>2000</td>
<td>325</td>
<td>411.55</td>
<td>0</td>
<td>San Francisco</td>
</tr>
<tr>
<td>MLB</td>
<td>Saint Louis Cardinals</td>
<td>Busch Stadium</td>
<td>2006</td>
<td>357</td>
<td>386.14</td>
<td>12</td>
<td>Saint Louis</td>
</tr>
<tr>
<td>MLB</td>
<td>Washington Nationals</td>
<td>Nationals Park</td>
<td>2008</td>
<td>611</td>
<td>618.81</td>
<td>100</td>
<td>Washington</td>
</tr>
<tr>
<td>NBA</td>
<td>Charlotte Bobcats</td>
<td>Time Warner Cable Arena</td>
<td>2005</td>
<td>265</td>
<td>295.88</td>
<td>100</td>
<td>Charlotte</td>
</tr>
<tr>
<td>NBA</td>
<td>Dallas Mavericks</td>
<td>American Airline Center</td>
<td>2001</td>
<td>420</td>
<td>517.13</td>
<td>30</td>
<td>Dallas</td>
</tr>
<tr>
<td>NBA</td>
<td>Houston Rockets</td>
<td>Toyota Center</td>
<td>2003</td>
<td>235</td>
<td>278.5</td>
<td>100</td>
<td>Houston</td>
</tr>
<tr>
<td>NBA</td>
<td>Memphis Grizzlies</td>
<td>FedEx Forum</td>
<td>2004</td>
<td>250</td>
<td>288.59</td>
<td>83</td>
<td>Memphis</td>
</tr>
<tr>
<td>NBA</td>
<td>New Jersey Nets</td>
<td>Prudential Center</td>
<td>2007</td>
<td>375</td>
<td>394.38</td>
<td>Unknown</td>
<td>New Jersey</td>
</tr>
<tr>
<td>NBA</td>
<td>Oklahoma</td>
<td>Ford Center</td>
<td>2002</td>
<td>89</td>
<td>107.88</td>
<td>100</td>
<td>Oklahoma</td>
</tr>
</tbody>
</table>

196 Adjusting for inflation using the CPI inflation calculator. See [http://146.142.4.24/cgi-bin/cpicalc.pl](http://146.142.4.24/cgi-bin/cpicalc.pl) (last visited February 22, 2011).
<table>
<thead>
<tr>
<th>League</th>
<th>Team</th>
<th>City</th>
<th>Stadium</th>
<th>Year</th>
<th>Capacity 1</th>
<th>Capacity 2</th>
<th>Capacity %</th>
</tr>
</thead>
<tbody>
<tr>
<td>NBA</td>
<td>Orlando Magic</td>
<td>Thunder</td>
<td>Amway Center</td>
<td>2010</td>
<td>480</td>
<td>480</td>
<td>87.5</td>
</tr>
<tr>
<td>NBA</td>
<td>San Antonio Spurs</td>
<td>Orlando</td>
<td>AT&amp;T Center</td>
<td>2002</td>
<td>186</td>
<td>225.45</td>
<td>84</td>
</tr>
<tr>
<td>NFL</td>
<td>Arizona Cardinals</td>
<td>San Antonio</td>
<td>University of Phoenix Stadium</td>
<td>2006</td>
<td>455</td>
<td>492.14</td>
<td>76</td>
</tr>
<tr>
<td>NFL</td>
<td>Cincinnati Bengals</td>
<td>Dallas</td>
<td>Paul Brown Stadium</td>
<td>2000</td>
<td>453</td>
<td>573.63</td>
<td>89</td>
</tr>
<tr>
<td>NFL</td>
<td>Dallas Cowboys</td>
<td>San Antonio</td>
<td>Cowboys Stadium</td>
<td>2009</td>
<td>1,150</td>
<td>1,168.86</td>
<td>30</td>
</tr>
<tr>
<td>NFL</td>
<td>Denver Broncos</td>
<td>Denver</td>
<td>Invesco Field at Mile High</td>
<td>2001</td>
<td>364.2</td>
<td>448.42</td>
<td>73</td>
</tr>
<tr>
<td>NFL</td>
<td>Detroit Lions</td>
<td>Phoenix</td>
<td>Ford Field</td>
<td>2002</td>
<td>430</td>
<td>521.2</td>
<td>36</td>
</tr>
<tr>
<td>NFL</td>
<td>Houston Texans</td>
<td>San Antonio</td>
<td>Reliant Stadium</td>
<td>2002</td>
<td>352</td>
<td>426.66</td>
<td>73</td>
</tr>
<tr>
<td>NFL</td>
<td>Indianapolis Colts</td>
<td>Indianapolis</td>
<td>Lucas Oil Stadium</td>
<td>2008</td>
<td>750</td>
<td>759.59</td>
<td>50</td>
</tr>
<tr>
<td>NFL</td>
<td>New England Patriots</td>
<td>New England</td>
<td>Gillette Stadium</td>
<td>2002</td>
<td>325</td>
<td>393.93</td>
<td>0</td>
</tr>
<tr>
<td>NFL</td>
<td>New York Jets</td>
<td>New York</td>
<td>New Meadowlands Stadium</td>
<td>2010</td>
<td>1,600</td>
<td>1,600</td>
<td>0</td>
</tr>
<tr>
<td>NFL</td>
<td>Philadelphia Eagles</td>
<td>Pittsburg</td>
<td>Lincoln Financial Field</td>
<td>2003</td>
<td>512</td>
<td>606.76</td>
<td>39</td>
</tr>
<tr>
<td>NFL</td>
<td>Pittsburg Steelers</td>
<td>Pittsburgh</td>
<td>Heinz Field</td>
<td>2001</td>
<td>281</td>
<td>345.98</td>
<td>69</td>
</tr>
<tr>
<td>NFL</td>
<td>Seattle Seahawks</td>
<td>Seattle</td>
<td>Qwest Field</td>
<td>2002</td>
<td>430</td>
<td>521.2</td>
<td>83</td>
</tr>
<tr>
<td>NHL</td>
<td>Dallas Stars</td>
<td>Dallas</td>
<td>American Airlines Center</td>
<td>2001</td>
<td>420</td>
<td>517.13</td>
<td>30</td>
</tr>
<tr>
<td>NHL</td>
<td>Minnesota Wild</td>
<td>Minnesota</td>
<td>Xcel Energy Center</td>
<td>2000</td>
<td>130</td>
<td>164.62</td>
<td>74</td>
</tr>
<tr>
<td>NHL</td>
<td>New Jersey Devils</td>
<td>New Jersey</td>
<td>Prudential Center</td>
<td>2007</td>
<td>375</td>
<td>394.38</td>
<td>66</td>
</tr>
<tr>
<td>NHL</td>
<td>Phoenix Coyotes</td>
<td>Phoenix</td>
<td>Jobing.com Arena</td>
<td>2003</td>
<td>220</td>
<td>260.72</td>
<td>82</td>
</tr>
<tr>
<td>NHL</td>
<td>Pittsburg</td>
<td>Pittsburg</td>
<td>Consol</td>
<td>2010</td>
<td>290</td>
<td>290</td>
<td>0</td>
</tr>
</tbody>
</table>
As the above chart indicates the cost of building a new sports facility has increased dramatically since *Raiders I*. The average public contribution of a city for the ten years prior to *Raiders I* was $245.15 million; compared with the average public contribution for the past ten years of $283.06 million.\(^{197}\) That is a 15.45% increase. But the mere percent increase in a city's contribution is only half the story. In the ten years prior to *Raiders I* only nine stadiums were built; compared with the thirty-nine stadiums built in the past ten years. This means that cities are paying more to build a stadium and approximately four times as many cities are paying nearly $300 million for stadia.\(^{198}\) Whether cities paying an increasing amount for the construction of new stadia is good or bad is debatable, but it cannot be denied that American cities are a consumer of sports franchises that has quadrupled since *Raiders I*.

### E. Why a Limited Antitrust Exemption is Required in the Franchise Relocation Area If the General Policies of Antitrust Law Are To Be Protected

Franchise relocation can be a useful tool owners of sports franchises possess in order to make a league more profitable or increase the league's stability. But the problem is that as more cities are spending more money on sports stadia, the risk those cities face of their teams relocating is increasing. Cities should not be penalized for expending millions of dollars to build stadia that recently, have been constructed solely for a single sports franchises use. Since *Raiders I*, professional sports leagues have either been unwilling or unable to prevent franchises from relocating, despite their commissioners believing it to be in their best interest to prevent

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\(^{197}\) Both figures are adjusted for inflation and calculated in 2010 dollars.

\(^{198}\) Remember how Harris County owes approximately $48 million on the vacant Astrodome; that has not stopped the city of Houston from building three new stadiums to either attract expansion franchises or keep their existing ones.
relocations;\textsuperscript{199} and communities have been unable to successfully prevent teams from relocating with any degree of certainty.\textsuperscript{200} To follow the dicta of \textit{Piazza}, Congress needs to grant the major professional sports leagues a limited antitrust exemption in order to follow the general principles of antitrust law of protecting the consumer (cities).

Based on the numerous pieces of legislation presented before both branches of Congress, it appears that the legislature understands that there is a problem with the current state of franchise relocation and that it must act to protect the consumers. Previous bills failed to garner

\footnotesize

‘As a practical matter, the courts are incapable of evaluating the consumer welfare effects of a franchise relocation decision. In addition, we believe that the interest of leagues in applying franchise relocation rules will nearly always coincide with the interest of consumer welfare. Because, in the unique competitive context of professional sports leagues, we cannot say that a narrowly-written and non-regulatory antitrust exemption for franchise relocation rules by itself would have a significantly adverse effect on our nation’s competition policy, the Department would not oppose such an exemption.’

***

In business and economic circumstances such as these, sports leagues face complex and difficult questions that require a balance of multiple issues—those of fans in communities with teams, those of fans in communities seeking teams, league interests, and individual club interests—to arrive at sound decisions with respect to the location of league teams. In the NFL, the League itself has increasingly been involved both with its teams and with public officials in seeking to develop solutions to the stadium and facility challenges that are presented in the current environment. Whatever the outcome of such efforts and decisions, \textit{a sports league cannot function in a responsible and predictable manner}—and without a paralyzing stream of actual and threatened antitrust treble damage claims—\textit{if its decision-making process on team location matters continue to be subject to review by antitrust courts and juries under the ‘conspiracy’ standard of Section 1 of the Sherman Act.} (emphasis added)

Commissioner Tagliabue succinctly pointed out the varying competing interests antitrust courts have a difficult time in balancing, but he failed realize that the communities themselves are class of parties to be protected.

\textsuperscript{200} Although this is not because of a lack of effort. When the Seattle Sonics decided to relocate to Oklahoma City, after months of threats, the City of Seattle sued the Sonics’ owners in federal district court to keep the team in Seattle. \textit{See} Complaint, City of Seattle v. The Professional Basketball Club, No. C07-1620RSM (W.D. Wa. 2007). \textit{See also} Will Hendrick, \textit{Pay or Play?: On Specific Performance and Sports Franchise Leases}, 87 N.C. L. REV. 504, 535-536 (2009) (noting it is no surprise that the City of Seattle felt forced to settle with the Sonics and receive some compensation because courts are reluctant to award specific performance).
enough support for many reasons, but chiefly because they were either introduced at the wrong
time or failed to adequately protect consumers while fostering competition. With the recent
debacles in Houston, Florida and Seattle, Congress would certainly have public, and league
support in a properly aimed piece of legislation to curb the harmful effects of franchise
relocation. Such a bill would need to require: (1) a precise definition of which sports leagues are
covered by the limited antitrust exemption; (2) objective factors leagues must use to determine
whether a team should relocate; (3) requirements for individual teams must satisfy before it can
present its case to their league; and (4) an opportunity to appeal such a decision to a court,
without the professional leagues being subject to treble damages.

The professional sports covered by such an antitrust exemption should be specifically
defined. Major League Baseball, the National Basketball Association, National Hockey League
and National Football League should be the leagues with an antitrust exemption.201 Also, the bill
should provide some mechanism to allow future leagues that become financially stable to gain
such an exemption, as noted by previous bills.202

The bill should set also forth objective factors leagues must balance when a member
franchise proposes relocation. The NFL’s rule on franchise relocation, although never tested in
court, was drafted with the purpose of surviving a Section 1 Sherman Antitrust attack, and
should provide a solid foundation. The bill should include the six factors of NFL Rule 4.3 and

201 These leagues are defined as “the big four” and are the only leagues whose franchises are valued by
Forbes annually of the sports leagues operating primarily within United States. See Tom Van Ripper, The
203 (1) A copy of the club’s existing lease and any other agreements relating to its use of the stadium; (2)
An audited financial statement for the last four years; (3) Assessment of the present stadium along with
possible costs of improvements and progress of negotiations to so improve the stadium; (4) A description
of the projected lease and operating terms available at the new location; (5) A description of the lease and
operating terms available at the old location; and (6) A budget statement projecting profits and losses for
the first three (3) years at the new stadium.
additionally require analysis of the loss of public investment of the old location. This final requirement would necessitate the leagues to consider the payment schedule for the public debt on the facility and potential community investments. The nine factors\textsuperscript{204} to be considered by member clubs under NFL Rule 4.3 would provide a strong foundation for the same reason.

However, two additional factors should be added in order to effectively protect the cities as consumers. First, if the stadium in which the team plays at the time of proposed relocation is funded by public money, then the franchise would be required to disclose its accounting books to the government body responsible for funding the stadium. This would allow cities to negotiate a fair lease term while understanding the economic feasibility of the current stadium situation of the franchise. Second, if the stadium in which the team plays at the time of proposed relocation is funded by public money, then the government body responsible for funding the stadium would be granted the right of first refusal to purchase the franchise before it would be allowed to relocate. This requirement would adequately protect a cities financial investment in a stadium because it would severely limit threats by franchise to relocate unless the city built a new

\textsuperscript{204} (1) The adequacy of the stadium in which the team played its home games in the previous season, and the willingness of the stadium or arena authority to remedy any deficiencies in such facility; (2) The extent to which fan loyalty to and support for the team has been demonstrated during the team’s tenure in the existing community; (3) The extent to which the team, directly or indirectly, received public financial support by means of any publicly financed playing facility, special tax treatment and any other form of public financial support; (4) The degree to which the ownership or management of the team has contributed to any circumstances that might otherwise demonstrate the need for such relocation; (5) Whether the team has incurred net operating losses, exclusive of depreciation and amortization, sufficient to threaten the continued viability of the team; (5) Whether the team has incurred net operating losses, exclusive of depreciation and amortization, sufficient to threaten the continued viability of the team; (6) The degree to which the team has engaged in good faith negotiations with appropriate persons concerning terms and conditions under which the team would continue to play its games in such community or elsewhere within its current home territory; (7) Whether any other team in the League is located in the community in which the team is currently located; (8) Whether the team proposed to relocate to a community in which no other team in the League is located; and (9) Whether the stadium authority, if public, is not opposed to such relocation.
stadium.\textsuperscript{205} Also, it would give cities a means to protect their investment in building a stadium for use by predominately a single tenant.

IV. Conclusion

Professional sports leagues are stuck in between the preverbal rock and a hard place. Even though it may be in their best interest to restrict a member franchises ability to relocate, they continue refuse to because of the weigh of \textit{Raiders I} and prohibitive treble damages. But \textit{Raiders I} was decided when public investment in professional sports stadia was only a tiny fraction of what is spent today. This increased investment by government bodies has made then a consumer of professional sports services. And the current antitrust laws do not adequately protect those interests. Whether or not this proposal is adopted, the problem is unmistakable. Cities are required to bear the bulk of the financial burden in supplying sports stadia, and they have no adequate method to protect their investment.

\textsuperscript{205} Furthermore, if a stadium was funded solely by private funds, like AT&T Park in San Francisco, then a team could propose relocation without disclosing its accounting books to the city and could relocate without fear the city would exercise its right refusal and forcibly prevent a move.