Fordham Law Review

Volume 53 | Issue 2 | Article 2

1984

The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports

Daniel E. Lazaroff

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation

Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 Fordham L. Rev. 157 (1984).
Available at: https://ir.lawnet.fordham.edu/flr/vol53/iss2/2

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ARTICLES

THE ANTITRUST IMPLICATIONS OF FRANCHISE RELOCATION RESTRICTIONS IN PROFESSIONAL SPORTS

*Daniel E. Lazaroff**

INTRODUCTION

IN December of 1981, National Football League Commissioner Pete Rozelle testified before Congress that "[p]rofessional sports leagues are at a point where—because of the novel business form of a sports league—every league action, every league business judgment and every league decision can be characterized as an 'antitrust' issue."[1] Although one might be tempted to characterize this observation as an example of hyperbole or overreaction, it is not altogether without foundation.

There can be no doubt that contemporary professional sports activities are indeed "big business."[2] Such significant commercial endeavors will

* Professor of Law, Loyola Law School, Los Angeles; B.A. 1971, State University of New York at Stony Brook; J.D. 1974, New York University. Excerpts from this Article will appear in a forthcoming treatise by Daniel E. Lazaroff and Lionel S. Sobel, entitled The Law of Professional & Amateur Sports, to be published by Clark Boardman Co., Ltd.

1. Berkow, *Pro Football's Labor Scene*, N.Y. Times, Jan. 23, 1982, § 1, at 19, col. 6 (quoting Commissioner Rozelle's congressional testimony).

2. The closely held nature of most professional sports teams has enabled them to avoid full public disclosure of their earnings. Nevertheless, there is a body of data that underscores the fact that professional sports generate large revenues. Attendance figures for Major League Baseball, The National Football League (NFL), the National Hockey League (NHL) and the National Basketball Association (NBA) provide ample evidence of the multi-million dollar character of the business of sports. In 1984, regular season major league baseball games were attended by 44,739,157 fans. Office of the Commissioner, Major League Baseball, Press Release (Nov. 23, 1984) (available in files of *Fordham Law Review*). The 12 National League teams drew 20,778,000 paying customers, while the 14 American League teams saw 23,961,157 fans pass through their turnstiles. *Id.* The National Football League announced that its 28 teams drew 13,277,222 paying customers in their 224 regular season games during 1983. National Football League, Press Release No. NFL-5 (Mar. 19, 1984) (available in files of *Fordham Law Review*). Including pre-season exhibitions and post-season games, the NFL's 1983 paid attendance was 16,817,070. *Id.* The 23 National Basketball Association teams enjoyed paid attendance of 10,014,543 for the 1983-84 regular season, National Basketball Ass'n, 1983-84 Attendance (available in files of *Fordham Law Review*), and the National Hockey League's 21 franchises drew 11,359,386 paying customers during the 1983-84 season, National Hockey League, NHL Attendance (available in files of *Fordham Law Review*). Although ticket prices vary from sport to sport, as well as among teams within a given sport, it is apparent that the foregoing attendance figures translate into gross receipts totaling many millions of dollars. Further, professional sports teams can expect to earn substantial additional sums from parking, concessions and, of course, television and radio. For example, in Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 379 (1984), the Ninth Circuit

often engender a considerable amount of antitrust scrutiny, particularly when ostensible competitors—the teams—openly cooperate and collectively reach agreement as a league with respect to a variety of economic issues. Thus, it is not at all surprising that with the exception of a longstanding and rather anomalous judicially created antitrust exemption for baseball,[3] many professional and even some amateur sports have been the subject of extensive antitrust litigation. More specifically, the federal antitrust laws have been deemed applicable to professional football,[4] basketball,[5] golf,[6] hockey,[7] horse racing,[8] boxing,[9] tennis[10] and bowling,[11] as well as to various amateur athletic activities.[12] This proliferation of case

---

Court of Appeals noted that the NFL would receive "approximately $2 billion" from the television networks for the right to televise league games between 1982 and 1986. *Id.* at 1393. Even the relatively new United States Football League has negotiated a multimillion dollar package for the telecasting of its games. *See* N.Y. Times, July 1, 1984, § 6 (Magazine), at 19, col. 3.

3. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 282 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953); Federal Baseball Club v. National League, 259 U.S. 200, 209 (1922). In *Flood*, Justice Blackmun explained that baseball's antitrust exemption is an established aberration supported by the doctrine of stare decisis. 407 U.S. at 282. The rationale for the baseball exemption and questions regarding its continued viability are beyond the scope of this Article. For recent commentary with respect to professional baseball, see Allen, *Lawyers, Law and Baseball*, 64 A.B.A. J. 1530 (1978); Martin, *The Labor Controversy in Professional Baseball: the* Flood *Case*, 23 Lab. L.J. 567 (1972); Rogers, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 Hous. L. Rev. 611 (1977); Shapiro, *Monopsony Means Never Having to Say You're Sorry—A Look at Baseball's Minor Leagues*, 4 J. Contemp. L. 191 (1978); Note, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. Indus. & Com. L. Rev. 737 (1971); Note, *Flood in the Land of Antitrust: Another Look at Professional Athletics, the Antitrust Laws and the Labor Law Exemption*, 7 Ind. L. Rev. 541 (1974); Note, *Applicability of the Antitrust Laws to Baseball*, 2 Mem. St. U.L. Rev. 299 (1972); Note, *Curt Flood at Bat Against Baseball's "Reserve Clause,"* 8 San Diego L. Rev. 92 (1971); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 Wm. & Mary L. Rev. 859 (1971); Comment, *Antitrust Law—Baseball Reserve System*, 48 Notre Dame Law. 460 (1972); 1971 U. Tol. L. Rev. 594.

4. *See* Radovich v. National Football League, 352 U.S. 445, 451-52 (1957).

5. *See* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1060 (C.D. Cal. 1971).

6. *See* Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973).

7. *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 466 (E.D. Pa. 1972).

8 *See* United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 787-90 (7th Cir. 1981).

9. *See* United States v. International Boxing Club, Inc. 348 U.S. 236, 242 (1955).

10. *See* Heldman v. United States Lawn Tennis Ass'n, 354 F. Supp. 1241, 1250 (S.D.N.Y. 1973).

11. *See* Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 376-77 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966).

12. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948 (1984) (men's collegiate athletics); Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n, 1984-1 Trade Cas. (CCH) ¶ 66,007, at 68,433 (D.C. Cir. 1984) (women's collegiate athletics); Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1147-54 (5th Cir. 1977) (collegiate athletics); Amateur Softball Ass'n v. United States, 467 F.2d 312, 315-16 (10th Cir. 1972) (softball); Justice v. Na-

law has, in turn, provided fertile ground for the rapid development of an impressive collection of modern scholarly commentary with respect to the relationship between the antitrust laws and the business of sports.[13]

---

tional Collegiate Athletic Ass'n, 577 F. Supp. 356, 375-84 (D. Ariz. 1983) (collegiate football); Erie Buffalo Tondas v. Amateur Hockey Ass'n, 438 F. Supp. 310, 313 (W.D.N.Y. 1977) (hockey); College Athletic Placement Serv. Inc. v. National Collegiate Athletic Ass'n, 1975 Trade Cas. (CCH) ¶ 60,117, at 65,266 (D.N.J.) (collegiate athletics), *aff'd without published opinion*, 506 F.2d 1050 (3d Cir. 1974). *See generally* Weistart, *Antitrust Issues in the Regulation of College Sports*, 5 J. C. & U. L. 77 (1977) (effect of antitrust laws on collegiate athletics); Note, *National Collegiate Athletic Association's Certification Requirement: A Section 1 Violation of the Sherman Antitrust Act*, 9 Val. U.L. Rev. 193 (1974) (same); Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 Yale L.J. 655 (1978) (same); 7 Cum. L. Rev. 505 (1977) (same).

13. *See, e.g.*, J. Weistart & C. Lowell, The Law of Sports, 477-766 (1979); Allison, *Professional Sports and the Antitrust Laws: Status of the Reserve System*, 25 Baylor L. Rev. 1 (1973); Blecher & Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 Whittier L. Rev. 217 (1982); Glick, *Professional Sports Franchise Movements and the Sherman Act: When and Where Teams Should Be Able to Move*, 23 Santa Clara L. Rev. 55 (1983); Goldstein, *Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports*, 4 Pepperdine L. Rev. 285 (1977); Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1983); Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971); Jones & Davies, *Not Even Semitough: Professional Sport and Canadian Antitrust*, 23 Antitrust Bull. 713 (1978); Kempf, *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 De Paul L. Rev. 625 (1983); Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws:* Los Angeles Memorial Coliseum Commission v. National Football League, 15 Conn. L. Rev. 183 (1983); Leavell & Millard, *Trade Regulation and Professional Sports*, 26 Mercer L. Rev. 603 (1975); Roberts & Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 Wm. & Mary L. Rev. 395 (1978); Simon, *The First Great Leap: Some Reflections on the Spencer Haywood Case*, 48 L.A. B. Bull. 149 (1973); Sobel, *The Emancipation of Professional Athletes*, 3 W. St. U.L. Rev. 185 (1976); Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 Wm. & Mary L. Rev. 703 (1977); Note, *Antitrust and Professional Sport: Does Anyone Play By the Rules of the Game?*, 22 Cath. U.L. Rev. 403 (1973); Note, *The Sherman Act and Professional Team Sports: The NFL Rozelle Rule Invalid Under the Rule of Reason*, 9 Conn. L. Rev. 336 (1977); Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 Harv. L. Rev. 418, 429-30 (1967) [hereinafter cited as *Super Bowl*]; Note, *The Eighth Circuit Suggests a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 St. Louis U.L.J. 565 (1977); Note, *Antitrust—Professional Football—The Rozelle Rule as an Unreasonable Restraint of Trade*, 26 U. Kan. L. Rev. 121 (1977); Comment, *National Football League Restrictions on Competitive Bidding for Players' Services*, 24 Buffalo L. Rev. 613 (1975); Comment, *The Sherman Act: Football Player Controls—Are They Reasonable?*, 6 Cal. W.L. Rev. 133 (1969); Comment, *Application of Antitrust Laws to Professional Sports' Eligibility and Draft Rules*, 46 Mo. L. Rev. 797 (1981); Comment, *The National Hockey League's Faceoff with Antitrust:* McCourt v. California Sports, Inc., 42 Ohio St. L.J. 603 (1981); Comment, Herschel Walker v. National Football League: *A Hypothetical Lawsuit Challenging the Propriety of the National Football League's Four-or-Five Year Rule Under the Sherman Act*, 9 Pepperdine L. Rev. 603 (1982); Comment, *Antitrust Law: Procedural Safeguard Requirements in Concerted Refusals to Deal: An Application to Professional Sports*, 10 San Diego L. Rev. 413 (1973); Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation*, 28 UCLA L. Rev. 252 (1980); Comment, *Antitrust: Preseason Football Tickets and Tie-Ins*, 1975 Wash. U. L.Q. 495; Case Note, *Tying Arrangements in the Sale*

The fundamental purpose of this Article is to focus on and assess critically, pursuant to prevailing and developing antitrust principles, one practice that is common to all major professional sports leagues: the franchise relocation restriction. This type of restriction prohibits individual teams in a league from moving to a different home site without the prior approval of a specified percentage of other league members.[14] The relocation restraint may operate to prevent a transfer to a previously unrepresented city or to encumber a move to a location already occupied by a league member. It is primarily the latter sort of restriction with which this Article is concerned, because it is apparent that prevention of relocation under those circumstances eliminates the potential for significant direct economic competition between teams in the same league.

Although relocation restraints have been the subject of some recent commentary,[15] they have not received nearly as much attention as other restrictive practices in the business of sports, such as those relating to player eligibility, discipline and movement.[16] Further, it appears that some of the existing scholarship errs in its antitrust analysis, and that the remainder fails either to assess sufficiently the legal ramifications of relocation restrictions or to propose a satisfactory solution to the problems presented.[17] In light of the Ninth Circuit Court of Appeals' recent decision in *Los Angeles Memorial Coliseum Commission v. National Football*

---

of Season Tickets, 47 Temp. L.Q. 761 (1974); 41 Alb. L. Rev. 154 (1977); 15 Duq. L. Rev. 747 (1977); 59 Marq. L. Rev. 632 (1976).

14. *See, e.g.*, National Basketball Ass'n Const. § 9(a) (Majority vote required for franchise move after consideration of various objective factors. This provision just recently replaced § 9 of the NBA Constitution that gave a league member the right to prevent a transfer to its home territory.); National Football League, Constitution and By-Laws § 4.3 (75% vote required before member can "transfer its franchise or playing site to a different city, either within or outside its home territory"). The NFL only recently established a procedure to consider certain criteria before a franchise can relocate, such as past and projected revenues, stadium adequacy and the effect of relocation on other league members. Janofsky, *N.F.L. In New Policy*, N.Y. Times, Dec. 30, 1984, § 5, at 1, col 1; *see also* Kurlantzick, *supra* note 13, at 184 n.4 (discussing NHL and NBA relocation rules).

15. *See, e.g.*, Glick, *supra* note 13; Kurlantzick, *supra* note 13, at 196-206; *see also* Blecher & Daniels, *supra* note 13, at 218-32 (discussing "single entity" defense to relocation restraints); Grauer, *supra* note 13 (same); Kempf, *supra* note 13 (evaluating application of antitrust laws to professional sports in general).

16. See *supra* note 13 and authorities cited therein.

17. For a critical analysis of some recent commentary, see *infra* notes 87-96, 175-87 and accompanying text. For a proposed statutory solution to the antitrust issues created by relocation restraints, see *infra* notes 380-95 and accompanying text. It should also be noted that all existing commentary preceded the Ninth Circuit's decision in Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 397 (1984), as well as two highly relevant June 1984 decisions by the United States Supreme Court: National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948 (1984) (holding restrictive collegiate football television plan violative of § 1) and Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984) (holding corporation and wholly owned subsidiary constitute a single entity to which § 1 is inapplicable).

League,[18] concluding that a relocation restriction violates section 1 of the Sherman Act,[19] and in view of the fact that this issue continues to surface in professional sports,[20] further discussion of the antitrust issues raised by such restraints is warranted.

There is another rationale for engaging in careful antitrust analysis of the relocation restraint. The antitrust implications of relocation restrictions are of central importance to practitioners, students and teachers who are or will be intimately involved in the legal aspects of sports organizations. Moreover, the results reached in relocation decisions may well be of broader significance because the courts must necessarily grapple with questions that have great relevance to all commercial and industrial endeavors that encounter antitrust problems. This Article will therefore utilize franchise relocation restraint litigation to facilitate a discussion of several issues of more general importance.

The Article will begin by exploring the parameters of the intracorporate conspiracy doctrine, because sports teams frequently assert that they are a single league unit for antitrust purposes and not individual competitors engaged in concerted action. If a court were to accept the teams' view, the implications for other businesses might well be profound. The Article will then proceed to a discussion of the substantive antitrust questions raised by the relocation restraint. In so doing, it will be necessary to discuss the relative propriety of per se rules or rule of reason analysis in deciding certain antitrust cases. Discussion of the rule of reason will involve relevant product and geographic market analysis and an evaluation of the rule of reason itself, with particular emphasis on whether the rule lacks sufficient resilience to deal correctly with some of the problems presented in both sports and other types of antitrust cases. This analytical exercise will provide guidance in reaching conclusions in other business contexts in which competitors seek to collaborate in some fashion and still avoid antitrust liability. Finally, because it seems unlikely that major sports leagues will be able to impose any relocation restraints that can withstand attack under any existing antitrust standard, this Article will suggest a legislative solution to the conundrum presented by the sports cases. In sum, the primary purposes of this Article are to inform the reader with respect to the antitrust implications of the franchise relocation restraint and to argue that it is an unlawful practice. In so doing,

18. 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 397 (1984).

19. *See id.* at 1397-98. Section 1 of the Sherman Act is codified at 15 U.S.C. § 1 (1982).

20. The threatened relocation of the NFL's Philadelphia Eagles to Phoenix and the recent moves of the NFL's Baltimore Colts to Indianapolis and the NBA's San Diego Clippers to Los Angeles without league approval have kept franchise relocation issues in the news. In fact, the NBA has sued the Clippers for $25 million for moving without permission. L.A. Times, June 16, 1984, § III, at 1, col. 1. The NBA has taken the position that the Ninth Circuit's decision in *Los Angeles Coliseum* does not preclude its restrictions on team movement. *Id.*

the Article seeks also to demonstrate the broader importance of the sports cases in the general development and growth of antitrust law.

I. The Single Entity Defense

Section 1 of the Sherman Act is quite explicit that concerted action is a prerequisite to a finding of a violation: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[21] Even though the statute's admonition that every concerted trade restraint is illegal has been judicially modified by the creation of a rule of reason,[22] the statutory requirement of collective conduct has remained a fundamental threshold burden for any antitrust plaintiff. In fact, unilateral conduct, no matter how anticompetitive, simply cannot be deemed a violation of section 1 of the Sherman Act,[23] although it may result in a violation of section 2 of the Sherman Act,[24] or section 5 of the Federal Trade Com-

21. 15 U.S.C. § 1 (1982). One commentator has noted:

> When courts talk about concerted action among competitors they are talking in terms of conduct. . . . The statute, classically conceived, aims at bad conduct, at conspirators who deliberately decide on evil, who eschew competition, who plan and execute action to stifle market forces and who, conscious of their own wrongdoing, take precaution to hide their conduct or disguise it.
>
> Other things are notable about this vision in addition to its conduct orientation. . . . [I]t presents a single concept about common action, not three separate ones: "contract . . . combination or conspiracy" becomes an alliterative compound noun, roughly translated to mean "concerted action." There is little need to grapple with issues about the meanings of the particular words of the statute nor to mark nice distinctions among them.

L. Sullivan, Handbook of the Law of Antitrust § 109, at 311-12 (1977).

22. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179 (1911). For a discussion of the history and development of the rule of reason and its applicability to trade restraints in professional sports, see *infra* notes 300-79 and accompanying text.

23. *See, e.g.*, Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740 (1984); Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464, 1469 (1984); Albrecht v. Herald Co., 390 U.S. 145, 148-49 (1968); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954); United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Modern Home Inst., Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102, 108 (2d Cir. 1975); Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 878 (1st Cir. 1966); Barnosky Oils, Inc. v. Union Oil Co., 1979-1 Trade Cas. (CCH) ¶ 62,668, at 77,782-83 (E.D. Mich. 1978), *aff'd in part and rev'd in part on other grounds*, 665 F.2d 74 (6th Cir. 1981); Overseas Motors, Inc. v. Import Motors Ltd., Inc., 375 F. Supp. 499, 531 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *see also* Desgranges Psychiatric Center, P.C. v. Blue Cross & Blue Shield, 124 Mich. App. 237, 244-45, 333 N.W.2d 562, 565 (1983) (unilateral refusal to deal cannot violate state antitrust statute requiring concerted action).

24. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), provides, in relevant part, that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." Because § 2 prohibits attempts to monopolize and the act of monopolization, as well as combinations and conspiracies to monopolize, it reaches unilateral as well as concerted conduct. For a discussion of the possible applicability of § 2 to franchise relocation restraints, see *infra* notes 362-64 and accompanying text.

mission Act.[25]

The relevance of the concerted action requirement of section 1 to litigation involving the validity of franchise relocation restraints may be simply stated. If, as some sports leagues have contended, a league should be treated for purposes of antitrust analysis as a single economic unit, a franchise relocation restriction agreed to by all league members could never violate section 1 of the Sherman Act. Although the relocation restraint might create a significant anticompetitive impact, or might even reflect horizontal business activity that could be labeled per se illegal if the individual teams were deemed separate and distinct business competitors, a decision to treat the National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL) or any other sports organization as a single entity would preclude finding the concerted conduct essential to any section 1 wrongdoing. In essence, the relocation restriction would then be nothing more than a mechanism for unilaterally determining where a product—the league sport—would be marketed. It is therefore not at all unusual to find that sports league defendants have repeatedly attempted to persuade courts that the sui generis nature of professional sports organizations requires that they be treated as single entities when their trade practices are challenged pursuant to section 1.[26]

A. *Application of* Copperweld *to Sports Leagues*

Although the Supreme Court has not specifically addressed this issue in the context of sports leagues, it has had numerous opportunities to comment on defendants' claims that affiliated enterprises should be treated as a single entity for purposes of section 1. Just recently, in *Copperweld Corp. v. Independence Tube Corp.*,[27] the Court made a dramatic departure from its earlier decisions dealing with intracorporate or intraenterprise conspiracy. Prior to *Copperweld*, Supreme Court precedent had developed over four decades indicating that a parent company and its subsidiaries, or two subsidiaries of the same parent, could be deemed separate entities capable of concerted action.[28] *Copperweld*, however, per-

25. Section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45 (1982), declares unlawful "[u]nfair methods of competition in or affecting commerce." It does not require concerted conduct and the United States Supreme Court has repeatedly indicated that the FTC may proceed pursuant to § 5 in order to reach conduct that might not violate either the Sherman Act or the Clayton Act, 15 U.S.C. §§ 12-27 (1982). *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972); FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953).

26. For a discussion of these cases, see *infra* notes 48-86 and accompanying text. One recent article argued strenuously for single entity treatment for teams participating in league sports. *See* Grauer, *supra* note 13; *see also* Kempf, *supra* note 13, at 627-33 (economic interdependence of league members requires single entity treatment). *But see* Blecher & Daniels, *supra* note 13 (arguing against single entity defense).

27. 104 S. Ct. 2731 (1984).

28. *See, e.g.*, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 117 (1975);

haps in response to a substantial body of critical scholarly commentary,[29] repudiated earlier case law and deemed a parent and its wholly owned subsidiary legally incapable of conspiracy for antitrust purposes.[30] It thus provided a glimmer of hope to those who would advance a single entity status for sports teams in a league setting. Nevertheless, careful analysis of *Copperweld* suggests that it would not and should not be extended to immunize separately owned and operated sports teams from section 1 coverage.

The Supreme Court carefully and narrowly framed the question in *Copperweld* as "whether the coordinated acts of a parent and its wholly

---

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-98 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

29. *See, e.g.*, M. Handler, Reforming the Antitrust Laws 5, 8, 12-13 (1982); Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 Mont. L. Rev. 158, 197 (1962); Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 Calif. L. Rev. 182, 184-85 (1969); Handler, *Twenty-Five Years of Antitrust*, 73 Colum. L. Rev. 415, 452-53 (1973); Handler, *Annual Review of Antitrust Developments*, 10 The Record 332, 342-44 (1955); Handler, *Anti-trust: New Frontiers and New Perplexities*, 6 The Record 59, 79-80 (1951); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 Yale L.J. 92, 119-22 (1966); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 25-26 (1981); Kempf, *Bathtub Conspiracies: Has* Seagram *Distilled a More Potent Brew?*, 24 Bus. Law. 173, 181 (1968); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 184-88 (1955); Rahl, *Conspiracy and the Antitrust Laws*, 44 Ill. L. Rev. 743, 767-68 (1950); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L.J. 5, 26-27 (1963); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 24-35 (1968); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717 (1977); Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982); Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?*, 14 Duq. L. Rev. 63 (1975); Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 Yale L.J. 372 (1954).

30. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2742-45 (1984). In *Copperweld*, Lear Siegler, Inc. (Lear) had agreed not to compete with Regal Tube Co. (Regal), a wholly-owned subsidiary of petitioner Copperweld Corp. (Copperweld) purchased by Copperweld from Lear. *Id.* at 2732. When a Lear officer formed a company to compete with Regal, Copperweld threatened a supplier with legal action if it dealt with the competitor in what Copperweld perceived to be violation of the noncompetition covenant agreed to by Lear. *Id.* at 2732-33. The supplier ceased selling to the competitor, who then brought suit alleging a § 1 violation by Copperweld, Regal and the supplier. *Id.* The jury exonerated the supplier from any conspiratorial activity, but found that Copperweld and Regal had unlawfully conspired in violation of § 1 of the Sherman Act. *Id.* at 2735. On appeal, the Seventh Circuit affirmed the finding of liability, even though the sole conspirators were a parent company and its wholly owned subsidiary. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 316-20 (7th Cir. 1982) (citing Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)), *rev'd*, 104 S. Ct. 2731 (1984). The Supreme Court thereupon granted certiorari to re-examine the intra-enterprise conspiracy doctrine, and ultimately reversed the decision of the court below by a five-to-three vote. *See Copperweld*, 104 S. Ct. at 2736. Justice White did not participate in the consideration or decision of the case. *Id.* at 2745.

owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy."[31] Indeed, in reaching the conclusion that these entities could not conspire for antitrust purposes,[32] the Court's holding was expressly limited to a parent and a wholly owned subsidiary.[33] Chief Justice Burger was very careful to emphasize that the Court was not considering at all the circumstances, "if any, [under which] a parent may be liable for conspiring with an affiliated corporation it does not completely own."[34] Therefore, *Copperweld*

---

31. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2736 (1984).

32. *Id.* at 2745.

33. *Id.* at 2740.

34. *Id.* Chief Justice Burger, writing for the majority, argued that "in all but perhaps one" earlier case, reliance on a theory of conspiracy between affiliated corporations was unnecessary to the result. *Id.* at 2736. *But see id.* at 2746-49 (Stevens, J., dissenting) (majority opinion inconsistent with at least seven previous Supreme Court decisions). For a collection of the earlier cases, see *supra* note 28. In United States v. Yellow Cab Co., 332 U.S. 218 (1947), the Justice Department alleged that certain defendants had combined to restrain and monopolize trade in the sale of motor vehicles for use as taxicabs in several cities, and to restrain and monopolize trade in the business of furnishing cab services for hire in the Chicago area. *Id.* at 224. The defendants were one Markin, the president, general manager and controlling shareholder of Checker Cab Manufacturing Corporation, and five affiliated companies (controlled by Markin) that operated a substantial share of licensed cabs in several cities. *Id.* at 220-22. The government charged that Markin had illegally combined with the affiliated cab companies and with Checker by requiring the affiliated companies to purchase taxi cabs exclusively from Checker, thereby foreclosing sales by other manufacturers. *Id.* at 224. Even though Markin asserted that the alleged antitrust violation was merely a form of lawful vertical integration, the Supreme Court disagreed and expressly found that the facts alleged supported a finding of concerted action by separate actors. *Id.* at 227. In *Copperweld*, however, the majority chose to distinguish and to minimize the effect of *Yellow Cab* by asserting that "the affiliation of the defendants was irrelevant because the original acquisitions [of the affiliates] were *themselves* illegal." *Copperweld*, 104 S. Ct. at 2737 (emphasis in original); *see also* Handler & Smart, *supra* note 29, at 29 (subsidiaries in *Yellow Cab* had not been formed to carry out parent's business but were corporations of "prior disparate ownership that were combined to effect a restraint of trade").

Similarly, in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), the Supreme Court apparently took a rather dim view of the single entity defense. In *Kiefer-Stewart*, the defendants were a liquor manufacturer and its two wholly-owned subsidiaries that distributed the liquor to wholesalers. It was alleged that the subsidiaries had jointly and illegally refused to sell to a wholesaler who declined to abide by maximum resale prices imposed by the subsidiaries. The Supreme Court found that despite defendants' claim that they were " 'mere instrumentalities of a single manufacturing-merchandizing unit,' " *id.* at 215, the affiliated companies were capable of conspiring with each other for § 1 purposes, *id.* at 214. Justice Black reasoned that the defendants' tendered defense "runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors." *Id.* at 215. Despite this rather blunt and straightforward language, the *Copperweld* Court suggested that "the *Kiefer-Stewart* Court failed to confront the anomalies an intra-enterprise doctrine entails" and that "were the cases decided today, the same result probably could be justified on the ground that the subsidiaries conspired with wholesalers other than the plaintiff." *Copperweld*, 104 S. Ct. at 2738 & n.9 (citing Albrecht v. Herald Co., 390 U.S. 145, 149-150 & n.6 (1968) and United States v. Parke, Davis & Co., 362 U.S. 29, 45-46 (1960)).

After *Kiefer-Stewart*, in Timken Roller Bearing Co. v. United States, 341 U.S. 593

provides little or no guidance on the issue of single entity treatment for sports teams enjoying no common ownership. Indeed, if any inference

(1951), the Court was faced with claims that commonly owned but separately incorporated defendants had combined in restraint of trade. More specifically, it was alleged that an American company, together with its British and French subsidiaries, jointly owned with others, had agreed to fix prices, allocate territories and protect each other's markets. *Id.* at 596. The Court reiterated that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." *Id.* at 598. Yet, in *Copperweld,* Chief Justice Burger once again concluded that the intra-enterprise conspiracy doctrine "was in no way necessary to the result" because of the lack of a true parent-subsidiary relationship and the presence of illegal stock acquisitions. *Copperweld,* 104 S. Ct. at 2739; *see also* Handler & Smart, *supra* note 29, at 31-33 (discussing Court's application of intracorporate conspiracy doctrine).

More recently, in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968), the Supreme Court repudiated a single entity claim and again gave a broad reading to the concerted action requirement of § 1 by applying it to affiliated enterprises. In *Perma Life,* the Court reversed decisions below that had permitted defendants to shelter themselves from antitrust liability by claiming that they were a single business entity. *See Perma Life,* 376 F.2d 692, 699 (7th Cir. 1967), *rev'd,* 392 U.S. 134 (1968). Several franchised dealers of Midas, Inc. alleged that Midas had combined with its parent, other subsidiaries of the parent and six individuals who were corporate agents or officers. *Perma Life,* 392 U.S. at 135. Plaintiffs claimed that defendants had combined through franchise agreements to ban plaintiffs from purchasing supplies from others and from selling outside designated territories. *Id.* at 136-37. In addition, it was alleged that the agreements tied muffler sales to sales of other Midas products and fixed retail prices. *Id.* The Court, speaking through Justice Black, tersely rejected the single entity argument by noting that "since . . . Midas and [its parent] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Id.* at 141-42. Despite this apparently unequivocal endorsement of the intra-corporate conspiracy doctrine in *Perma Life,* the *Copperweld* Court dismissed the broad language of that case by characterizing it as "at most only an alternative holding." *Copperweld,* 104 S. Ct. at 2739.

Further, the Court in *Copperweld* did not even attempt to respond to language in the recent case of United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 117 (1975), in which the Supreme Court had given short shrift to a single entity argument. In *Citizens,* the Court did ultimately conclude that a bank's de facto branching system and subsequent acquisition of such branches did not result in either Sherman or Clayton Act violations. *Id.* at 119-22. Nevertheless, Justice Stewart indicated that the earlier cases dealing with intracorporate conspiracy remained good law and were controlling:

> The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. . . . *A fortiori,* independently owned firms cannot escape competing merely by pretending to common ownership or control, for the pretense would simply perfect the cartel. We may also assume, though the question is a new one, that a business entity generally cannot justify restraining trade between itself and an independently owned entity merely on the ground that it helped launch that entity, by providing expert advice or seed capital.

Id. at 116-17 (citations omitted).

In sum, a more than colorable argument can be made that the *Copperweld* Court is unfaithful to a long line of precedent and that it errs as a matter of sound antitrust policy. *See Copperweld,* 104 S. Ct. at 2745-55 (Stevens, J., dissenting) (lengthy argument for separate entity treatment of even affiliated corporations).

may be drawn from the majority opinion, it is that the Court would be reluctant to extend its decision to preclude section 1 liability for wholly unaffiliated business entities.

In the context of sports leagues, the relationships of teams to each other and to the league itself simply do not fit neatly into the parent/wholly owned subsidiary paradigm. As some of the recent case law illustrates,[35] teams are not only separately incorporated, but they are also separately owned and do not share the single "corporate consciousness" or "complete unity of interest" found by the *Copperweld* Court.[36] Indeed, teams often display markedly different attitudes with respect to a number of business issues, including salaries, ticket prices and athletic strategies. Although there is a very real degree of interdependence and a need for some cooperation,[37] sports teams fall far short of the common control and total unity of interest exhibited by a parent and its wholly owned subsidiary. It would therefore appear that sports leagues may not qualify for single entity treatment.

This conclusion is further supported by Chief Justice Burger's attempt in *Copperweld* to distinguish between unilateral action on the one hand and concerted activity on the other.[38] The Chief Justice made the point that even unreasonable unilateral conduct will be treated unfavorably under existing antitrust law only when it poses a danger of monopolization.[39] This is because it is often difficult, in examining a single entity, to distinguish healthy competition from anticompetitive behavior.[40] In contrast, "[c]oncerted activity . . . is judged more sternly than unilateral activity."[41] Unlike unilateral conduct, collective behavior may be attacked even if it does not threaten monopolization.[42] The rationale for this substantial distinction in the law is simply that "[c]oncerted activity inherently is fraught with anticompetitive risk [because] [i]t deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands."[43]

It can be inferred from this analysis by the *Copperweld* Court that single entity status for sports leagues would immunize them from section 1 and insulate even unreasonably anticompetitive behavior unless it threatened to effect a monopoly in violation of section 2 of the Sherman Act. There is no indication that the Court intended to widen this conceded gap in antitrust law between sections 1 and 2 of the Sherman Act. Rather, *Copperweld* reflects a narrow ruling that is limited to parent/wholly owned subsidiary relationships. Even if it is a decision upon

35. See *infra* notes 49-86 and accompanying text.
36. *See* Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2742 (1984).
37. See *infra* notes 99-111 and accompanying text.
38. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740-45 (1984).
39. *Id.* at 2740.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 2741.

which courts may build and that courts might extend to partly owned subsidiaries,[44] there is not even a shred of dicta in *Copperweld* suggesting that separately owned and operated sports teams should be protected by its holding. Further, in view of the gap between sections 1 and 2, sound public policy militates against statutory interpretations that effectively insulate even unreasonable behavior from judicial scrutiny.

It is true that even before *Copperweld*, while some federal circuit courts of appeals zealously applied the prior Supreme Court precedents and held as a matter of law that separate incorporation established a plurality of actors,[45] other lower federal courts struggled mightily to avoid a rigid application of these earlier cases.[46] Yet, neither this line of cases nor critical commentary went so far as to suggest that firms that lack any common ownership or control (such as individually owned sports teams) should be protected by an alteration of the prevailing doctrine.[47] In fact, the single entity defense has been the subject of litigation in the context of professional sports and there is an evolving body of precedent rejecting the claim. Although earlier cases had hinted at the possibility that professional sports leagues might seek protection from section 1 by claiming single entity status,[48] recent decisions have properly reached an opposite

44. Courts are already extending *Copperweld* beyond the parent/wholly owned subsidiary situation. *See, e.g.*, Hood v. Tenneco Tex. Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984) (two wholly owned subsidiaries of common parent cannot conspire under § 1); Magnum Force Distribs. v. Bon Bon Co., No. 84-2629, Bench Order at 13-14 (E.D.N.Y. Nov. 9, 1984) (60% subsidiary cannot conspire with parent).

45. *See, e.g.*, Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 (3rd Cir.), *cert. denied*, 439 U.S. 876 (1978); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244-45 (5th Cir. 1978); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 511-12 (3d Cir. 1976); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

46. Prior to *Copperweld*, some circuits refused to rely solely on separate incorporation as dispositive and instead indicated that all the surrounding relevant facts and circumstances had to be analyzed. *See, e.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1054-55 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982); Ogilvie v. Fotomat Corp., 641 F.2d 581, 587-90 (8th Cir. 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-19 (9th Cir. 1979), *cert.denied*, 447 U.S. 906 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); Knutson v. Daily Review, Inc., 548 F.2d 795, 801-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). Handler and Smart have discussed these authorities in some detail and have also set forth additional categories of cases that militate against the rigid, literal application of the pre-*Copperweld* case law: (1) cases involving a sole decisionmaker in which one person controls the related entities and makes the business decisions; (2) cases involving concerted action restraining no outsider's trade; and (3) cases dealing with corporations not held out as competitors. *See* Handler & Smart, *supra* note 29, at 46-55.

47. See authorities cited *supra* notes 29, 46. *See also* Blecher & Daniels, *supra* note 13, at 232-38 (necessity of cooperation among sports league members does not preclude separate entity status). *But see* R. Bork, The Antitrust Paradox 278-79 (1978) (favoring single entity status for sports teams and leagues); J. Weistart & C. Lowell, *supra* note 13, at 698-702 (same); Grauer, *supra* note 13, at 2-6 (same).

48. *See, e.g.*, Levin v. National Basketball Ass'n, 385 F. Supp. 149, 152 (S.D.N.Y.

conclusion.[49]

B. *Analyzing the Argument for Single Entity Treatment*

The National Football League argued strenuously for single entity treatment in its recent unsuccessful appeal in *Los Angeles Memorial Coliseum Commission v. National Football League*,[50] and its arguments there were typical of the issues raised in the other professional sports cases. In directing a verdict for plaintiff on this issue in the trial court, Judge Pregerson took the opportunity to review the nature of the relationship among NFL teams and their relationship with the league itself. He explained that "[o]n its face, the NFL certainly appears to be an an association of separate business entities rather than one single enterprise," as each club is a separate legal entity with separate ownership.[51] Although members share a large portion of their revenues, profits and losses are not shared.[52] Furthermore, Judge Pregerson noted that each team is "managed independently, each making its own decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators, and the terms of their stadium leases. They do not exchange or share their accounting books and records."[53]

1974); San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974).

49. *See, e.g.*, Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1387-90 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984); North American Soccer League v. National Football League, 670 F.2d 1249, 1256-58 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). Other sports cases have implicitly concluded that the single entity defense is not applicable to sports leagues. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1177 & n.11 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606, 616 & n.19 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); Boris v. United States Football League, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,462 (C.D. Cal. 1984); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1320 (D. Conn. 1977); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 892-93 (S.D.N.Y. 1975); Kapp v. National Football League, 390 F. Supp. 73, 79-82 (N.D. Cal. 1974), *aff'd and cross appeal dismissed as moot*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503-04 (E.D. Pa. 1972).

50. *See* Opening Brief of NFL Appellants at 10-19, 28-44, Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984) (available in files of *Fordham Law Review*) [hereinafter cited as NFL Brief].

51. Los Angeles Memorial Coliseum Comm'n v. National Football League, 519 F. Supp. 581, 582 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984). The district court commented that "[t]he Supreme Court has consistently rejected the single-entity argument in circumstances more favorable to that argument than those presented in this case." *Id.* (citations omitted). The opinion then noted that even firms with a high degree of common ownership were deemed separate actors for § 1 purposes, and cited several pre-*Copperweld* Supreme Court cases as support. *Id.* The Supreme Court's recent repudiation of those decisions in *Copperweld* should not alter the result in *Los Angeles Memorial Coliseum* because there is a complete lack of common ownership in the case of NFL teams. *See id.*

52. *Id.*

53. *Id.*

At an earlier stage of the same litigation,[54] Judge Pregerson purported to distinguish both *San Francisco Seals, Ltd. v. National Hockey League*[55] and *Levin v. National Basketball Association*[56]—the two earlier cases that had flirted with single entity treatment for sports leagues. In *San Francisco Seals*, the owners of a professional hockey team asserted that the NHL and its member clubs had violated the Sherman Act by preventing plaintiff from moving to Vancouver, British Columbia.[57] In rejecting the claim the court stated that hockey teams are "not competitors in the economic sense. . . . They are, in fact, all members of a single unit competing as such with other similar professional leagues."[58] Similarly, in *Levin*, where a businessman was denied permission to purchase an NBA team, the court, in rejecting the antitrust claim, alluded to the *Seals* case and asserted that plaintiff was seeking "co-partnership" with other NBA owners.[59] Nevertheless, Judge Pregerson in *Los Angeles Memorial Coliseum* expressly eschewed any reliance on those cases and tersely dismissed them as cases that "merely held that the actions complained of did not have any anticompetitive effect."[60]

Although the *Los Angeles Memorial Coliseum* trial court's reading of these decisions may be criticized as unduly narrow, it is certainly true that in neither case was the problem of franchise relocation to another league member's home city presented. Thus, there is a much stronger argument for a finding of an absence of anticompetitive impact in *Levin* and *San Francisco Seals* than in a case such as *Los Angeles Memorial Coliseum*, in which the relocation restriction prevented intra-league competition.[61] Yet, for section 1 purposes, the presence or absence of anticompetitive purpose and/or effect is utterly irrelevant if no concerted action exists. Perhaps a better approach would be to recognize that although these cases do provide some support for the single entity defense, they were incorrectly decided. Certainly, professional sports leagues cannot be viewed as true partnerships in any real sense. Perhaps

54. *See* Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 164 n.12 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

55. 379 F. Supp. 966 (C.D. Cal. 1974).

56. 385 F. Supp. 149 (S.D.N.Y. 1974).

57. San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 967 (C.D. Cal. 1974).

58. *Id.* at 970.

59. Levin v. National Basketball Ass'n, 385 F. Supp. 149, 152 & n.6 (S.D.N.Y. 1974).

60. Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 164 n.12 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

61. Of course, one could still argue that even if no issue of intra-league competition were presented in *Levin* or *San Francisco Seals*, the challenged conduct might nonetheless have caused other anticompetitive effects. For example, stadium owners' ability to compete nationally for major sports franchises might be inhibited by denial of permission to move a team. Also, it seems that concerted refusal to sell a team, or to permit such a sale, restrains the ability of sports entrepreneurs to enter the market.

the most generous characterization of their activities may be that they are somewhat unconventional joint ventures,[62] and even this may be an exaggeration of that term.[63] Yet even if the joint venture label is applicable, it provides no blanket protection from antitrust scrutiny under section 1. Rather, determination of the appropriate antitrust standard—per se illegality or rule of reason analysis—may be influenced by the existence of a joint venture, the asserted need for cooperation among allegedly independent teams and all other factors that might militate in favor of mutual cooperation.[64]

On appeal in *Los Angeles Memorial Coliseum* the Ninth Circuit, over a vigorous dissent by one judge,[65] affirmed the district court's holding that the NFL and its teams were not one actor for antitrust purposes.[66] Focusing upon the undisputed material facts regarding NFL organization and the nature and extent of cooperation among its teams, Judge Anderson explained that a directed verdict for the plaintiff on the single entity issue was appropriate.[67] The court noted that other cases had flatly rejected single entity claims by sports leagues.[68] Although the Ninth Circuit acknowledged that it would characterize multiple corporations as a single entity where a single individual or parent corporation set corporate policy,[69] it concluded that NFL clubs simply failed to fit within this "exception":[70] "While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly."[71] Thus, the Ninth Circuit concluded that NFL teams are indeed "an association of teams sufficiently independent and competitive with one an-

62. The joint venture label is the characterization given by the NFL itself to its teams' conduct. *See* NFL Brief, *supra* note 50, at 10.

63. *See* Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 162 n.9 (C.D. Cal. 1979) ("Strictly speaking, the NFL teams are not engaged in a joint venture" because they do not share risks as well as profits.), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984). For other definitions of the joint venture concept for antitrust purposes, see *infra* notes 249-59 and accompanying text.

64. As Chief Justice Burger explained in Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740-41 (1984) (citations omitted):

> Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. . . . Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.

65. *See* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1401-10 (9th Cir.) (Williams, J., concurring in part, dissenting in part), *cert. denied*, 105 S. Ct. 397 (1984).

66. *Id.* at 1387-90.

67. *Id.* at 1387.

68. *Id.* at 1388.

69. *Id.*

70. *Id.*

71. *Id.* at 1388-89.

other" to be deemed separate entities for section 1 purposes.[72] Emphasizing the independent ownership of the clubs, the absence of profit and loss sharing, and interteam competition for players, coaches and management, as well as direct economic rivalry for fans, local television and radio revenues, and media space where teams operate in close proximity, the Ninth Circuit concluded that each team is a separate entity for antitrust purposes.[73]

Similarly, in *North American Soccer League v. National Football League*,[74] the Second Circuit Court of Appeals also found that the NFL was not a single entity.[75] In that case, a professional soccer league successfully challenged an NFL cross-ownership ban that precluded members from owning teams in other professional sports leagues.[76] The court characterized the NFL as an "unincorporated joint venture consisting of 28 individually owned separate professional football teams."[77] The court acknowledged that the interdependence of teams engaged in league football made an economic joint venture "essential."[78] The court also went on to indicate, as did the Ninth Circuit in *Los Angeles Memorial Coliseum*,[79] that while teams do share certain television revenues and gate receipts, each team is a "discrete legal entity," and expenses, capital expenditures and profits are not shared.[80] The court further recognized that local radio and television revenue was not shared,[81] nor was revenue derived from parking and concessions.[82]

In its rejection of the single entity argument, the circuit court in *North American Soccer League* tersely rejected the assertion that by attaching a joint venture label to NFL activities the bite of section 1 could be completely avoided: "The theory that a combination of actors can gain exemption from § 1 of the Sherman Act by acting as a 'joint venture' has repeatedly been rejected by the Supreme Court and the Sherman Act has been held applicable to professional sports teams by numerous lesser federal courts."[83] The court also explained that the district court's attempt to distinguish earlier cases[84] was unpersuasive because the cross-owner-

72. *Id.* at 1389.

73. *Id.* The Court of Appeals did conclude that the nature of league sports militated in favor of a rule of reason analysis rather than a per se approach. *Id.* at 1389-90. See *infra* notes 108-11 and accompanying text.

74. 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

75. *Id.* at 1251-52.

76. *Id.* at 1250.

77. *Id.* at 1251.

78. *Id.*

79. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

80. North American Soccer League v. National Football League, 670 F.2d 1249, 1251-52 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

81. *Id.* at 1252.

82. *Id.*

83. *Id.* at 1257 (citations omitted).

84. *See* North American Soccer League v. National Football League, 505 F. Supp. 659, 671-78 (S.D.N.Y. 1980), *rev'd*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074

ship ban did not merely protect the NFL as a league, but rather, also was designed to shield NFL teams "as discrete economic entities from competition in their respective home territories."[85] Thus, the Second Circuit concluded that the single entity defense was intolerable in this case because "such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects."[86]

It is true that some recent commentary argues strenuously that the conclusions reached in the foregoing decisions are erroneous.[87] In the most detailed and exhaustive criticism of these cases, Professor Grauer attempts to draw an analogy between the NFL and a law firm partnership,[88] and concludes that consumer wealth maximization should be the sole antitrust goal and that this goal precludes the application of section 1 to the sports league cases.[89] Although Grauer's efforts reflect perhaps the most clearly articulated arguments for single entity status for sports leagues,[90] his reasons seem insufficient for providing section 1 immunity to these sports organizations.

Even if Grauer correctly characterizes the restraints imposed by a league on its members as the equivalent of a partner's covenant not to compete, it must be recognized that such ancillary agreements are not immune from antitrust scrutiny. Rather, they are subject to a rule of reason analysis.[91] Even if the league acts as a single entity, each agreement between the league as an entity and individual teams may be viewed, for antitrust purposes, as a "contract" between two parties.[92] Grauer's analogy to a law firm partnership breaks down when it is recognized that generally such firms, unlike sports leagues, operate under com-

---

(1982). The district court had concluded that earlier cases involved competition between individual teams regarding player relations or playing sites, whereas the cross-ownership ban involved the NFL as a single league unit acting against another league.

85. North American Soccer League v. National Football League, 670 F.2d 1249, 1257 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

86. *Id. But see* North American Soccer League v. National Football League, *cert. denied*, 459 U.S. 1074, 1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (analogizing sports league to partners working together in a law firm).

87. *See* Grauer, *supra* note 13, at 1-7; Kempf, *supra* note 13, at 633. *But see* Blecher & Daniels, *supra* note 13, at 236-38 (supporting refusal to exempt sports leagues from § 1 of Sherman Act).

88. *See* Grauer, *supra* note 13, at 3-7.

89. *See id.* at 59.

90. The majority opinion in Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984), characterizes Grauer's arguments as "persuasive" but determines that his reasoning is not "so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act." *Id.* at 1390 n.4.

91. *See* Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. Rev. 669, 750-55 (1982).

92. *See id.* (discussing covenants not to compete pursuant to a rule of reason analysis).

mon ownership and control. They may be departmentalized, but each firm still enjoys the efficiency associated with partners sharing common policies and practices and one set of administrative overhead costs. Grauer argues that some firms include partners who are separately incorporated and that there may be an unequal allocation of profits and losses,[93] but it does not follow that this suggests single entity treatment for sports leagues. On the contrary, these somewhat unorthodox alterations of traditional partnership relationships, particularly separate incorporation without common control, may militate in favor of finding the participating professional corporations to be separate actors for section 1 purposes. To the extent that law firms are structured in a manner that approximates a joint venture between two or more separate corporate entities, there appears to be no policy reason forbidding antitrust scrutiny of their joint action.[94]

Certainly the most important aspect of Grauer's article is the recurrent theme that intra-league restraints may be essential to the efficient conduct of the business of professional sports.[95] Yet even if one were to concede this point, it does not support the proposition that teams are part of a single league entity. At best, this argument makes a strong case for a rule of reason approach to such restraints rather than per se condemnation of them. If these trade restraints are in fact so procompetitive and so conducive to efficient operation, why are scholars such as Grauer so reluctant to have them subjected to rule of reason scrutiny? After all, if these restraints, on balance, promote competition more than they hinder it, and contribute measurably to the realization of efficiencies, they should survive a rule of reason test. There should be no need to foreclose totally an inquiry into the justifications for and the dangers of a particular restraint.[96]

In sum, the world of professional sports does indeed present unique and difficult problems for the antitrust observer. Courts and scholars have struggled for years to reconcile the basic precepts of antitrust law with the need for greater flexibility created by the sports cases.[97] The sui generis nature of professional sports organizations may well be relevant,

93. *See* Grauer, *supra* note 13, at 29-30.

94. This approach would most likely be only of academic significance. If modification of traditional law firm partnerships resulted in the treatment of individual lawyers and professional corporations as separate actors, it still would be highly improbable that any antitrust problem would arise. One would be hard pressed to think of any law firm with enough market power to have any serious anticompetitive effect on the marketplace for legal services. In sharp contrast, major sports leagues wield significant market power. See *infra* notes 325-53 and accompanying text.

95. *See* Grauer, *supra* note 13, at 59; *see also* Kempf, *supra* note 13, at 631-33 (discussing the economic need for joint action in professional sports leagues).

96. The propriety of not precluding substantive analysis of these restraints is best emphasized by the fact that courts have concluded that sports league restraints have been unreasonable and therefore unenforceable even under a rule of reason standard. See *infra* notes 357-76 and accompanying text.

97. See *infra* notes 99-112 and accompanying text.

or even determinative, in deciding the substantive antitrust issues raised in franchise relocation and other sports cases. This uniqueness, however, is not and should not be dispositive of the distinct and separate issue of single entity characterization. Case law and public policy both militate in favor of a conclusion that sports teams, as separately owned and independent legal entities, are capable of combining for section 1 purposes. A contrary result would certainly be justified if teams were merely divisions of a single corporation, and perhaps a different conclusion would also be reached if such teams were commonly owned and controlled. Neither scenario applies, however, and it is therefore appropriate to find that a plurality of actors exists for section 1 purposes.

Any other conclusion would preclude all section 1 inquiry and would engraft on the Sherman Act the type of implied exemption that should be sparingly granted.[98] Single entity status for sports organizations would create a foundation of precedent, and other industries would then argue that interdependence and the need for cooperation between firms preclude any application of section 1 to their collective conduct. This potentially massive avoidance of substantive consideration of trade restraints on the merits does not seem wise as a matter of sound antitrust policy.

II. Per Se Illegality or Rule of Reason Analysis for Relocation Restrictions?

Once the single entity issue is resolved and it is established that professional sports teams are separate actors for section 1 purposes, a more perplexing and complex set of issues is presented. Simply stated, the key question is whether section 1 of the Sherman Act is violated by a franchise relocation restriction. This rather straightforward question, however, is not easily resolved. The antitrust analyst must respond to this query by asking, for example, whether the individual teams, as members of each league, should be characterized as economic competitors engaged in a collective, horizontal restraint of trade. If so, should a rule of per se illegality apply or should a rule of reason analysis be invoked whether or not individual teams compete, and can the latter approach be justified in light of prevailing doctrine? In sum, it is necessary to determine the extent to which the sui generis nature of professional sports can be relied on in characterizing and analyzing the franchise relocation restraint.

This section of the Article will attempt to demonstrate that although plausible arguments for application of a per se rule can be made, a rule of reason standard is preferable as a matter of policy, and that such an ap-

98. *See* Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (repeal of antitrust law by implication is generally not favored); California v. Federal Power Comm'n, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not lightly implied."); Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 456-57 (1945) (repeals of Sherman Act by implication are not favored); United States v. Borden Co., 308 U.S. 188, 198 (1939) (same).

proach is supported by emerging precedent. It will also be shown, however, that even pursuant to a rule of reason analysis, it is highly unlikely that major sports leagues will be successful in defending their franchise relocation restraints against antitrust attack.

A. *The Nature of Professional Sports*

It has already been observed that sports organizations and leagues defy precise description in classic economic or legal nomenclature[99] and are therefore difficult to analyze and classify in an antitrust context. At the risk of being somewhat redundant, however, the attributes of sports leagues merit repetition and amplification as a means of underscoring the nature of the analytical problems presented. Courts have recognized the unique interdependent relationship of teams in a league and their need—unlike ordinary competitive businesses—to regulate competition among themselves in order to survive.

In a relatively early decision, *United States v. National Football League*,[100] the government challenged NFL bylaws restraining television and radio broadcasting of NFL games. The bylaws prevented: (a) the telecasting of outside games into home territories of other teams on days when those other teams played at home; (b) the telecasting of outside games into home territories when home teams were playing away from home but telecasting into their home territories; and (c) the radio broadcasting of outside games into home territories when home teams were either playing at home or playing away from home and televising or broadcasting those games.[101] The court used a rule of reason analysis, upholding the first restriction[102] and invalidating the other two.[103] The opinion, emphasizing the sui generis aspects of professional sports, noted that whereas "[t]he ordinary business makes every effort to sell as much of its product or services as it can. . . . [i]f all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure," eventually causing the entire league to fail.[104]

This characterization of sports leagues as a unique combination of interdependent entities has been echoed in more recent case law and commentary. For example, in *Smith v. Pro Football, Inc.*,[105] even though the

99. See *supra* notes 50-86 and accompanying text.

100. 116 F. Supp. 319 (E.D. Pa. 1953).

101. *Id.* at 321.

102. *Id.* at 322-26.

103. *Id.* at 326-27. Subsequently, Congress expressly authorized NFL teams to cooperate with respect to joint telecasting of NFL games. *See* 15 U.S.C. §§ 1291-1295 (1982). There have been cases construing these statutory provisions. *See, e.g.*, Colorado High School Activities Ass'n v. National Football League, 711 F.2d 943 (10th Cir. 1983); WTWV, Inc. v. National Football League, 678 F.2d 142 (11th Cir. 1982).

104. United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

105. 593 F.2d 1173 (D.C. Cir. 1978).

court found that the NFL player draft ran afoul of the rule of reason,[106] Judge McKinnon noted that NFL clubs are not only noncompetitive in the economic sense, but that on the playing field as well, a competitive balance is necessary to maintain spectator interest.[107] Similarly, in *Los Angeles Memorial Coliseum Commission v. National Football League*,[108] the trial court noted that "in certain areas cooperation among the teams, not competition, is required to produce an entertainment product."[109] On appeal from a jury verdict adverse to the league, the court of appeals also acknowledged the rather unique nature of league sports[110] and the consequent difficulty of "analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context."[111]

Thus, it is common to find that courts are reluctant to apply per se rules of illegality to antitrust cases involving sports organizations and frequently opt instead for a rule of reason approach.[112] Nevertheless, it

---

106. *Id.* at 1183-89.

107. *Id.* at 1179.

108. 468 F. Supp. 154 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

109. *Id.* at 163; *accord* North American Soccer League v. National Football League, 670 F.2d 1249, 1253 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); Kapp v. National Football League, 390 F. Supp. 73, 79 (N.D. Cal. 1974), *aff'd and cross appeal dismissed as moot*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *see also* J. Weistart & C. Lowell, *supra* note 13, § 5.11, at 757-58 (discussing interdependence of league members); Grauer, *supra* note 13, at 24 (potential harm of economic competition among NFL teams); Kempf, *supra* note 13, at 628 (underlying economics of professional sports leagues); Kurlantzick, *supra* note 13, at 189 (unique character of competing football teams).

110. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1389 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

111. *Id.* at 1391.

112. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2953 (1984); M & H Tire Co. v. Hoosier Racing Tire Corp., 1984-1 Trade Cas. (CCH) ¶ 65,975, at 68,213, 68,216 (1st Cir. 1984); Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1390-98 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984); Mid-South Grizzlies v. National Football League, 720 F.2d 772, 783 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 2657 (1984); Brenner v. World Boxing Council, 675 F.2d 445, 454-55 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); North American Soccer League v. National Football League, 670 F.2d 1249, 1258-59 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 787-90 (7th Cir. 1981); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222, 223 (8th Cir. 1981); Neeld v. National Hockey League, 594 F.2d 1297, 1299-1300 (9th Cir. 1979); Smith v. Pro-Football, Inc., 593 F.2d 1173, 1183-89 (D.C. Cir. 1978); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-54 (5th Cir. 1977); Mackey v. National Football League, 543 F.2d 606, 619-21 (8th Cir. 1976); Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1369-70 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165, 170-71 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 379-80 (D. Ariz. 1983); Cooney v. American Horse Shows Ass'n, 495 F. Supp. 424, 430-31 (S.D.N.Y. 1980); Kapp v. National Football League, 390 F. Supp. 73, 81-82 (N.D. Cal. 1974), *aff'd and cross appeal dismissed as moot*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961). *But see* Washington

should be recognized that this trend toward adherence to a rule of reason is not necessarily correct, particularly when dealing with sports franchise relocation questions. First, the Supreme Court has sometimes demonstrated a marked unwillingness to carve out exceptions to well established rules of commercial conduct for particular industries based merely on their idiosyncratic aspects or claims of ruinous or destructive competition.[113] Second, the Supreme Court has rigidly adhered to a per se rule of illegality for horizontal restraints involving territorial allocations or allocations of customers[114]—a label that might well attach to a practice by which sports teams, under the rubric of league sports, preclude economic competition between themselves for patronage. Even the two parties that attacked an NFL franchise relocation restraint in the *Los*

State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966) (per se rule applied to eligibility rule for bowling tournaments); Boris v. United States Football League, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,461-63 (C.D. Cal. 1984) (USFL's eligibility rules constitute per se illegal boycott); Fishman v. Wirtz, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,779-82 (N.D. Ill. 1981) (joint refusal to approve of team ownership transfer held per se illegal); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1320-23 (D. Conn. 1977) (per se rule applies to minimum age rule for profesional hockey players); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1265-66 (N.D. Ga. 1973) (suspension of professional golfer by her competitors was per se invalid); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1056, 1058, 1063-66 (C.D. Cal. 1971) (NBA bylaws prohibiting qualified players from negotiating with teams until four years after high school class graduates deemed per se illegal). Thus, it is respectfully submitted that one recent commentator errs by flatly concluding that "there is no example of a court applying a per se rule to any sports league restrictive practices." Glick, *supra* note 13, at 69.

113. *See, e.g.* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 349 (1981); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-90 (1978); United States v. Paramount Pictures, Inc., 334 U.S. 131, 159 (1948); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 467-68 (1941); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22 (1940); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930); United States v. Joint Traffic Ass'n, 171 U.S. 505, 575-76 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 337 (1897); United States v. Addyston Pipe & Steel Co., 85 F. 271, 291 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). *But see* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2978 (1984) (discussing need for cooperation in Association's college football telecasting plan); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 347 (1933) (taking note of peculiar conditions and economic breakdown in bituminous coal industry). The Supreme Court has, however, recognized that the public service aspect and other features of the professions may permit certain unspecified practices to survive a Sherman Act challenge in a particular factual context even though the same practices might constitute an antitrust violation in another setting. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-49 (1982); *see also* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975). It would be difficult indeed to view a sports franchise relocation restraint as a professional ethical norm. Nevertheless, see *infra* notes 373, 385, 388-94 for a consideration of the public service aspect of professional sports.

114. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (citing as support numerous Supreme Court cases dating back to 1898); *see also* Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740 (1984) (reaffirming, in dicta, that "[c]ertain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused").

Angeles Memorial Coliseum case have apparently split over whether such restraints should be per se illegal or deemed unlawful only after a full rule of reason inquiry is completed.[115] Thus, further discussion of a possible per se approach, as well as a consideration of all possible rationales for a rule of reason analysis, are required.

B. *The Argument for Per Se Treatment of Relocation Restraints*

Antitrust cases involving the business of sports have often repudiated per se invalidity for restraints of trade in that industry.[116] It is arguable, however, that the decisions err or are at least unfaithful to current doctrine. Although the rule of reason may be the usual tool of antitrust analysis, the Supreme Court has articulated several exceptions to that approach and has embraced a principle of per se illegality for a number of categories of restraints: (1) horizontal[117] and vertical[118] price-fixing, whether minimum[119] or maximum;[120] (2) certain tying arrangements;[121]

---

115. *Compare* Brief of Appellee Los Angeles Raiders at 34-37, Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984) (per se illegality urged) (available in files of *Fordham Law Review*) *with* Opposition Brief of Los Angeles Memorial Coliseum Commission at 19, 34-35, Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984) (arguing rule of reason analysis appropriate) (available in files of *Fordham Law Review*).

116. See *supra* note 112 and accompanying text.

117. Horizontal restraints involve collective practices by competitors—business entities at the same level of distribution. United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).

118. Vertical restraints involve collective action by buyers and sellers—firms at different levels in the chain of distribution. *Id.*

119. *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (horizontal); Goldfarb v. Virginia State Bar, 421 U.S. 773, 781 (1975) (horizontal); United States v. Parke, Davis & Co., 362 U.S. 29, 37-38 (1960) (vertical); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (horizontal); United States v. Trenton Potteries Co., 273 U.S. 392, 396-97 (1927) (horizontal); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 400-09 (1911) (vertical); United States v. Joint Traffic Ass'n, 171 U.S. 505, 577 (1898) (horizontal); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312-13 (1897) (horizontal); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464, 1469-70 (1984) (declining to overrule per se rule applicable to vertical minimum price-fixing).

120. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-55 (1982) (horizontal); Albrecht v. Herald Co., 390 U.S. 145, 147-48, 151-53 (1968) (vertical); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213-14 (1951) (horizontal and vertical).

121. A tying arrangement involves an agreement whereby the seller of a product or service conditions a sale on the willingness of the buyer to accept a second product or service. The desired product or service is the tying product, and the second item is the tied product. The Supreme Court has indicated that such agreements are per se violations of § 1 of the Sherman Act whenever the seller has sufficient economic power in the tying product to foreclose a not insubstantial amount of commerce in the tied product. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1556 (1984) (surgery patients compelled to purchase hospital's chosen anesthesia service); United States Steel Corp. v. Fortner Enters., 429 U.S. 610, 617-18 (1977) (credit tied to sales of prefabricated housing); United States v. Loew's, Inc., 371 U.S. 38, 44-45 (1962) (block booking of films to television stations); Northern Pac. Ry. v. United States, 356 U.S. 1, 5-7 (1958) (sales of land tied to use of seller's railroad); Times-Picayune Publishing Co. v. United

(3) certain concerted refusals to deal;[122] and (4) horizontal allocations of territories or customers.[123]

The rationale for a limited application of per se rules has been frequently recited by the Court. Very early in the history of antitrust jurisprudence it was recognized that even though a thorough factual inquiry into the circumstances surrounding a particular restraint was ordinarily required, certain restraints were, by virtue of their nature, purpose or character, inherently unreasonable on their face.[124] Although per se rules "always contain a degree of arbitrariness. . . . [t]hey are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result."[125] As Justice Powell recently explained in *Continental T.V., Inc. v. GTE Sylvania Inc.*:[126]

> *Per se* rules . . . require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials.[127]

States, 345 U.S. 594, 608-09 (1953) (advertisements accepted only for both morning and evening newspapers); International Salt Co. v. United States, 332 U.S. 392, 396 (1947) (equipment lessor required that only its nonpatented products be used in its machines); United States Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922) (restrictive covenants in equipment leases).

122. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60 (1961) (trade association's refusal to give "seal of approval"); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959) (boycott of appliance retailer by manufacturers, distributors and a competitor); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 465 (1941) (manufacturers' boycott of retailers selling copies of their designs). Interestingly, many cases in both sports and nonsports contexts have strained to avoid per se analysis in unconventional concerted refusal to deal cases. For a discussion of this development, see *infra* notes 188-94, 281-96 and accompanying text.

123. See *supra* note 114.

124. *See* Standard Oil Co. v. United States, 221 U.S. 1, 58, 63-68 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179 (1911).

125. United States v. Container Corp., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

126. 433 U.S. 36 (1977).

127. *Id.* at 50 n.16; *see also* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2962 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1560 n.25 (1984) (per se rules designed to "avoid a burdensome inquiry into actual market conditions . . . where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of the determining whether the particular case at bar involves anticompetitive conduct."); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 (1982) ("For the sake of business certainty and litigation efficiency, we have

Thus, although it is true that courts should classify business practices as per se illegal only after "considerable experience with certain business relationships,"[128] they have adopted a per se approach to invalidate trade restraints that reflect a "pernicious effect on competition and lack . . . any redeeming virtue . . . without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[129]

Because the Court has decided to include horizontal allocations of territories and customers within the per se category,[130] the key question that remains is whether sports franchise relocation restrictions can escape per se treatment without offending the principle of stare decisis and without lower courts simply ignoring the teaching of the Supreme Court. In view of the Supreme Court's 1972 decision in *United States v. Topco Associates, Inc.*,[131] it appears that a relocation restraint agreed to by independently owned and operated members of a sports league may be subject to per se invalidity.

In *Topco*, the Court applied a per se rule to what it considered to be a classic case of horizontal territorial and customer restraints.[132] Topco, a cooperative association of small independent regional supermarket chains, acted as a purchasing agent for its members and distributed various items under private label brand names owned by Topco.[133] The

tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable."); M. Handler, H. Blake, R. Pitofsky & H. Goldschmid, Cases & Materials on Trade Regulation 275 (1983) ("[I]n the overwhelming majority of instances, full exploration or analysis of all relevant factors would show anticompetitive effects, and the few instances in which errors occur constitute a price worth paying to have an effective legal rule.").

128. United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972).

129. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). The Court in *Northern Pacific* went on to explain that the per se rule engenders certainty and avoids "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Id. See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965) (discussion of per se rule); 75 Yale L.J. 373 (1966) (same).

130. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).

131. 405 U.S. 596 (1972).

132. *See id.* at 608.

133. *Id.* at 599 & n.3. Topco's founding members had experienced difficulty in competing with larger grocery chains, and recognized that the absence of a private-label program was a factor contributing to the problem. *Id.* at 599 n.3. The Court explained that private-label products differ from other brand-name products because the private-label products are sold at a few easily identifiable stores. The use of private-label products allows a chain to effect significant cost economies in purchasing, transportation, warehousing, promotion and advertising, which in turn may permit lower prices. Thus, a store can either sell national-brand products at the same price as other stores while also offering a desirable, lower-priced substitute, or sell the national brands at a reduced price if the profit margin on the private-label goods is high enough. Other advantages of a private label include: (1) increased bargaining power for stores dealing with national manufacturers; (2) creation of a "price-mix" allowing lower prices on special items; and (3) generation of goodwill. *Id.*

government charged that a licensing agreement among Topco members, by which each member essentially agreed to sell Topco-brand merchandise only within the marketing territory or territories allocated to it, violated section 1.[134] In addition, members' veto powers within their territories hindered or precluded new membership and further insulated members from competition in Topco-brand goods.[135] Further, Topco members could not sell Topco products at wholesale without special permission.[136] Topco convinced the lower court that no violation of the antitrust laws had occurred, arguing that, on balance, the restrictions were procompetitive in that they increased the ability of Topco members to compete with national chains and other supermarkets.[137] Despite the district court's detailed application of the rule of reason and its specific determination that the horizontal marketing restraints were actually beneficial to the competitive process, the Supreme Court reversed. It concluded that a rule of reason inquiry was simply "irrelevant"[138] because "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition" is a classic example of a per se violation of section 1.[139] Justice Marshall, writing for the Court, stated that even though there might have been an overall procompetitive influence resulting from the horizontal restraint, "Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy."[140] On the contrary, the Sherman Act required that each Topco member have the prerogative to make an individual determination as to whether or not to compete with other chains or with other Topco member stores.[141]

Interestingly, Justice Blackmun concurred in the result but noted that the Court's conclusion "has its anomalous aspects" because the conclusion seemed to be inconsistent with the public interest.[142] Chief Justice Burger, in a vigorous dissent, initially noted that the case did not involve interbrand restraints or allocation of markets by a monopolist.[143] He then went on to emphasize that the joint venture of the parties enabled a new line of products to be brought to market that otherwise might never

134. *Id.* at 601-02.

135. *Id.* at 602.

136. *Id.* at 603.

137. United States v. Topco Assocs., Inc., 319 F. Supp. 1031, 1043 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972). In essence, the benefits to interbrand competition outweighed any diminution of intrabrand competition. Interbrand competition involves competition among sellers of the same generic product, whereas intrabrand competition occurs between sellers of the same product of a particular manufacturer. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977).

138. United States v. Topco Assocs., Inc., 405 U.S. 596, 609 (1972).

139. *Id.* at 608.

140. *Id.* at 610-11. The Court indicated that it could not properly balance the detriment of anticompetitive effects in one sector of the economy against promotion of competition in another, and that a per se rule was therefore needed. *Id.* at 609-10.

141. *Id.* at 611.

142. *See id.* at 612-13 (Blackmun, J., concurring).

143. *See id.* at 613 (Burger, C.J., dissenting).

have been produced.[144]

In the face of this legal precedent, and given the fact that *Topco* has not been overruled by the Supreme Court,[145] how can a franchise relocation restraint, agreed to by separately owned and operated members of a sports league, survive per se invalidity in a section 1 case? Some lower federal courts have not applied the per se rule,[146] but that does not necessarily mean that they are correct in their avoidance of per se illegality. After all, the Court in *Topco* seemed totally unimpressed with the facts that: (1) There was apparent economic necessity for cooperation because no individual Topco member could effectively implement its own private-label program;[147] (2) there was a joint venture that actually created a new product line that had previously not been a factor in any market;[148] and, most significantly, (3) there was a finding of fact that the imposed restraints had a procompetitive effect.[149] Instead, the Supreme Court, perhaps recognizing that a per se rule will sometimes yield an undesirable result because of unique economic circumstances presented in a particular case,[150] opted for the certainty of per se invalidity for all horizontal territorial and customer restraints.

It might be argued that members of a sports league are not really in any horizontal relationship, and that they are not in fact in economic competition with each other.[151] Although there is some authority to this effect, it seems that such a view is erroneous. After all, are there not members of some leagues who clearly compete for the patronage of fans within the same geographic area?[152] Further, to the extent such eco-

---

144. *Id.* at 613-14 & n.1 (citing district court's fact findings that revealed that it would not have been economically feasible for individual Topco members to implement their own private-label programs); *see also id.* at 620 n.9 (private label merchandising offers the public lower prices on high quality goods).

145. In fact, in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 & n.27, 58 & n.28 (1977), the Court overruled the per se rule for vertical restraints on territories and customers enunciated in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967), but noted that *Topco* remained good law because it involved horizontal restraints. *See also* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2960 & n.19 (1984) (*Topco* cited approvingly); Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740 (1984) (dicta stating that horizontal market allocation is per se illegal).

146. See *supra* note 112 and accompanying text. See *infra* notes 165-71 and accompanying text.

147. United States v. Topco Assocs., Inc., 405 U.S. 596, 599 n.3 (1972).

148. *Id.* at 600.

149. *Id.* at 610.

150. See *supra* note 127 and accompanying text.

151. See *supra* notes 99-109 and accompanying text.

152. For example, in baseball the New York Yankees and New York Mets must obviously be viewed as economic rivals. In Los Angeles, it is at least arguable that the Dodgers and Angels compete with each other, as do the Cubs and White Sox in Chicago, and the Oakland A's and San Francisco Giants in the Bay area. In football, the New York Jets and New York Giants have been competitors and, as of autumn 1984, play in the same stadium in New Jersey. In ice hockey, the New York Rangers, New York Islanders and New Jersey Devils are located in the same New York metropolitan area. Thus, it is simply incorrect to assert that sports teams fail to compete economically.

nomic competition does not occur, is it not plausible that the absence of such competition is simply the result of trade restraints and not an economic manifest destiny? In *Smith v. Pro Football, Inc.*,[153] the United States Court of Appeals for the District of Columbia Circuit decided to analyze the NFL player draft pursuant to a rule of reason.[154] In so doing, it concluded, in part, that per se treatment was inappropriate because NFL clubs "are not *competitors* in any economic sense."[155] However, as the trial court in *Los Angeles Memorial Coliseum Commission v. National Football League*[156] recognized, the court in *Smith* was somewhat confused.[157] The *Smith* court announced that NFL teams are not economic competitors, but then went on to find the NFL draft anticompetitive in that it unreasonably eliminated economic competition among buyers—the NFL teams—for players' services.[158] There seems to be implicit in such a conclusion a belief that teams in a sports league are in a horizontal relationship and can and do economically compete in various ways. As the district court recognized in *Los Angeles Memorial Coliseum*, teams do compete for college players and free agents, and such competition has an economic aspect because winning teams may generate more revenue.[159] The court also noted that a city with two teams would experience economic competition for ticket sales and other revenue.[160] Thus, "the fact that NFL teams cooperate or act concertedly in a number of significant ways . . . may indicate the presence of antitrust violations rather than the existence of a joint venture that is immune from the antitrust laws."[161]

On appeal in the *Los Angeles Memorial Coliseum* case, the Ninth Circuit also acknowledged that there is indeed a horizontal relationship among teams within a sports league: They compete with each other to acquire players, coaches and management personnel and "[i]n certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space."[162] Similarly, in *North American Soccer League v. National Football League*,[163] the court, in dictum, acknowledged that

153. 593 F.2d 1173 (D.C. Cir. 1978).

154. *Id.* at 1183-89.

155. *Id.* at 1179.

156. 468 F. Supp. 154 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

157. *Id.* at 163 n.10.

158. Smith v. Pro Football Inc., 593 F.2d 1173, 1178-79, 1185 (D.C. Cir. 1978).

159. Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 163 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

160. *Id.*

161. *Id.*

162. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1390 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984). *But see id.* at 1391 ("NFL teams are not true competitors nor can they be.").

163. 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

"competition exists between NFL members in various respects," including competition for patronage where more than one team plays in a particular metropolitan area.[164]

Because league members may be accurately characterized as competitors or as entities in a horizonal relationship, it is certainly arguable that per se analysis is appropriate when such competitors engage in territorial and customer allocations. Although both the trial court and the court of appeals in *Los Angeles Memorial Coliseum* specifically eschewed per se analysis, the arguments advanced for a rule of reason approach may not suffice if *Topco* is given its full and literal meaning. District Judge Pregerson, after conceding that the NFL's relocation rules might be labeled a territorial allocation,[165] nevertheless chose to utilize a rule of reason approach for two reasons: *Topco* was arguably distinguishable in that NFL teams must cooperate in order for league competition to take place at all,[166] and, because teams must agree on where games are to be played, the franchise relocation restraint at least appeared to promote competition to some degree.[167] Similarly, on appeal the Ninth Circuit avoided a per se rule by first characterizing the lawsuit as one that required the court "to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context."[168] The court then went on to argue that teams were not only in a simple horizontal relationship. Rather, they also enjoyed a vertical relationship with the league itself.[169] They therefore had to protect the integrity of the league by taking some collective action to "produc[e] the most marketable product attainable."[170] The court of appeals asserted that even though the relocation rule "divides markets among the 28 teams, a practice presumed illegal . . . the unique structure of the NFL precludes application of the per se rule."[171]

---

164. *Id.* at 1258.

165. Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 165-66 (C.D. Cal. 1979), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

166. *Id.* at 166. Yet the court itself acknowledged that even without a league resulting from a cooperative effort, a "barnstorming" approach might allow independent teams to play exhibitions and to compete economically. *Id.* at 166 n.15.

167. *Id.* at 166. Of course, given the national scope of most major sports leagues, each team could simply announce its home site unilaterally and scheduling could follow without any significant loss of efficiencies. *See id.*

168. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1391 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

169. *Id.* Although this Article suggests that there may be both horizontal and vertical aspects to the relocation issue, see *infra* notes 221-44 and accompanying text, it does not make this claim based on the teams' relationship to the league. On the contrary, because NFL teams control the league office, there is no real vertical relationship between the league and its teams. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 609 (1972); United States v. Sealy, Inc., 388 U.S. 350, 352-53 (1967).

170. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1391-92 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

171. *Id.* at 1392.

The problem with this reasoning, however, is that none of these justifications for avoiding a per se rule seems to be compatible with *Topco.* There was ample evidence in *Topco* that cooperation was essential in order for small supermarket chains to offer private-label brands in any cost-effective manner.[172] This seemingly made no difference in the Supreme Court's *Topco* decision and therefore should arguably be of no consequence in sports franchise relocation cases. Further, it has been established in some cases that the overall procompetitive aspects of a restraint that is ordinarily per se illegal will not save it from per se invalidity.[173] The Supreme Court has openly conceded that it is willing to tolerate seemingly wrong results in individual cases rather than permit ad hoc abrogations of accepted per se rules.[174]

For the foregoing reasons, this Article takes issue with a recent commentator's efforts to distinguish the *Topco* case from the sports league situation.[175] After properly characterizing the teams' relationship in a league as horizontal and also conceding "the strength of the analogy to *Topco*,"[176] Jeffrey Glick suggests that "close scrutiny of the particular circumstances surrounding sports leagues leads to uncertainty regarding the appropriateness of a rigorous, absolute, *per se* prohibition against all restrictions on team movement."[177] Glick views sports leagues as "functionally different" from the stores in *Topco* and concludes that individual grocery stores can compete without cooperation and that greater integration is needed in a sports league.[178] He also argues that league sports represent a unique product that would be kept from the marketplace absent a cooperative league structure.[179] In short, Glick sees location restraints as potentially procompetitive and he also suggests that courts lack experience with such arrangements.[180]

The problem with Glick's analysis, however, is that once he admits that teams are in a horizontal relationship, much of what follows is arguably irrelevant if *Topco* remains good law, because the Supreme Court labeled the horizontal territorial restraints there "classic examples of a *per se* violation of § 1."[181] As Glick himself recognizes,[182] teams could play each other in exhibition contests even if there were no league at all. To the extent that league sports represent a different product than such exhibitions, it must be recognized that the same "different product" ar-

172. See *supra* notes 137, 143-44 and accompanying text.
173. See *supra* notes 124-29 and accompanying text.
174. See *supra* notes 117-29 and accompanying text.
175. *See* Glick, *supra* note 13, at 64-70.
176. *Id.* at 64. Glick correctly rejects the argument that teams have a vertical relationship with their leagues, *id.* at 61-64, but does not consider the dual distribution analogy discussed in this Article. See *infra* notes 221-44 and accompanying text.
177. Glick, *supra* note 13, at 64-65.
178. *Id.* at 67.
179. *Id.*at 67-68.
180. *Id.* at 68-69.
181. United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).
182. *See* Glick, *supra* note 13, at 68.

gument essentially failed in *Topco*, where only through cooperation could smaller stores bring a new, private-label brand to market. Even conceding arguendo the possible procompetitive benefits of location restraints, it must be remembered that the Supreme Court deemed it irrelevant that the horizontal agreement regarding territories in *Topco* actually created a positive effect on competition.[183] Instead, in *Topco* and other cases, the Supreme Court has adhered to the notion that the attractiveness of individual cases should not create a basis for carving out exceptions to recognized per se principles.[184]

Although sports location restrictions may be a relatively new subject of litigation, the courts have had considerable experience with other cases involving horizontal allocation of territories and customers in other industrial contexts.[185] In spite of Glick's bold assertion that "there is no example of a court applying a *per se* rule to any sports league restrictive practices,"[186] per se cases involving sports organizations can be found.[187]

Moreover, most of the sports cases that do apply a rule of reason are economically and analytically distinguishable from cases involving horizontal allocation of territories or customers. The rationale for application of a rule of reason rather than a per se rule in some of the sports cases has been that the restraints were not perceived to be horizontal. For example, in *Brenner v. World Boxing Council*,[188] the court found that the suspension of a boxing promoter by a boxing regulatory body was neither illegal per se nor illegal pursuant to a rule of reason analysis.[189] In rejecting the per se group boycott claim, the Second Circuit

183. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 606-08 (1972).

184. See *supra* notes 124-27 and accompanying text.

185. For a collection of cases involving horizontal allocation of territories and customers, see *supra* note 114.

186. Glick, *supra* note 13, at 69.

187. See *supra* note 112.

188. 675 F.2d 445 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982).

189. *Id.* at 454-55. Similarly, in United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781 (7th Cir. 1981), the Seventh Circuit declined to utilize a per se rule when a trotting horse association sued nonaffiliated racetracks for alleged misappropriation of property and the tracks counterclaimed, asserting that plaintiff had engaged in an illegal boycott. *Id.* at 787-90. Defendants' counterclaim charged that plaintiff's rules required association members to refrain from racing horses at meets sponsored by organizations that were neither association members nor under contract with plaintiff. *Id.* at 787. The court below had concluded that plaintiff's rules were per se illegal and entered summary judgment, United States Trotting Ass'n v. Chicago Downs Ass'n, 487 F. Supp. 1008, 1017 (N.D. Ill. 1980), *rev'd*, 665 F.2d 781 (7th Cir. 1981), but the court of appeals reversed, United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781 (7th Cir. 1981). In so doing, Judge Cummings explained: "At the most obvious level, [defendants] had no intention of setting up an organization to rival [the United States Trotting Association (USTA)], and USTA was not [defendants'] competitor in the business of organizing harness race meetings." *Id.* at 788. Thus, because the purpose and effect of the challenged rules were not to drive actual or potential competitors out of business, a rule of reason was applied.

The same sentiments were reflected in Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979), in which the court opted for a rule of reason approach in a suit brought by a player challenging the NFL player draft. *Id.* at 1178. Because plaintiff was a player who distinguished the per se cases as arrangements involving attempts by competitors at one level in the market structure to insulate themselves from competition from others who wish to compete at the same level.[190] In *Brenner*, the court discovered no such horizontal element in the challenged practice.[191] In contrast, in *Blalock v. Ladies Professional Golf Association*,[192] a case involving a golfer suspended from tournament play for alleged cheating, the court applied a per se rule because the suspension was imposed by a committee composed of competing players who could gain financially from the exclusion.[193]

A franchise relocation restraint case is arguably closer to *Blalock* than to *Brenner* because it does involve efforts by teams collectively to eliminate or diminish direct competition among themselves or among themselves and other teams outside their league. Although both *Blalock* and *Brenner* involve what are essentially boycott claims rather than territorial division issues, they are nevertheless significant in their emphasis on the important distinctions between purely horizontal and other restraints. When a challenge is made to restrictive practices that may inhibit competition but do not involve protection of one group of competitors against another, the per se rule will be abandoned and a rule of reason applied.[194] When competitors act to preclude business rivalry at their own level in the market structure, however, the per se rule seems to retain considerable vigor. The franchise relocation restraint seemingly falls within the classic horizontal category and thus there remains a plausible argument for per se invalidity.[195] After all, a relocation restraint,

---

was not seeking to compete with the NFL clubs engaged in the restrictive practices challenged, the court applied a rule of reason and confined per se analysis to "concerted attempts by competitors to exclude horizontal competitors." *Id.* at 1180; *see also* M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 978-79 (1st Cir. 1984) (rule of reason applied when manufacturer challenged racetrack's tire restrictions); Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 379-80 (D. Ariz. 1983) (rule of reason applied in players suit to enjoin Association's sanctions against college football team). The purported distinction in *Smith* can be criticized on the ground that the teams were eliminating direct competition among themselves for the services of players and thereby distorting market forces in the process. Still, the alleged "victim" of the antitrust violation was not in competition with defendants. In a relocation case, however, both plaintiff and defendants compete at the same level of the market.

190. Brenner v. World Boxing Council, 675 F.2d 445, 454 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982).

191. *Id.* at 456.

192. 359 F. Supp. 1260 (N.D. Ga. 1973).

193. *Id.* at 1265-66; *see also* Mid-South Grizzlies v. National Football League, 720 F.2d 772, 776 (3d Cir. 1983) (court did not apply per se rule after noting that case did not involve exclusion of competition in existing NFL territory), *cert. denied*, 104 S. Ct. 2657 (1984); North American Soccer League v. National Football League, 670 F.2d 1249, 1258 (2d Cir.) (court did not apply per se rule because competition among NFL teams was not in issue), *cert. denied*, 459 U.S. 1074 (1982).

194. For additional decisions applying a rule of reason to antitrust claims in a professional sports context, see *supra* note 112.

195. *See* Leavell & Millard, *supra* note 13, at 613-14. One student writer has argued that relocation restraints should generally be held illegal but may be more justifiable when a team seeks to move to an already occupied area. *See Super Bowl*, *supra* note 13,

particularly when league members refuse to permit movement to an area already represented by another team, precludes competition between entities at the same level in the same market.

Given the apparent continued vitality of *Topco* and the adherence to it reflected in recent cases[196] and consent decrees,[197] it is necessary to search further for adequate justification for avoiding per se invalidation. It will not suffice merely to suggest that sports are "unique" or are in some way entitled to preferential judicial treatment.

C. *The Arguments for a Rule of Reason Approach*

Although franchise relocation restraints sufficiently resemble horizontal allocations of territories and customers to warrant serious consideration as per se restraints pursuant to *Topco* and its progeny, there are several arguments that may be advanced to support a more flexible rule of reason analysis.

1. The Erosion of *Topco*'s Viability?

Initially, one might opt for a rule of reason approach based on the

---

at 429-30. This seems somewhat anomalous because the movement of a second team to a city already represented presents a greater potential for economic competition.

196. *See, e.g.*, Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1296 (9th Cir.), *cert. denied*, 104 S. Ct. 279 (1983); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 7-11 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 826-31 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); Gainesville Utils. Dep't v. Florida Power & Light Co., 573 F.2d 292, 299 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1242-43 (3d Cir. 1975); Sport' Shoe of Newark, Inc. v. Ralph Libonati Co., 512 F. Supp. 921, 923-25 (D. Del. 1981); *see also* United States v. Consolidated Laundries Corp., 291 F.2d 563, 574-75 (2d Cir. 1961) (pre-*Topco* decision similarly applying per se rule); Op. Ark. Att'y Gen., No. 81-94 (1981), *reprinted in* 1981-1 Trade Cas. (CCH) ¶ 64,066, at 76,461 (horizontal market allocation by banks per se unlawful under *Topco*).

197. *See, e.g.*, United States v. Shamrock Foods Co., 1982-1 Trade Cas. (CCH) ¶ 64,503, at 72,777 (D. Ariz. 1982); United States v. Dickerson Group, Inc., 1981-2 Trade Cas. (CCH) ¶ 64,344, at 74,593 (W.D.N.C. 1981); United States v. Societe Nationale des Poudres et Explosifs, 1981-2 Trade Cas. (CCH) ¶ 64,221, at 73,864 (D.N.J. 1981); Tennessee *ex rel.* Leech v. Bi-Rite Foods, Inc., 1981-1 Trade Cas. (CCH) ¶ 64,073, at 76,486 (M.D. Tenn. 1981); United States v. Ashland Oil, Inc., 1980-81 Trade Cas. (CCH) ¶ 63,610, at 77,224 (W.D. Ky. 1980); United States v. Rea Constr. Co., 1980-81 Trade Cas. (CCH) ¶ 63,586, at 77,125 (W.D.N.C. 1980); United States v. Countryside Farms, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,474, at 76,497 (D. Utah 1980); United States v. Allied Maintenance Corp., 1979-1 Trade Cas. (CCH) ¶ 62,431, at 76,569-70 (S.D.N.Y. 1978); United States v. Dixo Co., 1978-2 Trade Cas. (CCH) ¶ 62,353, at 76,128 (E.D.N.Y. 1978); United States v. Holsum Bakery, Inc., 1978-2 Trade Cas. (CCH) ¶ 62,215, at 75,406 (D. Ariz. 1978); United States v. Atlanta News Agency, Inc., 1978-1 Trade Cas. (CCH) ¶ 61,991, at 74,230-31 (N.D. Ga. 1978); United States v. Diebold, Inc., 1977-2 Trade Cas. (CCH) ¶ 61,736, at 73,024 (N.D. Ohio 1977); United States v. American Bldg. Maintenance Corp., 1977-2 Trade Cas. (CCH) ¶ 61,713, at 72,908 (D.N.J. 1977); United States v. DeBeer Indus. Diamond Div. (Ireland) Ltd., 1978-1 Trade Cas. (CCH) ¶ 62,056, at 74,565 (S.D.N.Y. 1976); United States v. Addison-Wesley Publishing Co., 1976-2 Trade Cas. (CCH) ¶ 61,225, at 70,642 (S.D.N.Y. 1976); United States v. C. Reiss Coal Co., 1976-2 Trade Cas. (CCH) ¶ 61,082, at 69,884-85 (E.D. Wis. 1976).

argument that recent Supreme Court trends in antitrust necessarily undermine *Topco*'s precedential value and implicitly question its continued viability. As some recent commentators have observed, it may be time simply to scrap the rigid per se rule and adopt a rule of reason approach for all horizontal nonprice intrabrand restraints.[198] Obviously, it is ordinarily only with a considerable degree of temerity that one would claim that a Supreme Court precedent has lost its vitality, particularly when the Court has seemingly indicated to the contrary.[199] Nevertheless, the Burger Court has repeatedly demonstrated that the rule of reason is enjoying a resurgence.[200] Thus, it may well be time flatly to overrule *Topco*.[201]

A primary rationale advanced in *Topco* for rejecting a rule of reason in favor of a per se rule was the alleged inability of a court to "weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion in another sector."[202] The Court therefore declined what it perceived to be an invitation to "ramble through the wilds of economic theory in order to maintain a flexible approach."[203] This represented an unequivocal denial of any responsibility for balancing the anticompetitive effects of an intrabrand restraint against the resulting procompetitive benefits to interbrand competition.

Yet in 1977, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[204] the Court, in the context of a vertically imposed location restriction, expressed a willingness to engage in a balancing analysis, expressly overruled an earlier case applying a per se rule to such restraints[205] and

198. *See, e.g.*, Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1 (1977); Weisberg, Continental T.V. v. GTE Sylvania*: Implications for Horizontal, As Well As Vertical, Restraints on Distributors*, 33 Bus. Law. 1757 (1978); Comment, *A Proposed Rule of Reason Analysis for Restrictions on Distribution*, 47 Fordham L. Rev. 527 (1979); Comment, *A Uniform Rule of Reason for Vertical and Horizonal Nonprice Restraints*, 55 S. Cal. L. Rev. 441 (1982). *But see* Calkins & Polden, *Intrabrand Territorial Allocations and the Per Se Rule*, 30 Drake L. Rev. 1 (1980); Comanor, *Vertical Territorial and Customer Restrictions:* White Motor *and its Aftermath*, 81 Harv. L. Rev. 1419 (1968).

199. See *supra* note 145 and accompanying text.

200. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2969-71 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 7-10 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977).

201. The primary advantage of a square overruling of *Topco* for purposes of analyzing a franchise relocation restraint would be the elimination of a need to draw questionable distinctions between the *Topco* facts and the facts involved in a relocation case. See *supra* notes 156-85 and accompanying text. More importantly, a repudiation of *Topco* would also correct what amounts to a growing degree of schizophrenia in contemporary antitrust doctrine. Given the reemergence of the rule of reason as the primary antitrust tool of analysis, stubborn allegiance to *Topco* creates an apparent doctrinal inconsistency that engenders confusion and frustration for the student of antitrust. See *infra* notes 262-73 and accompanying text.

202. United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 (1972).

203. *Id.* at 609 n.10.

204. 433 U.S. 36 (1977).

205. *Id.* at 58, *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365

adopted a rule of reason approach.[206] In *Continental T.V.*, a television manufacturer that sold directly to retailers utilized a location clause that required retailers to sell only from approved sites.[207] The purpose and effect of the location restriction was clearly to inhibit intrabrand competition to some extent, in an effort to improve the manufacturer's share of television sales in relation to other brands.[208] When the location clause issue reached the Supreme Court, Justice Powell described the rule of reason as the "prevailing standard of analysis" in antitrust cases.[209] In refusing to apply a per se rule to a vertically imposed location clause, the Court noted that per se rules should be applied only to conduct that is "manifestly anticompetitive,"[210] and recognized that the market impact of the challenged practice was "complex because of [its] potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."[211] In short, the Court appeared to reject flatly the primary basis for the per se decision in *Topco*: the notion that a court cannot adequately balance the anticompetitive effects on intrabrand competition and the procompetitive benefits to interbrand competition in any meaningful fashion.

If the intrabrand/interbrand calculation can be achieved in a vertical restraint case such as *Continental T.V.*, there appears to be no reason why a similar analysis cannot be applied in a horizontal context.[212] Although one might argue that in a vertical restraint setting the manufacturer may function as a sort of surrogate for the public interest, whereas horizontal restraints include no such safeguard,[213] it is undeniable that in either situation there is potential for an overall benefit to competition. Further, even if a horizontal arrangement is more likely to result in unnecessary restraint, absent a monopoly the public is still protected by the availability of other brands of the same product, and the rule of reason may be employed to reach a proper result. Thus, the recognized potential for an overall procompetitive effect justifies abandoning a per se rule in both vertical and horizontal territorial and customer allocation cases. The threshold requirement for imposition of a per se rule—the overwhelming likelihood that the restraint will fail even after considerable analysis—does not appear to be satisfied in the case of horizontal intrabrand restraints.

An additional reason for reconsidering the *Topco* decision is that the

(1967). Interestingly, the Court in *Continental T.V.* noted that the "great weight of scholarly opinion" had criticized *Schwinn*. 433 U.S. at 47-48 & n.13.

206. *Id.* at 59.

207. *Id.* at 38.

208. *Id.* at 46.

209. *Id.* at 49.

210. *Id.* at 49-50.

211. *Id.* at 51-52. Justice Powell noted that vertical restraints may promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in distribution. *Id.*

212. *See* Weisberg, *supra* note 198, at 1765.

213. *See* M. Handler, H. Blake, R. Pitofsky & H. Goldschmid, *supra* note 127, at 550, 598-99.

precedent on which it relied to conclude that a per se rule was appropriate was not as compelling as the Court suggested. Chief Justice Burger's dissent in *Topco* accurately indicated that the decision to apply a per se rule to horizontal territorial restraints represented a major departure from prevailing principles or at least an insufficiently explained extension of existing doctrine.[214] As the Chief Justice noted, the majority in *Topco* relied on a number of cases to support a per se rule, none of which actually dealt squarely with the issue at hand.[215] More specifically, the majority based its argument on cases that either did not involve horizontal restraints or involved horizontal restraints in addition to other illegal practices such as price-fixing.[216] Given that no prior decision of the Supreme Court had held that a horizontal division of territory, without more, constituted a per se section 1 violation, additional justification would seem to be needed for per se treatment. If such further support is to be derived from the *Topco* Court's assertion that judicial bodies lack sufficient competence to engage in the economic analysis required to balance intrabrand and interbrand effects, the simple and direct response is that in 1977 the Court deemed itself fit to pursue that line of inquiry in *Continental T.V.*

In sum, the validity of *Topco* may fairly be questioned,[217] and a rule of reason arguably should apply to franchise relocation restrictions as well as to other horizontal territorial restraints. Of course, the decision to employ a rule of reason would not ensure escape from antitrust liability. Rather, in order to determine whether a restraint was unreasonable, the court would have to consider the type of evidence to which the Court in *Continental T.V.* alluded.[218] Even though the relevant considerations may differ somewhat in assessing the procompetitive and anticompetitive effects of a sports league restraint rather than those of a system of television set sales, the fundamental inquiry would remain the same: Is the

214. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 615-20 (1972) (Burger, C.J., dissenting). In 1977, in *Continental T.V.*, the Court relied on the fact that the earlier adoption of a per se rule for vertical nonprice restraints had been a radical departure from existing law, and concluded that for this reason a reversion to a rule of reason standard was appropriate. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47-48, 57 (1977). The same rationale could apply to a decision to overrule *Topco.*

215. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 614-20 (1972) (Burger, C.J., dissenting).

216. *Id.* at 615-19; *see also* Weisberg, *supra* note 198, at 1766-67 (*Topco*'s reliance on *Sealy* misguided because *Sealy* also involved price-fixing).

217. See *supra* note 198 and accompanying text. *See also* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979, 987 (1977) (discussing Chief Justice Burger's dissent in *Topco*); Louis, *Restraints Ancillary to Joint Ventures and Licensing Arrangements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music?, 66 Va. L. Rev. 879, 893-99 (1980) (ancillary restraint doctrine). For a discussion of joint ventures, see *infra* notes 245-75 and accompanying text.

218. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977). For a rule of reason analysis of franchise relocation restraints, see *infra* notes 300-79 and accompanying text.

intrabrand restraint on NFL or NBA or NHL teams[219] outweighed by some benefit to competition on a larger scale?

If a franchise relocation restraint case were to reach the Supreme Court, it could serve as a useful vehicle for a frank and thorough reappraisal of *Topco*. Should the Court overrule *Topco*, rather than attempt to distinguish it in some way, the implications for product and service distribution in all American business could be profound indeed.

2. The Dual Distribution Analogy

Although a square overruling of *Topco* may well be justified, the fact remains that the case has not yet been expressly repudiated by the Supreme Court and is therefore something with which the lower courts must reckon. Consequently, it may be more appropriate and useful to seek other justifications for abandoning a per se rule in the franchise relocation cases. One alternative approach is to analogize sports franchise relocation restrictions to dual distribution restraints. The dual distribution issue will arise whenever a manufacturer imposes territorial or customer restrictions while selling to wholesalers and simultaneously competing with them by selling directly to retailers.[220] Thus, such arrangements involve both vertical and horizontal restraints. At first blush, it may seem that the dual distribution litigation has no real bearing on the resolution of franchise relocation issues. Yet, as one author has noted, "[l]eague territorial and transfer restrictions possess features of both vertical and horizontal market divisions."[221] Similarly, in *Los Angeles Memorial Coliseum Commission v. National Football League*,[222] the court concluded that "[t]he NFL's structure has both horizontal and vertical attributes."[223] The court reasoned that "to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division."[224] Although the court's reasoning on this issue is questionable, because the league is in fact controlled by its constituent teams and is not analogous to an autonomous manufacturer or licensor,[225] the court apparently reached a cor-

219. Admittedly, one might legitimately quarrel with the characterization of a relocation restriction as a classic intrabrand restraint. For example, even though all teams may be NFL members producing the same "product"—NFL football—perhaps some would say that the Los Angeles Raiders and Los Angeles Rams, for example, present qualitatively different products. If Fords and Cadillacs are not the same brand of automobile, it is not altogether clear that all teams in the same league, regardless of their relative quality, represent the same product. Nevertheless, this Article will proceed on the assumption that the product restrained by relocation restrictions is, for example, NFL football or NHL hockey.

220. *See* L. Sullivan, *supra* note 21, at 403.

221. Kurlantzick, *supra* note 13, at 189 n.33. *But see* Glick, *supra* note 13, at 61-64.

222. 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

223. *Id.* at 1391.

224. *Id.*

225. See *supra* notes 169-76 and accompanying text.

rect conclusion for the wrong reasons. Even though the teams' collective control over the league entity precludes characterization of the league/team relationship as vertical, the relationship among the teams themselves fits within the dual distribution—vertical and horizontal—paradigm. More specifically, teams in a league act not only as economic competitiors but also can be deemed to function as mutual suppliers. Each team relies on another to supply a complement of players in order to present the finished product to fans.[226] Absent an opponent, neither team can provide its fans with the bargained-for good: a game between different teams. In this way, every league member can be viewed as being part of both a horizontal and vertical relationship with other teams in the league.

The significance of the foregoing characterization is simply that a number of recent cases have been decided in which courts have refused to apply *Topco* to restraints with both horizontal and vertical attributes. Instead, these courts suggest that the nonhorizontal aspects of the arrangement preclude per se treatment and militate in favor of a more tolerant and flexible rule of reason inquiry.[227] For example, in *Copy-Data Systems v. Toshiba America, Inc.*,[228] the defendant (TAI) marketed plain paper copiers, parts and supplies, all manufactured by its parent.[229] Plaintiff Copy-Data was engaged in the wholesale distribution of office copying equipment and supplies, and concluded a deal with TAI to act as its exclusive distributor in several states and as a nonexclusive distributor in certain other states.[230] Subsequently, TAI sought to deal directly with plaintiff's customers and to prevent plaintiff from competing with it in various markets.[231] Plaintiff, after being driven into bankruptcy, charged

226. None of the literature or case law has focused on this rationale for treatment of a relocation restriction as both a vertical and horizontal restraint. This Article suggests that it is the most defensible rationale for reliance on the dual distribution analogy and a rule of reason approach.

227. *See, e.g.*, Dart Indus., Inc. v. Plunkett Co., 704 F.2d 496, 499 (10th Cir. 1983); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1356-57 (9th Cir. 1982); Copy-Data Sys. v. Toshiba America, Inc., 663 F.2d 405, 408 (2d Cir. 1981); Abadir & Co. v. First Miss. Corp., 651 F.2d 422, 425 (5th Cir. 1981); Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir.) (per curiam), *cert. denied*, 454 U.S. 864 (1981); Red Diamond Supply, Inc., v. Liquid Carbonic Corp., 637 F.2d 1001, 1005 (5th Cir.), *cert. denied*, 454 U.S. 827 (1981); Cowley v. Braden Indus., Inc., 613 F.2d 751, 754 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 246 (5th Cir. 1978); Marietta Packaging Co. v. Guest Supply, Inc., 1982-83 Trade Cas. (CCH) ¶ 65,184, at 71,721 (N.D.N.Y. 1982). *But see, e.g.*, Dougherty v. Continental Oil Co., 579 F.2d 954, 959 (5th Cir. 1978), *appeal dismissed per stipulation*, 591 F.2d 1206 (5th Cir. 1979); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1242 (3d Cir. 1975); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 899-901 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 720 n.4 (S.D.N.Y.), *aff'd on other grounds*, 417 F.2d 621 (2d Cir. 1969) (per curiam).

228. 663 F.2d 405 (2d Cir. 1981).

229. *Id.* at 406.

230. *Id.*

231. *Id.* at 406-07.

TAI with a per se illegal market division in violation of section 1 as construed in *Topco*.[232] The district court agreed, holding that a per se test was applicable because, insofar as TAI dealt directly with retailers, it stood in a horizontal relationship with plaintiff.[233] The Second Circuit reversed, concluding that even though there was an element of horizontality to the restraint,[234] a rule of reason was applicable because the potential overall benefit to interbrand competition required that a per se rule be avoided.[235] In short, the court decided that the vertical aspects of the restraint took the case out of the per se category, and emphasized that per se rules should be expanded only after careful consideration.[236]

More recently, in *Marietta Packaging Co. v. Guest Supply, Inc.*,[237] the court refused to enter summary judgment for plaintiff when defendant, a manufacturer and distributor of hotel amenities, asserted that its relationship to another distributor was primarily vertical.[238] The defendant had given certain amenities-packaging business to plaintiff on the condition that plaintiff would refrain from competing with defendant for sales of such amenities to certain hotels. Plaintiff claimed that this constituted a per se illegal allocation of territories under *Topco*,[239] and that this was a fatal flaw despite any vertical aspects of the relationship.[240] The court nevertheless decided that "[i]n cases involving both horizontal and vertical restraints the rule of reason is usually applied,"[241] and refused to enter summary judgment for plaintiff.

Thus, despite the existence of decisions to the contrary,[242] there seems to be a clearly emerging line of authority that rejects the per se rule in

232. *Id.* at 407-08.

233. Copy-Data Sys., Inc. v. Toshiba America, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,696, at 77,903 (S.D.N.Y. 1979), *rev'd*, 663 F.2d 405 (2d Cir. 1981).

234. Copy-Data Sys., Inc. v. Toshiba America, Inc., 663 F.2d 405, 408 (2d Cir. 1981).

235. *Id.* at 408-09.

236. *Id.* at 411. Similarly, in Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 (5th Cir. 1981), the Fifth Circuit Court of Appeals reversed a district court's application of a per se rule to a dual distribution restraint. *Id.* at 429. In *Abadir*, a seller of urea limited the geographic area in which, and the customers to whom, plaintiff could resell the urea. *Id.* at 424. Because defendant sold urea in competition with its distributors, there was an element of horizontality to the arrangement. Notwithstanding this fact, the court characterized the restraint as vertical, indicated that competition might be enhanced by the restraint, and concluded that a rule of reason was appropriate. *Id.* at 428.

237. 1982-83 Trade Cas. (CCH) ¶ 65,184, at 71,719 (N.D.N.Y. 1982).

238. *Id.* at 71,721.

239. *Id.* at 71,719 (citing United States v. Topco Assocs., Inc., 405 U.S. 596 (1972)).

240. *Id.* at 71,720.

241. *Id.* at 71,721.

242. See *supra* note 227 and accompanying text. *See also* United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956) (horizontal aspects took arrangement outside statutory exemption for vertical price-fixing; dual distributor could not escape price-fixing charges by pointing to now-repealed fair trade laws that permitted only vertical price-fixing). *McKesson & Robbins* may be distinguished from the problem at hand on two grounds: it involved price-fixing, which is generally illegal per se in either a vertical or horizontal context, and it involved judicial construction of a statute that carved out a narrow exception for vertical price-fixing only.

dual distribution restraint cases. The courts are limiting *Topco* to its facts and are searching for any additional factors that will allow them to avoid *Topco* without offending the usual rule that lower federal courts must follow Supreme Court precedent. Although one might argue that any horizontal aspect of a restraint should taint the remainder of an agreement, that has not been the approach. Rather, it is more accurate to conclude that even though horizontal territorial agreements, without more, may violate section 1, many courts will allow the introduction of evidence to show that the restraint also has a vertical aspect that will allow it to avoid per se invalidity.[243]

In the case of a franchise relocation restraint, it appears that more than a naked horizontal agreement is presented. There is a symbiotic relationship among league members and they function as suppliers and customers for each other in a very real sense. If the current trend in the case law is regarded as valid, one should conclude that the fact that teams stand in both a horizontal and vertical relationship is sufficient to preclude per se invalidity. Admittedly, sports teams are not in precisely the same position as are sellers of goods imposing restraints on distributors. Nevertheless, the modern case authorities should apply by analogy, and the absence of pure, unadulterated horizontality suggests that the rule of reason is a preferable method of analysis. Stated simply, the presence of some vertical aspects in the franchise relocation cases removes them from the shadow of *Topco* and permits a departure from the per se rule without offense to the principle of stare decisis.[244] Once again, this would not prevent a finding that a relocation restriction was a section 1 violation. It would merely require that the court engage in a more elaborate rule of reason analysis prior to reaching any legal conclusion.

3. The Joint Venture/Ancillary Restraint Argument

Another possible rationale for embracing a rule of reason approach to sports franchise relocation restrictions is that such restraints may be viewed as merely ancillary to an otherwise lawful business transaction—the creation of a joint venture—rather than as naked horizontal agreements. It has already been noted that sports leagues are frequently characterized as joint ventures.[245] Admittedly, the joint venture label may be technically inappropriate. After all, a joint venture has been narrowly defined by some scholars as "a sort of 'temporary partnership'—dissolv-

243. See *supra* notes 227-41 and accompanying text.

244. If the Supreme Court had granted certiorari in Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 379 (1984), it could have relied on the dual distribution analogy to put its imprimatur on the rule of reason approach to dual distribution restraints. This would have had significance beyond the sports world, because all businesses with dual distribution networks would be affected by such a decision. Thus, future relocation cases may well be useful vehicles for shaping antitrust principles of more general application.

245. See *supra* notes 74-82, 100-12 and accompanying text.

ing upon the completion" of a particular business undertaking.[246] The indicia of a traditional joint venture include: (1) an express or implied agreement; (2) joint interest (contribution); (3) sharing of profits and usually losses; and (4) mutual right to control.[247] Because members of sports leagues do not share profits and losses, and because they unilaterally make business decisions regarding personnel, salaries and other economic matters,[248] it may seem difficult to argue that they are joint venturers.

Nevertheless, the joint venture label may be permissible for antitrust purposes because both judges and some commentators appear to have defined that term quite broadly in the context of restraint of trade litigation. For example, Professor Areeda bluntly states that " '[j]oint venture' is an expansive notion without definite meaning or antitrust consequence."[249] He suggests that the term applies to concerted activities that purportedly are designed to achieve a joint "legitimate" objective but may have some attendant anticompetitive consequences.[250] The joint venture may be a simple agreement, a partnership or association, a merger of subsidiaries, or the creation of a new subsidiary by two parent companies, and its procompetitive and anticompetitive consequences may vary from significant to negligible.[251]

Kaysen and Turner view the joint venture more narrowly as "a special problem" that may be deemed a "quasi merger."[252] They would include in their definition only joint participation in the creation of a new productive organization, and they identify two types of joint ventures that may be economically justifiable: the joint venture formed to share unusual economic risks that no single firm would be willing to undertake, and the joint venture that permits the co-venturers to achieve economies of scale.[253]

More recently, Professor Brodley lamented that a "central difficulty . . . is the lack of a sharp definition that would distinguish joint ventures from other interfirm contractual agreements."[254] He notes that defining the term too expansively to include any undertaking that links the economic welfare of the parties would render the joint venture concept analytically useless.[255] As an alternative, he suggests that an effective and somewhat narrower definition for antitrust purposes may be forged by "focusing on the factors that make joint ventures a distinctive subject of

246. H. Henn & J. Alexander, Laws of Corporations and Other Business Enterprises § 49, at 105-06 (3d ed. 1983).

247. *Id.* at 106.

248. See *supra* notes 50-53, 71-82 and accompanying text.

249. P. Areeda, Antitrust Analysis ¶ 360, at 471 (3d ed. 1981).

250. *Id.*

251. *Id.* at 472.

252. C. Kaysen & D. Turner, Antitrust Policy 136 (1975).

253. *Id.*

254. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1524 (1982).

255. *Id.* at 1525.

antitrust concern—the potential efficiency gains and anticompetitive risks of the joint enterprise."[256] Thus, Brodley offers a four-pronged test for ascertaining whether a joint venture has been established:

> [A] joint venture may be defined for antitrust purposes as an integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes a substantial contribution to the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market.[257]

In a similar vein, others have acknowledged that one could label almost any collaborative conduct among firms a joint venture, because the concept is not a term of art in antitrust law.[258] The definition of a joint venture should therefore be more carefully tailored to refer to "cooperation among firms, usually accompanied by some actual integration of managerial or production resources, to achieve some useful business objective more efficiently than either (or any) could alone."[259]

Thus, it appears that the traditional commercial law definition of joint venture, which limits its scope to an undertaking among "partners," has been supplanted for antitrust purposes by a more expansive definition that emphasizes factors other than the characteristics of a partnership. More specifically, the concern is less with whether there is an actual sharing of profit and loss or joint control over all business functions, and more with the potential procompetitive benefits from certain concerted business conduct.

League sports may not qualify as joint ventures under the narrower, nonantitrust definition, but they do appear to qualify for joint venture status under the antitrust definitions suggested above. For example, the twenty-eight NFL teams retain individual discretion over a variety of business decisions and do not share all profits and losses, but they are undeniably parts of an economic integration. Moreover, the collaborative conduct of NFL clubs creates a new product because no team alone can provide the public with league football. It is true that teams might be able to "barnstorm"—arrange games with other teams in the United States on an ad hoc basis—but it seems axiomatic that many fans would regard this as a poor substitute for league play with its accompanying playoffs, championship games and Super Bowl. Similarly, intra-squad

256. *Id.*

257. *Id.* at 1526 (citation omitted); *see also* Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 Antitrust Bull. 453, 454 (1976) (definition of joint venture).

258. M. Handler, H. Blake, R. Pitofsky & H. Goldschmid, *supra* note 127, at 496.

259. *Id.* This integration and creation of efficiency distinguishes the joint venture from the cartel or price-fixing agreement.

scrimmages and exhibitions would hardly engender the attention and rabid fan interest that established intercity or crosstown rivals create when they compete against each other.

In essence, cooperation among teams in professional sports leagues is essential to produce the final product: league sports. One enterprising entrepreneur might conceivably be tempted to organize an entire league, but capital expenditures would necessarily be substantial, if not prohibitive, and the common ownership of teams that are supposedly rivals could raise serious questions regarding the legitimacy of the on-the-field "competition." The foregoing suggests that the new productive capacity requirement of the antitrust joint venture definitions is readily satisfied by the sports league. Further, if teams in a professional sports league must compete economically for patronage with other leagues in the same or different sport or with other forms of entertainment, the league integration may be viewed as an efficiency-oriented, procompetitive practice that adds to the range of consumer choices in the marketplace. In sum, it does appear appropriate to characterize league sports as a joint venture for purposes of antitrust analysis.

Of course, just because the concerted activity may be properly characterized as a joint venture does not end the antitrust inquiry. On the contrary, although the standard of legality of the franchise relocation restriction may be affected by the labeling process, a conclusion that an antitrust violation has occurred might still follow. Further, some cases have not permitted the per se rule to be avoided merely by labeling concerted activity a joint venture.[260] Nevertheless, it does seem to be the emerging view that joint ventures with efficiency potential should be analyzed pursuant to a rule of reason.

In *Broadcast Music, Inc. v. Columbia Broadcasting System*,[261] the Supreme Court concluded that a blanket licensing scheme for copyrighted musical compositions should be assessed under a rule of reason because, despite its arguable price-fixing characteristics, the scheme "accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use."[262] The Court explained: "Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."[263]

260. *E.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 8 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); COMPACT v. Metropolitan Gov't, 1984-2 Trade Cas. (CCH) ¶ 66,298, at 67,286-87 (M.D. Tenn. 1984); *see also* Louis, *supra* note 217, at 889-93 (1980) (asserting that *Topco* condemned restraints ancillary to joint ventures as per se illegal).

261. 441 U.S. 1 (1979).

262. *Id.* at 20. It should be noted, however, that the intention to prevent unauthorized copyright use may distinguish *Broadcast Music*, because federal copyright statutes enjoy coequal status with federal antitrust law. *See id.* at 15-16, 18-19.

263. *Id.* at 23; *see* L. Sullivan, *supra* note 21, §§ 77, 81. The Court in *Broadcast Music* was also careful to point out that despite the blanket licensing scheme, individual negotia-

More recently, in *National Collegiate Athletic Association v. Board of Regents*,[264] the Supreme Court strained mightily to avoid a per se rule and applied a rule of reason to the NCAA's television plan for college football games. Although the plan limited the total number of televised games and the number of games that any one school could televise,[265] and despite the obvious price-fixing aspects of the plan,[266] the Court rejected the Tenth Circuit's per se approach[267] and opted instead for a rule of reason.[268] The Court readily admitted that the restraints in issue were "horizontal,"[269] that they created an "output limitation,"[270] and that the preclusion of price negotiation for games smacked of illegal horizontal price-fixing.[271] As Justice Stevens explained, however, the "case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[272] Thus, because of the need to agree on certain rules and regulations in order for production to occur at all, the *NCAA* Court eschewed per se analysis.[273] Even though the NCAA television plan was ultimately deemed to run afoul of the rule of reason,[274] the Court was at least willing to examine the alleged procompetitive justifications for the restraint. In essence, it treated the chal-

---

tions were permissible between sellers and buyers. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 11 (1979). This too arguably may limit the scope of *Broadcast Music*'s precedential value.

264. 104 S. Ct. 2948 (1984).

265. *Id.* at 2955-57.

266. *Id.*

267. *See* Board of Regents v. National Collegiate Athletic Ass'n, 707 F.2d 1147, 1152 (10th Cir. 1983), *aff'd on other grounds*, 104 S. Ct. 2948 (1984).

268. National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2962 (1984); *see also* Regents of the Univ. of Cal. v. ABC, 1984-2 Trade Cas. (CCH) ¶ 66,279, at 67,212-15 (9th Cir. 1984) (possibility of use of per se rule in assessing validity of college football television contract).

269. *Id.* at 2959.

270. *Id.* at 2960.

271. *Id.*

272. *Id.* at 2961.

273. Other decisions also have taken a rule of reason approach to necessary joint activity. *See, e.g.*, Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1050-53 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983); Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 821-22 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); *see also* Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740-41 (1984) (Court, in dictum, stated that although horizontal price-fixing and market allocation were illegal per se, "mergers, joint ventures, and various vertical agreements . . . . are judged under a rule of reason" because of possible procompetitive features.). Admittedly, these cases are still somewhat inconsistent with *Topco*, see *supra* notes 131-40 and accompanying text, but perhaps *Topco* can be distinguished as an ancillary restraint case in which the restraints were too severe and, therefore, incapable of surviving even a rule of reason analysis. *See* Louis, *supra* note 217, at 891-93. A more direct approach, however, would be to suggest that *Topco*'s vitality is further called into question by these recent joint venture decisions. For a discussion of *Topco*'s eroding viability as precedent, see *supra* notes 198-219 and accompanying text.

274. *See* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2971 (1984).

lenged television plan as a restraint ancillary to a valid co-production joint venture.

These recent decisions reveal a discernible trend toward viewing restraints ancillary to an otherwise lawful integration as trade restrictions susceptible to rule of reason scrutiny, particularly when the joint activity is necessary to permit production to occur at all. As one scholar had noted even prior to these cases, "courts, seemingly bemused by the label 'joint venture,' have applied a broad rule of reason, and more often than not, have exonerated the arrangement on grounds that it was related to business needs of the parties or was inspired by commercial considerations rather than an intent to suppress competition."[275] That same commentator mentioned in passing, however, that "[p]rofessional sports raise interesting problems, since they involve joint ventures (leagues) engaging in market division (exclusive territorial franchises)."[276] Certainly, there is a need for some cooperation in order for league sports to be produced,[277] but the need for and the legality of joint sports production does not necessarily guarantee antitrust immunity for all additional accompanying restraints. The fact that NFL football or NBA basketball does not offend the Sherman Act simply as a result of the concerted action required to function as a league does not automatically protect all additional inter-team agreements.[278] If relocation restraints are unnecessary to accomplish the legitimate ends of the joint venture, or are overbroad or severely anticompetitive, their ancillary character will not suffice to provide protection from the antitrust laws.

The dispositive question that still remains is thus not whether leagues are illegal joint ventures, but rather whether ancillary market division implemented through a franchise relocation restraint can survive antitrust attack. The importance of characterizing the franchise relocation restriction as ancillary to an otherwise lawful transaction—the joint venture—is simply that it brings that restraint within the well-established principle that ancillary trade restraints, as opposed to "naked" restraints, are not to be condemned unless unreasonable.[279] This precludes applica-

275. Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of* Penn-Olin, 82 Harv. L. Rev. 1007, 1045-46 (1969). The *Penn-Olin* decision to which Pitofsky refers—United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964)—indicated that certain joint ventures involving the creation of a jointly owned subsidiary could be scrutinized under § 7 of the Clayton Act, 15 U.S.C. § 18 (1982). 378 U.S. at 168.

276. Pitofsky, *supra* note 275, at 1046 n.84.

277. *See* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1391-92 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984); Glick, *supra* note 13, at 67-68; Kempf, *supra* note 13, at 628-30. See *supra* notes 99-111 and accompanying text.

278. A contrary view is presented in Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. Antitrust Sec. 211, 231-34 (1959), where (now) Judge Bork argues that all league agreements eliminating competition between league members only should be absolutely protected ancillary restraints.

279. The ancillary restraint doctrine is discussed thoroughly by Judge Taft in United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). The use of a rule of reason for such restraints may be traced to

tion of a per se rule and necessitates a factual inquiry into the elements of reasonableness, which are discussed in a later section of this Article.[280] If franchise relocation restraints are deemed ancillary, the implications for joint ventures in other fields of commercial endeavor are significant. Certain territorial and customer divisions in those industries could also avoid per se treatment by reliance on the ancillary restraint doctrine as developed in the sports cases.

4. The Self-Regulation Argument

The argument for application of a rule of reason to the ancillary franchise relocation restriction is even further supported by the frequently recited need for self-regulation in the business of sports.[281] The self-regulation rationale is not simply the result of a decision to give legal significance to the idiosyncracies of sports leagues. Rather, it derived its support from the Supreme Court's decision in *Silver v. New York Stock Exchange*,[282] in which the defendant stock exchange required termination of direct wire connections to certain nonmember securities dealers.[283] Although the Court found that such termination was improper when no opportunity for notice or hearing had been provided,[284] it carved out an exception to the usual per se rule for group boycotts. Although a per se rule applied "absent any justification derived from the policy of another statute or otherwise,"[285] the statutory policy of self-regulation for securities exchanges justified a departure from rigid adherence to a per se rule.[286]

In *Hatley v. American Quarter Horse Association*,[287] the Fifth Circuit seized on the "or otherwise" language in *Silver* and held that it was not always necessary to find statutory authority for otherwise unlawful con-

---

Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711). The propriety of a rule of reason approach for ancillary restraints has been recognized by the American Law Institute in both Restatements of Contracts. *See* Restatament (Second) of Contracts, §§ 186-188 (1981); Restatement of Contracts, §§ 513-519 (1932). For a critical evaluation of the treatment of restraint of trade principles in these Restatements, see Handler & Lazaroff, *supra* note 91, at 678-717. For an argument that *Topco* has undermined the ancillary restraint doctrine, see Louis, *supra* note 217, at 889-93.

280. See *infra* notes 300-79 and accompanying text.

281. *See, e.g.*, M & H Tire Co. v. Hoosier Racing Tire Corp., 1984-1 Trade Cas. (CCH) ¶ 65,975, at 68,218-19 (1st Cir. 1984); Brenner v. World Boxing Council, 675 F.2d 445, 454-55 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 789-90 (7th Cir. 1981); Neeld v. National Hockey League, 594 F.2d 1297, 1299 n.4 (9th Cir. 1979); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-53 (5th Cir. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971); *see also* Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 380-82 (D. Ariz. 1983) (discussing need for self-regulation in intercollegiate athletics).

282. 373 U.S. 341 (1963).

283. *Id.* at 344.

284. *Id.* at 361-67.

285. *Id.* at 348-49.

286. *Id.* at 349-57.

287. 552 F.2d 646 (5th Cir. 1977).

certed action. Rather, it would suffice if an industry had an inherent need for self-regulation, derived from a state of interdependence and necessary cooperation.[288] Thus, the *Hatley* court, pursuant to a rule of reason analysis, found that a decision by a quarter horse registering association to deny registration to a particular horse with improper markings did not violate section 1.[289] The court emphasized that "[i]n some sporting enterprises a few rules are essential to survival."[290]

The Seventh Circuit echoed similar sentiments in *United States Trotting Association v. Chicago Downs Association*:[291]

> There is now a considerable body of law, derived more or less proximately from *Silver*, recognizing that in certain self-regulatory contexts binding rules must be developed to safeguard the enterprise's viability, and that application of a *per se* standard of illegality to such endeavors is improper. Post-*Silver* court of appeals decisions have frequently acknowledged that in organized sports "interdependence," "cooperation," and at least "a few rules are essential to survival," and have often eschewed *per se* analysis in passing upon antitrust challenges to such rules. . . . These cases provide support for the proposition that, in the context of organized sports and sanctioning organizations, courts should be hesitant to fasten upon tags such as "group boycott" and "*per se*" in order to preclude inquiry into the business necessity for or precise harm occasioned by particular rules or practices.[292]

It is important to note, however, that the need for self-regulation in sports organizations has not been perceived as a carte blanche for courts to analyze all such concerted action only under a rule of reason. In *Denver Rockets v. All-Pro Management, Inc.*,[293] the court granted a preliminary injunction against application of an NBA bylaw restricting player eligibility,[294] and articulated three criteria for determining whether a rule of reason should be applied under *Silver*: (1) whether there is a legislative or other mandate for self-regulation; (2) whether the concerted action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary; and (3) whether the group provides procedural safeguards to prevent against arbitrary restraints and to create a foundation for judicial review.[295] If the franchise relocation restraint and the method of imposing it do not meet the foregoing requirements, the rule of reason approach may not be justified on the grounds of self-regulation.[296] The *Denver Rockets* court found that the NBA's player eligibil-

288. *Id.* at 652. *But see* Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1266-67 (N.D. Ga. 1973) (exception limited to statutory policy).
289. Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 653-54 (5th Cir. 1977).
290. *Id.* at 652.
291. 665 F.2d 781 (7th Cir. 1981).
292. *Id.* at 789-90 (citations omitted).
293. 325 F. Supp. 1049 (C.D. Cal. 1971).
294. *Id.* at 1066-67.
295. *Id.* at 1064-65.
296. *Id.* at 1064; *see* Kurlantzick, *supra* note 13, at 205.

ity restriction did not fit within the *Silver* exception because the bylaw was overly broad and failed to provide for a hearing or other procedural safeguard for the excluded player.[297] The court, therefore, utilized the per se rule to invalidate the challenged group boycott.[298] Of course, support for a rule of reason may nevertheless be derived from the other rationales already discussed.

In sum, there are a number of plausible arguments for employing a rule of reason rather than a per se rule for franchise relocation restrictions. In a climate in which the Supreme Court and many scholars have been demonstrating greater disdain for the inflexibility of per se rules, perhaps it is now time, as Justice Cardozo long ago suggested, to be wary of "the tyranny of tags and tickets."[299] It bears repeating that the adoption of a rule of reason approach is not tantamount to judicial approval of relocation restrictions. On the contrary, the restraint may ultimately prove to violate the Sherman Act, but this conclusion may be reached only after the appropriate inquiry is undertaken. Even though a rule of reason approach will probably prove to be more economically burdensome to plaintiffs and more time consuming, this is the price we must pay for an equitable application of antitrust policy, which will not catch in its web too much desirable business conduct along with properly forbidden anticompetitive behavior.

III. Application of a Rule of Reason

In applying a rule of reason to sports franchise relocation restrictions, the key question is whether such a restriction can satisfy the standards articulated in *National Society of Professional Engineers v. United States*,[300] in which the Supreme Court made it clear that a determination of reasonableness will depend solely on the overall procompetitive or anticompetitive impact of a restraint.[301] In essence, modern rule of reason analysis is confined to economic considerations, and only the enhancement or diminution of competition is relevant. Some have already suggested that the rule of reason, as construed in *Professional Engineers*, may have increased the difficulty of according organized sports the special antitrust treatment they may require for both economic and noneconomic reasons.[302]

Prior to a consideration of the likely result under *Professional Engineers*, however, it will be useful to explore briefly the historical antecedents of the current rule of reason case law. The need for this digression is that the common law rule of reason developed into a principle requiring

297. 325 F. Supp. at 1066.

298. *Id.*

299. Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev. 682, 688 (1931).

300. 435 U.S. 679 (1978).

301. *Id.* at 688-91. More recent approval of this approach can be found in National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2962 (1984).

302. *See* M. Handler, H. Blake, R. Pitofsky & H. Goldschmid, *supra* note 127, at 489.

that, in order to survive a claim of unreasonableness, an ancillary restraint of trade must be no broader than necesary to protect the legitimate interests of a covenantee. It is important to explain and understand this concept, because this strand of rule of reason analysis has found its way into the modern antitrust cases,[303] and because it is a particularly useful tool in assessing the validity of franchise relocation restraints.[304]

The common law originally forbade all trade restraints in order to prevent public injury and hardship to the covenantor.[305] Subsequently, the courts began to retreat from an absolute rule of voidness. In 1711, in *Mitchel v. Reynolds*,[306] the rule of reason was born in the context of a challenge to a restraint ancillary to the lease of a bakery. In the nineteenth century, English courts built upon the *Mitchel* foundation and settled on a principle applicable to ancillary restraints, requiring that a restraint should be no broader than necessary to protect adequately the interest of the promisee.[307]

Cases in the United States followed a similar pattern,[308] and the ancillary restraint doctrine evolved and became rooted as a fundamental restraint of trade principle.[309] Both Restatements of Contracts have embraced the doctrine and explain that an ancillary restraint cannot be reasonable unless it is no greater than required for the protection of the covenantee.[310] Contemporary antitrust cases challenging ancillary restraints pursuant to the Sherman Act have employed similar analysis.[311] Thus, at least one approach to a franchise relocation restraint might be to determine whether the restraint exceeds the bounds of reasonable neces-

303. See *infra* notes 308-12 and accompanying text.

304. See *infra* notes 356, 375 and accompanying text.

305. *See* Dyer's Case, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1415); *see also* Handler & Lazaroff, *supra*, note 91, at 721-23.

306. 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711).

307. *See* Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., 1894 A.C. 535, 565 (H.L.); Horner v. Graves, 7 Bing. 735, 743, 131 Eng. Rep. 284, 287 (C.P. 1831).

308. *See* Handler & Lazaroff, *supra* note 91, at 726-27.

309. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

310. *See* Restatement (Second) of Contracts § 188(1)(a) (1981); Restatement of Contracts § 515(a) (1932).

311. *See, e.g.*, Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082-83 (2d Cir. 1977) (postemployment competition restriction), *cert. denied*, 434 U.S. 1035 (1978); United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976) (covenant not to compete after sale of business), *cert. denied*, 429 U.S. 1122 (1977); Golden v. Kentile Floors, Inc., 512 F.2d 838, 845-46 (5th Cir. 1975) (provision for loss of profit-sharing if employee violated competition restriction); Bradford v. New York Times Co., 501 F.2d 51, 59-60 (2d Cir. 1974) (covenant not to compete while employed); Tri-Continental Fin. Corp. v. Tropical Marine Enters., 265 F.2d 619, 624-25 (5th Cir. 1959) (covenant not to use purchased property in competition with seller); Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252, 255-57 (D.N.J. 1975) (same), *aff'd on other grounds*, 533 F.2d 96 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976); Alders v. AFA Corp., 353 F. Supp. 654, 657 (S.D. Fla. 1973) (post-employment covenant not to compete), *aff'd without published opinion*, 490 F.2d 990 (5th Cir. 1974). For a discussion of the rule of reason approach to ancillary restrictions on shopping center leases, see Handler & Lazaroff, *supra* note 91, at 695-703.

sity. If it does, a conclusion that it is unreasonable should follow.[312]

A different mode of analysis may, however, be derived from *Professional Engineers*, in which Justice Stevens seemingly strained to reconcile his approach to the rule of reason with more traditional restraint of trade doctrine.[313] In that case, the government successfully challenged a provision in an association's canon of ethics prohibiting its members from submitting competitive bids for engineering services.[314] Justice Stevens took the opportunity to expound on the contours of the rule of reason and suggested that the rule "focuses directly on the challenged restraint's impact on competitive conditions."[315] Citing *Mitchel v. Reynolds* for the proposition that the rule involves a balancing of procompetitive and anticompetitive effects,[316] Justice Stevens concluded that "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[317] The Court did not apply the less restrictive alternative approach, and it specifically noted that the inquiry pursuant to a rule of reason was limited to competitive impact and did not permit a defense based upon the "assumption that competition itself is unreasonable."[318] Justice Stevens did, however, purport to recognize that ethical norms within a profession may be necessary as a procompetitive measure.[319] Although the Court's reading of common law ancillary restraint doctrine may leave much to be desired because it might invalidate many covenants not to compete that have traditionally been upheld,[320] the fact remains that *Professional En-*

---

312. Indeed, in Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1395-98 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984), the court followed precisely this approach in finding a franchise relocation restraint to be unreasonable.

313. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688-91 (1978). Some commentators have disagreed with Justice Stevens' analysis. *See, e.g.*, Handler & Lazaroff, *supra* note 91, at 751-55 (discussing adequacy of prevailing antitrust analysis as safeguard against anticompetitive results); Robinson, *Recent Antitrust Developments—1979*, 80 Colum. L. Rev. 1, 17-18 (1980) (lack of procompetitive virtues to offset harms of seller's covenant not to compete).

314. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692-98 (1978).

315. *Id.* at 688.

316. *Id.* at 688-89.

317. *Id.* at 691 (citing Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) and Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 n.15 (1977)).

318. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978).

319. *Id.* The Court relied on Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), for this point. The *Goldfarb* Court had explained that the public service aspects of the professions might require that some self-regulation that would not ordinarily pass muster under the Sherman Act be permitted. *Id.* at 788-89 n.17. Professor Handler, however, has questioned whether *Professional Engineers* leaves any real room for self-regulatory measures in the professions when there is no overall procompetitive effect. Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1366-69 (1978). If Handler is correct, and it appears that he is, then a franchise relocation restraint could not escape from the grasp of section 1, even if it served a public purpose, unless it had an overall procompetitive impact.

320. *See* Handler & Lazaroff, *supra* note 91, at 753-55. The true rationale for uphold-

gineers is an accepted and followed rule of reason precedent and its teaching must be applied in any rule of reason analysis.

Thus, the franchise relocation restraint should be analyzed under *Mitchel* and its progeny to determine whether there is greater protection provided than is reasonably necessary to protect the league members.[321] In addition, a balancing analysis to see whether the restraint is more procompetitive than anticompetitive is required by *Professional Engineers*. It is significant to note that, even under traditional ancillary restraint analysis, otherwise reasonable noncompetition agreements could still be invalidated if there were significant anticompetitive effects.[322] Perhaps these two strands of rule of reason analysis thus may be harmonized. In other words, the *Professional Engineers* balancing test seems to assume as a prerequisite the existence of some significant anticompetitive effect that can only be justified by a counterbalancing procompetitive impact. Even after *Professional Engineers*, courts have indicated that this balancing exercise is unnecessary absent any significant anticompetitive effect.[323] In the traditional ancillary restraint cases it was usually apparent that no real threat to competition was present, and courts needed only to consider whether the restraints were broader than necessary to protect the promisees. Perhaps the harmonization occurs when the *Professional Engineers* balancing approach is viewed as a second tier of analysis that is triggered when a restraint that merely protects a promisee is nevertheless too anticompetitive to be justified on that basis alone.[324] In sum, both rule of reason approaches should be employed in assessing the reasonableness of a franchise relocation restraint.

A. *Market Definition*

An initial fundamental step in any rule of reason analysis is market definition, because the presence or absence of market power will be quite important in determining whether a relocation restraint is either reason-

---

ing a variety of ancillary covenants not to compete was not that competition was enhanced. Rather, it was that such restraints promoted the vendibility of property and rarely had any significant anticompetitive impact.

321. For decisions suggesting that the existence of a less restrictive alternative is relevant in assessing reasonableness under section 1 of the Sherman Act, see Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975). See *supra* note 311.

322. *See* Restatement (Second) of Contracts § 188(1)(b) (1981) (public injury); Restatement of Contracts § 515(c) (1932) (tendency to create monopoly). For a discussion of these Restatement provisions, see Handler & Lazaroff, *supra* note 91, at 717-739.

323. *See, e.g.*, Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 & n.11 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); Optivision, Inc. v. Syracuse Shopping Center Assocs., 472 F. Supp. 665, 679 (N.D.N.Y. 1979).

324. It also seems that, given the two tiers of rule of reason analysis, a restraint might, on balance, be procompetitive, but still go beyond the reasonable needs of its beneficiaries. In these circumstances, a finding of unreasonableness should also follow.

ably necessary or significantly anticompetitive.[325] The process of market definition is a two-step exercise requiring a determination of both geographic and product markets.[326] The Supreme Court has indicated that the proper limits of a relevant geographic market should be determined with reference to "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies."[327] The Supreme Court has also established a test for relevant product market that focuses on the reasonable interchangeability between a product and substitutes for it.[328] Although it would appear that these rather straightforward Supreme Court precedents should facilitate the resolution of market definition questions in a franchise relocation case, the unique nature of the sports business militates against a simple solution. Rather, several alternative product and geographic market definitions are conceivable.[329]

In *Los Angeles Memorial Coliseum Commission v. National Football League*,[330] the only case in which a court has attempted a thorough rule of reason analysis with respect to a relocation restriction, Judge Anderson wrote at some length on the market definition issue.[331] Whereas defendants argued for a broad relevant market of "all forms of entertainment within the United States,"[332] the Raiders football club countered with a claim that the proper market definition was "NFL football . . . in the Southern California area."[333] The Los Angeles Coliseum argued that the relevant market was "stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market)."[334] The Ninth Circuit concluded that precise market definition was "especially difficult" because of the "exceptional nature of the industry,"[335] and found that the jury was not required to accept absolutely any

325. *See* M. Handler, H. Blake, R. Pitofsky & H. Goldschmid, *supra* note 127, at 169 n.2 ("problem of market definition cuts across every area of antitrust"); *see also* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984) ("relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue").

326. L. Sullivan, *supra* note 21, at 40.

327. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); *see* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 328, 336-39 (1962); Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5 (1949).

328. *See* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2966-67 (1984); United States v. Grinnell Corp., 384 U.S. 563, 571-76 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

329. *See* Glick, *supra* note 13, at 74-79.

330. 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

331. *Id.* at 1392-94.

332. *Id.* at 1393.

333. *Id.*

334. *Id.*

335. *Id.* at 1394.

of the proposed market definitions.[336] Rather, the court of appeals determined that the critical question was whether the jury could properly have concluded that the relocation restriction unreasonably restrained competition.[337] Although the court declined to endorse any particular market definition, its discussion at least hints at a proper result. As Judge Anderson apparently recognized, even if there could be both narrow and broad geographic market definitions,[338] the product market is most appropriately defined not as a general entertainment market, but as NFL football.[339] More specifically, the court emphasized that NFL football has "limited substitutes from a consumer standpoint," as evidenced by the Oakland Raiders having sold out their home games for ten consecutive years despite "some of the highest ticket prices in the League."[340] The court also focused on the fact that NFL football draws an "extraordinary number of television viewers" and was able to negotiate a $2 billion television package.[341] Further, evidence disclosed that the NFL itself views its product as unique,[342] and that from a stadium operator's standpoint an NFL team "is an especially desirable tenant" because of higher rental payments.[343]

In sum, regardless of the chosen geographic market definition, it seems correct to conclude that NFL football is a unique product that has no close substitutes. Both fans and stadium operators view NFL football as a unique and separate product. Indeed, does anyone really contend that a season ticketholder of the Los Angeles Raiders would accept a showing of *Heidi* as a reasonable substitute? Would a twenty percent increase in ticket prices result in massive defections to some other form of entertainment? It seems doubtful. Even if a more narrow sports entertainment market were proposed, it does not appear likely that NFL fans view hockey or basketball as adequate substitutes. Conversely, it does not seem that NHL or NBA fans would switch to football as a substitute if teams in those leagues raised prices. Thus, because the test for product market definition is reasonable interchangeability, a logical conclusion is

336. *Id.*

337. *Id.* This does seem to contradict somewhat the court's earlier admonition that market definition is essential in a rule of reason case. *See id.* at 1392.

338. *Id.* at 1393-94. The court acknowledged that teams compete for fan support where they operate in "close proximity." *Id.* at 1393. On the other hand, stadiums throughout the country may compete for NFL tenants. *Id.* at 1393-94. Thus, the geographic area within which buyers (fans) and sellers (NFL teams) do business is relatively small, because a Los Angeles resident, for example, will not travel to New Jersey for a football game each Sunday. Yet there also exists a broader geographical market because, as a buyer of stadium space, an NFL team might consider leasing a facility anywhere in the country.

339. *See id.*

340. *Id.* at 1393.

341. *Id.*

342. *Id.*

343. *Id.* at 1394.

that NFL football, NBA basketball, major league baseball and NHL hockey each constitutes a relevant product market.

Although some may disagree with this narrow product market definition,[344] courts have concurred in this approach by approving market definitions such as professional championship boxing,[345] college football telecasts,[346] major league professional hockey[347] and NBA basketball.[348] In fact, one court rejected a claim that NFL football was part of a general entertainment market.[349] Moreover, the Supreme Court itself has recently indicated the propriety of a narrow product market definition in sports cases. Justice Stevens, writing for the Court in *National Collegiate Athletic Association v. Board of Regents*,[350] explained that the proper question was whether other products were "reasonably substitutable for televised NCAA football games."[351] In answering this query, the Court noted that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience."[352] The Court then concluded that college football telecasts were indeed a separate product market and that the NCAA therefore possessed market power.[353] There seems to be no reason why the same result should not follow for NFL football or major league baseball. Unfortunately for major sports leagues, this type of narrow market definition is likely to be fatal to any relocation restriction.

B. *The Unreasonableness of the Relocation Restraint*

It seems correct to conclude that professional football is a proper submarket because for some no alternative is acceptable and no adequate substitutes exist. It follows that an NFL franchise relocation restraint will be difficult, if not impossible, to justify in so narrow a product market. The same argument could be made for any other major sports

344. *See* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2977 (1984) (White, J., dissenting); *cf.* Glick, *supra* note 13, at 78 (suggesting both sport and entertainment market definitions).

345. *See* International Boxing Club v. United States, 358 U.S. 242, 249-51 (1959).

346. *See* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2966-67 (1984).

347. *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 501-02 (E.D. Pa. 1972).

348. *See* Fishman v. Wirtz, 1981-2 Trade Cas. (CCH) ¶ 64,378, at 74,762-64 (N.D. Ill. 1981).

349. *See* Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1292 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); *see also* Mid-South Grizzlies v. National Football League, 720 F.2d 772, 783-84 (3d Cir. 1983) (professional football found to be relevant market), *cert. denied*, 104 S. Ct. 2657 (1984); North American Soccer League v. National Football League, 670 F.2d 1249, 1260 (2d Cir.) (sports capital and skill held to be relevant market), *cert. denied*, 459 U.S. 1074 (1982).

350. 104 S. Ct. 2948 (1984).

351. *Id.* at 2966 (citation omitted).

352. *Id.* (citation omitted).

353. *Id.*

league. Unlike a struggling, newly-formed organization such as the United States Football League (USFL), the NFL, NBA and NHL are all well established. The use of a franchise relocation restraint by a league with significant market power does not appear to be reasonably necessary to enable it to compete. Indeed, if the market definition is narrow enough to include, for example, only professional football, with whom is the NFL competing? Even the USFL is not a true rival because it currently plays its games during a different part of the year, although it plans to compete directly with the NFL by shifting to an autumn schedule beginning in 1986.[354] Neither the NBA nor the NHL faces any real competition. Perhaps one might argue that major sports leagues compete with each other to a degree, but the cases follow a narrower market definition pattern.[355]

It may be said that sports organizations with considerable market power, such as the major leagues in this country, cannot justify their relocation restraints under either the common law or *Professional Engineers* approach to the rule of reason. In the first instance, the restraints appear to exceed any legitimate needs of the league members in that the relocation rules have traditionally lacked objective standards or procedural safeguards.[356] Further, even assuming arguendo that the "needs" of the league members are not overprotected by the relocation restriction in terms of conventional ancillary restraint doctrine, the overriding concern remains the overall impact on competition. Whether analysis proceeds under the old noncompetition cases or under the *Professional Engineers* approach, the fact remains that the restraints on the market will be significantly anticompetitive and that there are insufficient procompetitive justifications to negate this fact.

1. The Anticompetitive Effects

As the court recognized in *Los Angeles Memorial Coliseum*,[357] a franchise relocation restraint is fraught with "competitive harms [that] are plain."[358] The use of such restraints to perpetuate exclusive territories insulates teams from direct competition with each other and facilitates the establishment of "monopoly prices to the detriment of the consuming public."[359] Further, such restraints inhibit free competition among stadia that seek to lure sports franchises by offering desirable lease terms.[360]

354. *See* Eskenazi, *U.S.F.L. Votes to Switch to Playing Fall Schedule*, N.Y. Times, Aug. 23, 1984, at B15, col. 4.

355. See *supra* notes 330-53 and accompanying text.

356. *See* Glick, *supra* note 13, at 89; *See also* Kurlantzick, *supra* note 13, at 205 (NFL requirement of 75% approval for franchise relocation should be deemed antitrust violation). But see *supra* note 14, indicating that the NFL and NBA have just recently adopted certain standards to be employed in making relocation decisions.

357. 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

358. *Id.* at 1395.

359. *Id.*

360. *Id.*

At both levels of the marketplace, the anticompetitive effects are obvious. Unprotected by alternatives, fans may be asked to pay exorbitant prices for a sports product. Yet at the same time the owner lacks incentive for improvement of either the quality of the team or the stadium in which it plays. Operators of stadia, even ones with superior facilities, location and other amenities, are foreclosed from competing on the merits for the sports franchise's patronage. Instead, they are dependent on the collective approval of teams in a league. Finally, team owners themselves are prevented from seeking out the best competitive options available to them and from unilaterally seeking maximum profitability by choosing the location of their teams. Although a particular stadium operator may propose a deal that will lower the team owner's costs or promise greater revenues, the franchise relocation restraint may prevent the team owner from taking advantage of that business opportunity.

In addition, unlike situations in which intrabrand restraints might enhance interbrand competition,[361] it appears that the relocation restriction represents an intrabrand restraint from which little or no interbrand competition—between league members and those outside—results. The consumer therefore lacks the protection that would be afforded if other brands placed a check on the unfettered discretion of those engaging in the intrabrand restraint. This leaves the leagues free to exploit their market power and to maximize profits as in any cartel arrangement.

In fact, if the product of the NFL, NHL or NBA is sufficiently unique to be placed in a separate market, not only does section 1 present a problem, but a question is also raised under section 2 of the Sherman Act. A monopolization claim may be made when a defendant has monopoly power in a relevant market and willfully acquires or maintains such power, as distinguished from power derived from growth or development

361. In Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), see *supra* notes 204-11 and accompanying text, the Court reviewed a vertical intrabrand restraint imposed by a television manufacturer whose market share had declined to one or two percent of national sales. 433 U.S. at 38. The restraint thus enabled the manufacturer to remain a viable interbrand competitor in an already competitive marketplace. *Id.* In contrast, NFL teams are firmly established in a market without real substitutes, so a location restraint could not be justified as enhancing interbrand competition. A newer league, such as the USFL, might fare better by using a relocation restraint to achieve market penetration. The other rationales advanced in *Continental T.V.* included encouraging retailers to promote a relatively unknown product and to invest in service and repair facilities. *Id.* at 55. Sports leagues do not share these problems. Further, the *Continental T.V.* Court noted that intrabrand restraints can prevent the "free-rider" effect, whereby some competitors will allow others to engage in costly promotion and service activities, but then attract patronage themselves by offering cheaper prices. *Id.* The free-rider effect seems to have no place in the franchise relocation cases because advertising by the Los Angeles Raiders, for example, would do little to attract fans to Los Angeles Rams games. *But see* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1407 (9th Cir.) (Williams, J., dissenting) (mentioning free-rider effect), *cert. denied*, 105 S. Ct. 397 (1984). In sum, as the Supreme Court apparently recognized in National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2959 (1984), the presence of substantial market power will make it quite difficult to overcome the obviously anticompetitive effects of a restraint.

that resulted from superior skill, business acumen or historic accident.[362] Even though the NFL's market power may, for example, be attributable in part to congressional sanction,[363] the maintenance of such power by market division could certainly be viewed as monopolistic conduct.[364]

2. The Alleged Procompetitive Effects

The court of appeals in *Los Angeles Memorial Coliseum* also identified what it perceived to be the procompetitive aspects of franchise relocation restictions. The court explained that antitrust laws are concerned primarily with promoting interbrand competition and that "[t]o the extent the NFL is a product which competes with other forms of entertainment, including other sports," its territorial restrictions might be viewed as procompetitive.[365] Implicit in this statement is an apparent recognition that unless the broader product market definition is adopted, there will be little or no procompetitive effect attributable to a relocation restraint. Because a narrower product market definition seems more consistent with antitrust policy,[366] the alleged procompetitive aspects of relocation restraints are indeed questionable. Nevertheless, they require identification and discussion because they have been given consideration by courts and commentators.

In *Los Angeles Memorial Coliseum*, the court noted that owners have a legitimate interest in protecting the integrity of the league and must act collectively to create league divisions, establish schedules and agree on playing rules in order to produce "the most marketable product attainable."[367] The court also acknowledged the league's argument that exclusive territories and franchise relocation restrictions help new franchises

---

362. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

363. *See* Mid-South Grizzlies v. National Football League, 720 F.2d 772, 784 (3d Cir. 1983) (discussing congressional approval of 1966 NFL-American Football League agreement to merge and to pool television revenues), *cert. denied*, 104 S. Ct. 2657 (1984).

364. *See* United States v. Grinnell Corp., 384 U.S. 563, 576 (1966); United States v. Griffith, 334 U.S. 100, 107-08 (1948); Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 589 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 336 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945). *But cf.* SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir. 1981) (unilateral refusal to license patents lawfully acquired did not trigger antitrust liability), *cert. denied*, 455 U.S. 1016 (1982); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979) (failure to predisclose product innovations not unlawful § 2 conduct), *cert. denied*, 444 U.S. 1093 (1980); Telex Corp. v. International Bus. Mach. Corp., 510 F.2d 894, 926 (10th Cir.) (price reductions were not unlawful use of IBM's market power), *cert. dismissed*, 423 U.S. 802 (1975). The parameters of the monopolization offense and the related but distinct offense of attempted monopolization are worthy of detailed consideration and no attempt is made here to engage in an exhaustive discussion.

365. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1397 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

366. See *supra* notes 328-53 and accompanying text.

367. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1391-92 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

achieve financial stability, create geographic diversity and foster fan loyalty.[368] Similarly, one author has suggested that relocation restraints promote cooperative scheduling, league legitimacy, community support, public service and profitability.[369]

The procompetitive nature of these alleged justifications for relocation restraints may fairly be questioned. Even if a broader product market approach were adopted, none of the foregoing rationales for such restrictions seems sufficient. Collective action regarding rules of play and scheduling is important, but it does not require relocation restrictions. Given the national scope of major sports leagues, any team could unilaterally determine its home site and scheduling could then follow.[370] Modern air travel also obviates the need for a geographic limitation on major league sports.

The argument that relocation restrictions are necessary for the achievement of financial stability also is unpersuasive because the goal of any cartel is to maximize profits. The financial stability of major professional sports leagues in this nation is evidenced by significant and growing attendance and by lucrative television contracts.[371] Unlike a new league, the NFL, NHL, NBA and Major League Baseball all have had many years to establish themselves as factors in the marketplace. Further, why should it be assumed that an individual owner would move a team to a new location unless it was likely to be more profitable? There seems to be no reason to allow a group of other owners to second-guess the efforts of one to seek a better home site. If a "stable core of teams" in certain markets is needed,[372] a franchise relocation could be followed by authorizing the placement of a new franchise in the abandoned city. Geographic diversity could thereby be maintained without the need for relocation restrictions.

Although sports teams do perform a public service,[373] it stretches the notion of procompetitive effect to suggest that this supports a relocation restriction when an antitrust challenge is launched. In fact, whereas fans in one city may be devastated by a franchise's departure, fans in another city are likely to be delighted by the arrival of a franchise, and the number of league supporters may increase. It is not inconceivable that fans in the city losing a team will continue to follow that club, while an entirely new group of fans will be cultivated in the new city. In short, it is not at all clear that the movement of the Raiders from Oakland to Los Angeles or the Colts from Baltimore to Indianapolis will result in lower

368. *Id.* at 1396.

369. *See* Glick, *supra* note 13, at 79-87.

370. Glick, *supra* note 13, at 80, supports the scheduling rationale for relocation restrictions by positing the extreme example of the Cleveland Indians moving to Tokyo. This seems a bit far-fetched, and there is no history of owners seeking movement to such an inconvenient site.

371. See *supra* note 2.

372. *See* Glick, *supra* note 13, at 81.

373. See *infra* notes 385-95 and accompanying text.

attendance at NFL games. Neither Raiders owner Al Davis nor Colts owner Robert Irsay would have moved his team if that were the anticipated result.

In *Los Angeles Memorial Coliseum*, despite these claims of procompetitive effect, the Ninth Circuit affirmed a jury's decision that the NFL's relocation restriction violated section 1 of the Sherman Act.[374] In so doing, the court of appeals found that the jury had been properly instructed to consider the existence of less restrictive alternatives and to balance procompetitive benefits and anticompetitive harms. It also noted the absence of any objective standards in the NFL's relocation rule.[375] Under either the balancing approach or the less restrictive alternative approach to the rule of reason, it appears that the restraint violated section 1.[376]

In addition, while a set of objective standards for enforcing a relocation restraint may somewhat diminish its anticompetitive aspects,[377] the fact remains that if a narrow approach to market definition is appropriate, the restraint will still be more anticompetitive than procompetitive. Because each sports league may itself constitute the relevant market, even a carefully tailored restriction will restrain intrabrand competition but will not be offset by an appreciable benefit to interbrand competition.

In sum, even if rule of reason analysis is appropriate, it does not appear that major sports leagues will succeed in attempts to seek protection for their relocation restrictions. The restrictions currently in force go beyond the legitimate needs of league members and appear to pose signficant threats to competition. Under alternative broader market definitions, the anticompetitive impact of such restraints wanes somewhat, but the problem of overbreadth remains. It appears that only if broader market definitions are accepted and if the restraints are more carefully tailored can a relocation restriction possibly survive a section 1 challenge. Although *Professional Engineers* recognized that there may be a public service aspect in the professions and suggested that a rule of reason may include this as a factor, that case clung to the notion that the restraint must still, on balance, be procompetitive. The essence of the sports leagues' claims, however, seems to be that competition is not necessarily as desirable in their business as in others. It is therefore difficult to see how a major sports league will be able to avoid section 1 liability under current rule of reason standards.

Perhaps the foregoing suggests that the rule of reason, by requiring a narrow focus solely on procompetitive and anticompetitive effects, has become too inflexible. Not only does *Professional Engineers* threaten the

374. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1396 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).

375. *Id.* at 1396-98. Subsequently, the NFL adopted objective standards. See *supra* note 14.

376. *Id.* at 1397, 1399.

377. *See* Glick, *supra* note 13, at 91-94.

validity of many ancillary restraints,[378] but it lacks clarity insofar as it does not provide any real guidance with respect to the balancing process.[379] Nevertheless, *Professional Engineers* is the law and will render it most difficult to enforce a sports franchise relocation restriction.

IV. A Proposed Legislative Alternative—Exemption or Regulation?

Because franchise relocation restrictions will probably not survive a rule of reason inquiry, two alternatives remain. One possibility would be to do nothing. The antitrust laws would simply function to invalidate franchise relocation restrictions. This would result in individual team owners unilaterally deciding where their teams would establish a home field. In essence, market forces would be permitted to be determinative and owners could simply decide to pursue whatever course seems most lucrative and beneficial. In some cases this might result in increased intrabrand competition and in others perhaps competition will be avoided or eliminated. In any event, the decision would be a unilateral one and would not run afoul of section 1.

The problem with this approach, even if it is economically sound, is that it fails to take into account interests, particularly fan interests, that are deserving of consideration. Although the contemporary rule of reason seems to have no place for values that go beyond competition, it is at least arguable that sports teams in America play a role that is unique and intimately linked to the concept of public service. Further, many businesses that surround major league stadiums depend on the patronage generated by the home team. These interests may not be properly protected under a *Professional Engineers* approach to a rule of reason. Perhaps they should not be protected, in order to preserve some degree of consistency and manageability in antitrust law. Yet any New York Yankees fan can eloquently articulate the dismay and emotional anguish he would suffer if the "Bronx Bombers" were moved to somewhere in the Midwest. In short, there are sound policy reasons for limiting franchise movement.

It seems, therefore, that a legislative exemption may be a reasonable alternative to a simple invalidation of relocation restrictions. More than once the Supreme Court has invited Congress to alter antitrust principles legislatively when the Court's attempts to preserve consistency and certainty have yielded arguably undesirable results.[380] In some cases, Con-

378. *See* Handler & Lazaroff, *supra* note 91, at 754.

379. *Id.* at 755. This presents an especially difficult problem in the context of rule of reason analysis of sports franchise relocation restrictions. How can the anticompetitive effects on fans and stadium operators be quantified and weighed with any degree of certainty against the alleged procompetitive benefits to be derived by leagues in relation to other forms of entertainment?

380. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 354-55 (1982) (Congress should reconsider per se rule when conduct has procompetitive effect); Na-

gress has responded by creating exemptions for certain industries,[381] and such legislative proposals have been suggested for sports franchise relocation restrictions.[382] Certainly a flat exemption for franchise relocation restraints would obviate the need for protracted litigation and would create considerable certainty. It would also allow sports fanatics to rest more comfortably, secure in the belief that today's Los Angeles Lakers will not tomorrow be the Oshkosh Lakers.[383]

The problem with a blanket exemption, however, is that it would protect, with no quid pro quo, behavior that is anticompetitive and contrary to prevailing antitrust policy. Thus, a middle ground must be found between strict section 1 enforcement and absolute exemption. Given the current deregulation environment in the United States,[384] the following proposal is offered with some trepidation. Nonetheless, it appears to be the best way to balance the competing public interest and antitrust policies. In short, it seems appropriate to permit restraints on sports franchise movement, but only in conjunction with administrative oversight to ensure that all relevant interests are protected. A blanket exemption would allow league members to pursue solely their own economic self-interest in making joint decisions about franchise locations. Use of an administrative agency to review franchise relocation requests on the other hand, would permit an objective and neutral body to consider not

tional Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-90 (1978) (exemptions for monopolies with "special characteristics" better addressed by Congress); United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972) (if Congress determines predictability unimportant then it can make per se rules inapplicable in some cases); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940) (any change in Sherman Act must be made by Congress); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) (court should not adopt uncertain test in "absence of express legislation").

381. *See, e.g.*, Newspaper Preservation Act, Pub. L. No. 91-353, §§ 1-5, 84 Stat. 466, 466-67 (1970) (codified at 15 U.S.C. §§ 1801-1804 (1982)) (newspaper joint operating agreements); McCarron-Ferguson Act, ch. 20, §§ 1-5, 59 Stat. 33, 33-34 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1982)) (insurance); Copper-Volstead Act, ch. 57, §§ 1-2, 42 Stat. 388, 388-89 (1922) (codified at 7 U.S.C. §§ 291-292 (1982)) (agricultural cooperatives); Reed-Bulwinkle Act, ch. 104, § 5, 24 Stat. 379, 380 (1887) (codified as amended at 49 U.S.C. § 10706 (1982)) (rail and motor carrier rate-fixing bureaus).

382. *See, e.g.*, S. 1078, 98th Cong., 1st Sess. (1983) (Major League Team Franchise Stability Act of 1983 to establish standards for determining when a team may move, including a requirement of a one year notice to local government); H.R. 3841, 98th Cong., 1st Sess. (1983) (same); S. 1036, 98th Cong., 1st Sess. (1983) (Sports Community Protection and Stability Act of 1983 to grant limited antitrust exemption to professional leagues to permit franchise relocation restraints); H.R. 2041, 98th Cong., 1st Sess. (1983) (same).

383. Loyalty to sports as a diversion requires no citation of authority. As the late Chief Justice Earl Warren said: "I always turn to the sports page first. The sports page records people's accomplishments; the front page nothing but man's failure." A. Lewis, The Quotable Quotations Book 262 (1980).

384. A number of industries have been the subject of deregulation statutes in recent years. *See, e.g.*, Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; National Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

only the economic interests of the league and its members, but also the economic interests of the businesses affected by a decision to relocate and the less tangible interests of sports consumers.

Although extension of direct government regulation may be anathema to free market supporters, it should be noted that professional sports might well be characterized as sufficiently affected with a public interest to warrant regulation.[385] In some cases, when only one team can be economically supported by a community, a natural monopoly justifying government intervention may be present.[386] In any case, under circumstances in which league members suggest that ordinary rules of competition are inappropriate, it seems logical that the government or some third party should function as a regulator of potential abuses if antitrust immunity is to be provided.[387]

Assuming that government regulation is desirable in this area, the problem that remains is determining the scope of the delegation and the standards to be employed. One approach might simply be to allow the agency to act in a manner consistent with "public convenience and necessity" or "the public interest." The agency would then be permitted to flesh out the factors that would be relevant in any particular relocation case. Alternatively, a statute could articulate a laundry list of factors to be considered, including the financial need for the move, the economic impact of a move on both the current home city and the proposed site, the extent of fan support in the current location and the length of time spent in that location by the team, as well as any other relevant criteria. Any attempt to create an exhaustive list of all criteria would be difficult and the appropriate agency could probably develop additional criteria as its experience grew.

One recent legislative proposal takes a significant step in the direction

385. *See* D. Boies & P. Verkuil, Public Control of Business §§ 109-117, at 35-55 (1977). Indeed, the City of Oakland is attempting to use eminent domain as a means of getting the Los Angeles Raiders back to Oakland. The California Supreme Court has indicated that if the condemnation is for a valid public purpose, use of eminent domain power may be appropriate. City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 76, 646 P.2d 835, 845, 183 Cal. Rptr. 673, 683 (1982) (en banc). After a remand to the trial court and a dismissal of the City's complaint, the California Court of Appeal reversed and remanded and directed the trial court to determine whether the condemnation was for a public use. City of Oakland v. Superior Court, 84 Daily Journal D.A.R. 84 (Cal. Ct. App. 1984). Just recently, the trial court again found no basis for the use of eminent domain. L.A. Times, July 18, 1984, § II, at 1, col. 1. An eminent domain proceeding is also going forward in Baltimore regarding the Colts' move to Indianapolis.

386. A natural monopoly is typically defined as an industry in which the long run unit cost function declines continuously out to a scale of output that saturates potential market demand. *See* D. Boies & P. Verkuil, *supra* note 385, § 105, at 25-31. Stated simply, it is more efficient in such circumstances for one firm to provide all supply; the government then restricts entry and regulates the natural monopoly to prevent abuse of market power. The natural monopoly characterization for professional sports teams has been suggested. *See* J. Weistart & C. Lowell, *supra* note 13, § 5.11, at 725-26.

387. For an endorsement of the neutral third party approach, see Kurlantzick, *supra* note 13, at 207.

of this suggested approach. Senator Gorton's "Professional Sports Team Community Protection Act"[388] is designed to provide a right of first refusal to a metropolitan area before a professional sports franchise is moved. Interestingly, the findings and policy section of the bill indicates that sports franchises "achieve a strong local identity with the people of the community in which they play, and provide a source of pride and entertainment to their supporters."[389] The bill also refers to the "strong public interest"[390] in teams and recognizes that owners will often seek relocation solely for their own benefit and financial gain.[391] No attempt is made to limit justification for relocation restrictions to purely antitrust concerns. Rather, the bill recognizes the broader social significance of sports teams and integrates values that go well beyond the limits of permissible antitrust inquiry. The bill specifies the factors to be considered for relocation of sports franchises, citing, for example, a manifestly inadequate stadium,[392] or significant operating losses.[393] Further, the bill would require team owners desiring to relocate, or to sell to someone who would relocate, to furnish notice and reasons for relocation and to provide an opportunity for a local purchaser to buy for equal value.[394] The bill would also create an arbitration board to hear disputes and to resolve issues arising under the substantive provisions of the bill.[395] In sum, this legislative proposal boldly acknowledges the social and economic importance of professional sports teams to communities and essentially gives cities a vested right to keep such teams subject to defeasance on the occurrence of certain contingencies. If enacted, this bill might both permit and prevent certain relocations irrespective of their ultimate effect upon competition in some well-defined market.

The proposal of this Article is not likely to be popular with team owners. Yet it seems that merely allowing them, unilaterally and without guidelines, to determine whether to permit team movement will not suf-

388. S. 287, 99th Cong., 1st Sess., 131 Cong. Rec. S663 (daily ed. Jan. 24, 1985). Prompted by the threatened move of the NFL's Philadelphia Eagles to Phoenix, Pennyslvania Senator Arlen Specter recently introduced the Professional Football Stabilization Act of 1985. *See* S. 172, 99th Cong., 1st Sess., 131 Cong. Rec. S282 (daily ed. Jan. 3, 1985). The bill would bar relocation of professional football teams unless they can prove financial hardship or stadium inadequacy. *See id.* § 4, 131 Cong Rec. at S285. Other legislation has recently been proposed to protect communities with professional sports franchises. *See, e.g.*, S. 298, 99th Cong., 1st Sess., 131 Cong. Rec. S682 (daily ed. Jan. 24, 1985) (to immunize from antitrust laws league rules preventing franchise relocations); S. 259, 99th Cong., 1st Sess., 131 Cong. Rec. S468 (daily ed. Jan. 22, 1985) (to allow leagues to block relocation after consideration of community's interests and team's reasons).

389. S. 287 § 101(a)(1), 99th Cong., 1st Sess., 131 Cong. Rec. S663, S665 (daily ed. Jan. 24, 1985).

390. *Id.* § 101(a)(2), 131 Cong. Rec. at S665.

391. *See id.* § 101(a)(6), 131 Cong. Rec. at S665.

392. *Id.* § 104(b)(1), 131 Cong. Rec. at S666.

393. *Id.* § 104(b)(5), 131 Cong. at S666.

394. *Id.* §§ 105, 107(b), 131 Cong. Rec. at S666.

395. *Id.* § 106, 131 Cong. Rec. at S666.

fice to ensure that all important interests are represented in the decision-making process. Administrative hearings that will permit the introduction of evidence extending beyond traditional antitrust issues will facilitate a broad consideration of all factors and inject an objective tribunal into the process. This seems to be an alternative preferable to allowing teams to reach decisions about franchise relocation without considering the fans and others who depend on their home team for both economic and noneconomic benefits. This approach candidly admits that although competition may be the only goal of antitrust law, unrestricted competition may not always yield the desired result even in a capitalistic society. Departures from the economic norm are occasionally required to achieve socially as well as economically sound results. Rather than distort antitrust principles to reach a particular result, a legislative solution seems more appropriate.

CONCLUSION

The franchise relocation restriction undoubtedly presents issues of great importance to antitrust lawyers and scholars. It appears that claims for single entity status for professional sports teams in leagues should fail and that section 1 of the Sherman Act should apply to relocation cases. Nothing in the Supreme Court's recent decision in *Copperweld Corp. v. Independence Tube Corp.*[396] suggests anything to the contrary. It further appears that under either a per se or rule of reason approach, relocation restrictions imposed by league members when substantial market power exists will violate section 1. This conclusion is buttressed by the Supreme Court's decision in *National Collegiate Athletic Association v. Board of Regents*[397] and by the Ninth Circuit's decision in *Los Angeles Memorial Coliseum Commission v. National Football League.*[398] These decisions support the use of a rule of reason approach for restraints ancillary to joint ventures, a development of importance for all businesses where competitors might cooperate. In light of these recent cases, this Article suggests a legislative solution that would do more to consider the various interests at stake than would a simple antitrust exemption. Instead, the local community interest in keeping or acquiring a team would be carefully considered along with various other factors, in order to protect all interested groups when franchise relocation issues arise.

396. 104 S. Ct. 2731 (1984).
397. 104 S. Ct. 2948 (1984).
398. 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984).