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Kenneth L. Shropshire

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# OPPORTUNISTIC SPORTS FRANCHISE RELOCATIONS: CAN PUNITIVE DAMAGES IN ACTIONS BASED UPON CONTRACT STRIKE A BALANCE?

*Kenneth L. Shropshire\**

## I. INTRODUCTION

Professional sports leagues were established to privately govern the major sports in the United States.<sup>1</sup> The individual team franchises involved in each major sport have combined to establish these entities to direct the financial success of their particular sport.<sup>2</sup> To obtain a franchise in a professional league, the individual owners must contractually agree to be controlled by the constitution and by-laws of that league.<sup>3</sup> The cooperation required under these league rules is often recognized as an important factor in bringing about the financial success of professional sports leagues.<sup>4</sup>

Recent Ninth Circuit opinions concerning the right of a franchise to move from its present home territory to another, coupled with "opportunism"<sup>5</sup> on the part of individual franchises, have eroded an important

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\* Assistant Professor, Department of Legal Studies, Wharton School of the University of Pennsylvania. A.B., Stanford University, 1977, J.D., Columbia University School of Law, 1980. The author gratefully acknowledges Emeritus Professor Frederick G. Kempin, Jr. of the Wharton School for his helpful comments on an earlier draft of this article, and University of Pennsylvania law student Gloria Johnson (Class of 1987), who rendered invaluable research assistance.

1. R. BERRY & G. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 1-4 (1986). The major sports leagues are: the National Football League (NFL); National Basketball Association (NBA); National Hockey League (NHL); and Major League Baseball (MLB). *See id.* at 3.

2. *Id.*

3. *See, e.g.*, N.F.L. CONST. & BY-LAWS art. III (1986) (football); Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (N.D. Ga. 1977) (baseball); Riko Enters. v. Seattle Supersonics Corp., 357 F. Supp. 521, 524 (S.D.N.Y. 1973) (basketball); *see also* J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 3.15, at 307-11 (1979) ("For the purpose of analyzing most private law issues, it can be said that the basic relationship between clubs within a league is one of contract.") *Id.* at 307.

4. *See* R. BERRY & G. WONG, *supra* note 1, at 40 wherein the authors state that: "The four major team sports—football, baseball, basketball, and hockey—gross combined revenues in excess of \$1 billion per year."

5. The leading "opportunistic" case is National Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir.), *cert. dismissed*, 108 S. Ct. 362 (1987) [hereinafter *Clippers*]; *see*

facet of league governance: the right of a league to determine the home territory or city of a member franchise. In recent years, this problem has affected baseball,<sup>6</sup> football,<sup>7</sup> basketball<sup>8</sup> and hockey.<sup>9</sup> In the long run, a loss of league control over franchise relocations could affect league operations and profits.<sup>10</sup>

The constitutions and by-laws of all leagues require a franchise to obtain league permission before moving.<sup>11</sup> The league decides whether to

also Gray, *Section 1 of the Sherman Act and Control Over NFL Franchise Locations*, 25 AM. BUS. L.J. 123 (1987). The term "opportunism" is often used by economists to identify unethical or crafty behavior. Professor Oliver Williamson defined it as "self interest seeking with guile." O. WILLIAMSON, *MARKETS AND HIERARCHIES* 26 (1975).

6. See Wong, *Of Franchise Relocation, Expansion and Competition in Professional Team Sports: The Ultimate Political Football?*, 9 SETON HALL LEGIS. J. 7, 27 (1985).

7. *Id.*

8. *Id.*

9. *Id.*

10. See *infra* notes 138-65 and accompanying text.

11. League guidelines regarding relocations have become more extensive as courts have continued to clarify what is permissible. The relevant NFL provision states in pertinent part:

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

NFL CONST. & BY-LAWS art. IV § 4.3 (1982).

In December of 1984, the NFL introduced an "objective" standard for evaluating proposed franchise relocations. Professor Gray reports that the memorandum issued to NFL team presidents stated the following:

The procedures implemented by the NFL require written notice, accompanied by a statement of reasons, to the League by January 15th of the year of the proposed relocation and provide to the team seeking relocation a full opportunity to present its request directly to the NFL owners. An affirmative vote of three-fourths of current owners is still required for league approval.

The statement of reasons must include the following information: a comparison of team revenues with the league averages and medians; a comparison of past and projected stadium revenues at the existing and proposed locations; audited annual financial and profit and loss statements for the last four seasons; operations of other professional and college sports in the existing and proposed locations; effects of the relocation on scheduling patterns, travel requirements of other teams, divisional alignments, traditional rivalries, TV patterns and interest, quality of stadium facilities, and the perception of fans and the general public; copies of current stadium lease and other current agreements regarding concessions, luxury boxes, scoreboard advertising, parking, and practice facilities; an assessment of the suitability of the existing stadium, cost of and prospects for improvement, and status of negotiations to achieve changes; financial analysis of projected lease and other arrangements in proposed locations as compared with those in the existing location; and budget projections for the first three years in the new location.

See Gray, *supra* note 5, at 141-42 (citing NFL Memorandum to NFL Presidents, n.62, Dec. 21, 1984); see also Wong, *supra* note 6, at 55 n.195 (citing *NFL in New Policy*, N.Y. Times, Dec. 30, 1984 § 5, at 1, col. 1). Prior to the initial decision in the Raiders' litigation, *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) [hereinafter *Raiders I*], the NBA Constitution contained no

permit a move based on the best interests of all the league member-franchises.<sup>12</sup>

Initially, when leagues acted aggressively to bar relocations, courts supported their actions.<sup>13</sup> In recent years, however, the leagues have been unsuccessful when a franchise has challenged a league denial of a relocation request.<sup>14</sup> In fact, leagues have become so frustrated that when the National Football League owners voted to allow the Cardinals franchise to move from St. Louis to Phoenix, one owner was prompted to remark, "[t]his move isn't our doing . . . [t]he free agency occurred in court . . ."<sup>15</sup> The "free agency" that the owner referred to was not the right of star athletes to play for the highest bidder but that of a sports franchise to move to the city that guaranteed it the highest revenues.<sup>16</sup>

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objective standards. NBA CONST. & BY-LAWS art. IX, (as in effect at the commencement of the 1984-85 season, Oct. 26, 1984). The rule provided:

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

*Id.* Today, the same rule in the NBA Constitution includes the relocation guidelines developed in the *Raiders* litigation. See NBA CONST. & BY-LAWS art. 9A, cited in Wong, *supra* note 6, at 55 n.198.

The leagues know best how to regulate themselves. This is reflected not only from the necessity of working together to produce a "product," but also from the public relations standpoint of continuing to market the product to municipalities and fans. The leagues obviously strive to increase the value of the product or to maintain it at the highest possible level. See Noll, *The Economics of Sports Leagues*, Stanford University Discussion Paper No. 141, at 33 (1987) (regarding overall league decisions concerning the location of franchises, "[t]he distribution of teams through the country affects the national popularity of a sport, particularly its television ratings, and hence the value of national broadcasting rights to all members.").

Congress has been reluctant to pass legislation that would exempt sports from antitrust scrutiny regarding this single relocation issue. Commentators have noted that in all likelihood, "Congress will at length do nothing and leave the disposition of the antitrust problems to the courts under existing law." R. BERRY, W. GOULD & P. STAUDOHAR, *LABOR RELATIONS IN PROFESSIONAL SPORTS* 255-56 (1986). However, with the Supreme Court's denial of certiorari in the *Raiders*' litigation, and the settlement of the Los Angeles Clippers' litigation, many are looking once again to Congress for relocation guidelines. Sports Indus. News, Oct. 9, 1987, at 314.

12. See *supra* note 11.

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

14. See cases cited *infra* note 19 and accompanying text.

15. The team owner made this statement in reference to the confusion caused by court decisions in this area and the owners' fear of a major antitrust damage award against them. Eskenazi, *N.F.L. Votes to Approve Cardinals' Move West*, N.Y. Times, March 16, 1988, at B9, col. 3.

The NFL begrudgingly granted the Cardinals football franchise the right to relocate to Phoenix, Arizona from St. Louis, Missouri, with 26 owners voting in favor of the relocation, none opposed, and 2 abstaining. *Id.*

16. The Philadelphia Eagles franchise is an example of the type of profitable arrangement

"The recent phenomenon of the relocation of sports franchises to different cities" is known as "franchise free agency."<sup>17</sup>

One element responsible for sports franchise free agency is the fear of large antitrust damage awards being levied against sports leagues under the Sherman Act.<sup>18</sup> In *Los Angeles Memorial Coliseum Commission v. National Football League*,<sup>19</sup> the most celebrated sports franchise relocation case, the Ninth Circuit granted a multi-million dollar treble damage award to the Los Angeles Raiders franchise after determining that the League's decision not to allow the franchise to relocate was unreasonable and, therefore, violated the antitrust laws.<sup>20</sup>

If the value of all franchise locations were equal, league governance would not be so problematic. However, of the approximately two dozen professional franchise locations in this country, some are clearly more profitable than others.<sup>21</sup> The factors affecting the revenue potential of a location are numerous. They include: the size of the stadium and, thus, potential ticket revenues; the terms of the stadium lease agreement; and the local television and radio market value.<sup>22</sup>

Attractive profit potential in other municipalities has caused some

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that can be negotiated. By threatening to relocate the franchise to Phoenix, Arizona, the organization negotiated a lease with the city of Philadelphia in 1984 running through 2011, including a ten-year rent deferral. *Tose Will Keep Eagles in Philadelphia*, Asbury Park (N.J.) Press, Dec. 16, 1984, at 1C, col. 2.

Lease arrangements in professional sports vary widely. In fact, municipalities often sacrifice millions in rental income in order to lure or retain a franchise. This type of arrangement has been referred to as the "superstadium game." See D. HARRIS, *THE LEAGUE: THE RISE AND DECLINE OF THE NFL* 24-25 (1986). The concept basically requires a team owner to play different stadium authorities against each other in order to bid down the cost of leasing a facility. Other prerequisites have included the building of stadiums to attract new franchises. See Sports Indus. News, Oct. 9, 1987, at 318 (\$7 million in stadium improvements needed to attract baseball expansion franchise); *Jacksonville Scouted*, N.Y. Times, Oct. 15, 1987, at 18B, col. 2 (Jacksonville offers \$125.8 million package to Houston Franchise of National Football League); see also Attmer, *The Battle of Baltimore*, The Sporting News, Sept. 28, 1987, at 9; Stellino, *The Stadium Game: NFL's New Lure*, The Sporting News, Aug. 10, 1987, at 44 (Atlanta and Houston franchises of the NFL using offers from Jacksonville, Florida officials as leverage in their respective stadium lease negotiations).

17. See G. UBERSTINE, *COVERING ALL THE BASES: A COMPREHENSIVE RESEARCH GUIDE TO SPORTS LAW* 221 (1985).

18. 15 U.S.C. § 1 (1982). The Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal" and is a felony punishable by fine and/or imprisonment. *Id.*

19. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); see also *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 92 (1987) [hereinafter *Raiders II*].

20. *Raiders I*, 726 F.2d at 1401.

21. See *infra* note 77 and accompanying text.

22. See Noll, *supra* note 11, at 30.

franchises to contemplate breaking, and others to actually break, league relocation rules.<sup>23</sup> One franchise, the National Basketball Association's Clippers, did not even seek the permission allegedly required by the NBA's rules—it simply moved from San Diego to Los Angeles.<sup>24</sup> The litigation that arose after the Clippers' move gave sports franchises an even clearer perspective on their right to circumvent league governance.<sup>25</sup>

Case law maintains that if a franchise relocates without first obtaining league permission, the franchise is only required to compensate the league for the difference in the estimated fair market value of the franchise expansion opportunity taken, less the estimated fair market value of the franchise location abandoned by the relocating franchise.<sup>26</sup> In other words, an individual franchise may act opportunistically by making an economic assessment of a relocation opportunity without regard to the desires or the best interests of the league as a whole.<sup>27</sup> This sort of individual action appears to contradict the traditional, as well as successful, financial operation of professional sports leagues.<sup>28</sup> The individual leagues have rules in place that when applied objectively should

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23. See *supra* text accompanying notes 16 & 19; see, e.g., *Clippers*, 815 F.2d at 564-65.

24. *Id.* at 564.

25. *Id.* at 565. The court stated that a league's rules that require relocations by individual member franchises do not automatically violate antitrust laws. *Id.* at 567-68. The court did state, however, that relocation actions must be assessed under a rule of reason analysis. *Id.* at 567. See *infra* text accompanying notes 89-123 for a discussion of the *Clippers* litigation.

26. See *Raiders II*, 791 F.2d at 1371-74.

27. See, e.g., *Raiders I*, 726 F.2d at 1395-96; *Clippers*, 815 F.2d at 568-69.

28. Franchises of the National Football League reportedly share 97% of their revenues. *Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before the Senate Comm. on Judiciary*, 97th Cong., 2d Sess. at 43-44 (1982). According to National Football League Commissioner Pete Rozelle,

[T]here are forms of revenue sharing, not all of it equal. The television [revenue] . . . is shared equally . . . . On the gate, you keep 60 percent when you play at home; the visitor gets 40 percent. The clubs have their own local radio rights and preseason television rights . . . . Our marketing income is shared from our film company and from our NFL properties [which include a] merchandising and publishing entity. So, 97 percent of it [revenue] is shared, not all equally, but a great preponderance of it equally.

*Id.* Others have cited the importance of these revenue sharing provisions, particularly to the survival of franchises in smaller media markets. See Morris, *In the Wake of The Flood*, 38 LAW & CONTEMP. PROBS. 85, 95 (1973). For an economic analysis, see Quirk & El Hodiri, *The Economic Theory of a Professional Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS 33, 34 (R. Noll ed. 1974). Regarding the sharing of revenues in other leagues, see R. BERRY, W. GOULD & P. STAUDOHAR, *supra* note 11. A key element in motivating opportunistic relocations are those location-based revenues that are not shared equally. In all sports other than football, gate receipts are the largest source of income. These ticket sales and concession revenues can cause a variation in revenues among teams, and make another location look more attractive to an individual franchise. Noll, *supra* note 11, at 30.

serve the best interests of all league members.<sup>29</sup>

As this Article discusses, the Ninth Circuit litigation involving the Los Angeles Raiders has had a "chilling effect" on league governance.<sup>30</sup> The subsequent Clippers litigation did nothing to improve a league's ability to govern itself.<sup>31</sup> This Article examines how the current status of the law allows individual franchises to circumvent the league constitutions and by-laws.<sup>32</sup> In examining the franchise-league relationship, the Article concludes that past court decisions citing the deep financial interdependence of the parties indicate that the league-franchise relationship is fiduciary in nature.<sup>33</sup> This fiduciary relationship arises because each party depends on the other for financial success. Obviously, cooperation is needed on the most basic level, from scheduling to determining how revenues should be shared.<sup>34</sup>

When a fiduciary relationship exists, certain rights and remedies are available by law.<sup>35</sup> One remedy that is becoming increasingly available for contract breaches involving fiduciary relationships is punitive damages.<sup>36</sup> This Article examines the role that punitive damages may play in deterring franchise free agency and the opportunistic takings of league-developed geographic franchise opportunities.<sup>37</sup> Just as the punitive portion of treble damages in antitrust actions has had a chilling effect on league actions denying franchise relocation requests, punitive damages flowing from a franchise's breach of contract may serve to bar opportunistic takings by individual league members.<sup>38</sup>

Part I of this Article reviews the leading sports franchise relocation cases as a framework for analysis. Part II briefly reviews the effect of these cases on leagues and franchises. Part III examines damages as a deterrent to opportunistic franchise relocations. The initial discussion in Part III attempts to establish that, at a minimum, a league has a right to be compensated for the geographic location taken. Generally, theories associated with usurpation of a partnership opportunity are used to illus-

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29. See *infra* notes 138-65 and accompanying text.

30. *Raiders II*, 791 F.2d at 1371-74; see also *infra* notes 35-80 and accompanying text.

31. *Clippers*, 815 F.2d at 568-70; see also *infra* notes 89-123 and accompanying text.

32. See *infra* notes 124-37 and accompanying text.

33. See *infra* notes 138-65 and accompanying text. A fiduciary is defined as "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires." BLACK'S LAW DICTIONARY 563 (5th ed. 1979).

34. See R. BERRY & G. WONG, *supra* note 1, at 1-4.

35. See *infra* notes 166-222 and accompanying text.

36. See Sebert, *infra* note 175, at 1600-29; see also *infra* text accompanying note 52.

37. See *infra* notes 59-63 and accompanying text.

38. *Id.*

trate this. The section then discusses why expanding the availability of punitive damages into litigation involving leagues and franchises would deter opportunistic franchise relocations. Part IV discusses a franchise relocation hypothetical applying some of the principles previously set forth.

## II. CURRENT STATE OF THE LAW

### A. Raiders I and II: *Unreasonable Denials of Relocation Requests*

In general, when an owner of a professional sports team obtains or is granted a franchise within a league, that owner is required to pay a franchise fee and must agree to abide by league rules.<sup>39</sup> In exchange, the franchisee generally receives a non-assignable, exclusive home territory, one vote on the league decision-making board and a share of the league revenues.<sup>40</sup>

In the leading sports franchise relocation case, *Los Angeles Memorial Coliseum Commission v. National Football League*,<sup>41</sup> involving the now Los Angeles Raiders and the National Football League, the managing partner of the then-Oakland Raiders, Al Davis, made a modern-day business decision that his franchise would have more economic success in the Los Angeles market than in Oakland.<sup>42</sup> In 1978, the Los Angeles Rams franchise moved to Anaheim, a city approximately fifty miles

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39. See NFL CONST. & BY-LAWS art. III-V.

40. *Id.*

41. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

42. *Id.* at 1384. The relocation of sports franchises is not a recent phenomenon. Relocation of franchises occurred frequently in the early days of both professional football and basketball. As one author notes:

Contrary to popular belief, the movement of franchises is not something that began in the 1950's. . . . Cities won and lost teams as rival leagues in those sports warred. Large and medium-size cities such as Boston, Chicago, Cleveland, Denver, St. Louis and Toronto were affected, as were smaller communities such as Anderson, Oshkosh, Sheboygan, and Waterloo.

Johnson, *Municipal Administration and the Sports Franchise Relocation Issue*, PUB. ADMIN. REV. 519 (Nov./Dec. 1983); see also Wong, *supra* note 6, at 22.

These early moves occurred primarily for economic reasons. Teams moved because of either unstable financial conditions or to join a new league. *Id.* at 24. A new era began in 1958 when both the Brooklyn Dodgers and the New York Giants moved west to Los Angeles and San Francisco respectively. Neither of these franchises relocated because of unstable financial conditions or to join a new league. When these franchises departed New York, both were doing quite well financially. *Id.* at 24-25. These franchises moved, in large part, because their owners determined that relocating would allow them even greater prosperity. As one commentator observed, "the franchise relocation issue had developed a new dimension—a move based on economic and business advantages of the new location and not the economic failures of the previous location." *Id.* at 25. Other commentators have characterized these moves as "opportunistic" franchise relocations. See Gray, *supra* note 5 at 124 n.6. We have since seen a



south of Los Angeles. This left a vacancy in one of the most profitable NFL markets.<sup>43</sup>

The desire to relocate the Raiders to Los Angeles was not Davis' alone. The Los Angeles Memorial Coliseum Commission (LAMCC), which managed the facility that the Rams had vacated, wanted to obtain a new tenant. In fact, the initial legal action in this relocation saga was instituted by the LAMCC when it sought an injunction in federal court to prevent the NFL from blocking a move by the Raiders to Los Angeles.<sup>44</sup>

The major barrier to relocation was NFL rule 4.3.<sup>45</sup> That provision of the NFL Constitution requires three-fourths of the League's clubs to approve a franchise relocation to a municipality that has an existing NFL franchise.<sup>46</sup> The initial LAMCC action sought, essentially, to invalidate rule 4.3. LAMCC contended that rule 4.3 constituted a "contract" that violated the Sherman Act.<sup>47</sup>

In initial interpretations of the Sherman Act, courts determined that a blanket ban on "every" contract that restrained trade in any way was inappropriate and not what Congress had intended in passing the Act.<sup>48</sup>

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number of relocations, both contested and uncontested by their respective leagues, for reasons other than financial problems or the formation of new leagues.

Although relocation is not new, litigation over such moves is a fairly recent phenomenon. *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974), was the first relocation litigation. Interestingly, it too involved a California-based franchise, the National Hockey League San Francisco Seals.

In *San Francisco Seals*, the San Francisco franchise of the NHL desired to relocate to Vancouver, Canada. A private antitrust action was brought by the San Francisco Seals owner against the NHL and all other member clubs for barring their relocation to Vancouver. *Id.* at 967.

The court viewed as a key issue whether the member clubs competed on an economic basis. The absence of economic competition indicates a single entity; without a duality of actors there can be no violation of the antitrust laws. *Id.* at 969. Not only was *San Francisco Seals* a case of first impression, but it was also unique because it was one of the few times that the "single entity" argument was successful in a sports antitrust action. Another instance in which the argument was successful at the district court level was *NASL v. NFL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *rev'd*, 670 F.2d 1429 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). In *San Francisco Seals*, the court did not allow the franchise to relocate to Vancouver. *San Francisco Seals*, 379 F. Supp. at 967-71.

43. Cardozo & Mishkin, *Does a League Have the Right to Determine Where Teams Play?*, Nat'l L.J., Nov. 30, 1987 at 24, col. 1.

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

45. NFL CONST. & BY-LAWS art. IV § 4.3 (1982). See *supra* note 11 for text and discussion of Rule 4.3.

46. *Id.*

47. 15 U.S.C. § 1 (1982).

48. See, e.g., *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911). Although the application of the rule of reason to the regulation of sports franchise relocations has not always been clear, the Ninth Circuit has added a degree of finality in this area. With the

Therefore, the courts adopted a "rule of reason" which typically requires a court to determine whether the agreement in question causes an unreasonable restraint on competition based on the circumstances of the case.<sup>49</sup>

The district court denied the initial injunction sought by LAMCC because at the time the action was brought, the move by the Raiders, or any other franchise, was not yet near fruition.<sup>50</sup> Subsequently, LAMCC returned to court when the Raiders' move to Los Angeles appeared probable.<sup>51</sup> In that action, the court granted LAMCC an injunction barring the NFL from asserting rule 4.3 to prevent the Raiders from moving to

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*Raiders* decisions, the rules regarding franchise relocations in the NFL and the NBA are, at least on their face, valid. *Raiders I*, 726 F.2d at 1390-98, *Raiders II*, 791 F.2d at 1363-65. The Ninth Circuit added, however, that scrutiny of the application of these league rules to specific relocations is appropriate. *Raiders I*, 726 F.2d at 1394-98. This result follows from the court's holding that a sports league, for antitrust analysis, is not a single entity and therefore is subject to antitrust scrutiny. *See id.* at 1387-90. Courts have recognized the need for some concerted action between the individual franchises within a league in order to insure efficient and profitable operation for the entire league. At the same time, however, courts are convinced that the franchises operate in an economic manner separate enough to be scrutinized to insure only a necessary level of concerted action. Presently, a sports league is not considered to be a single entity for antitrust purposes.

Senator Arlen Specter introduced the Professional Sports Community Protection Act of 1987, which provided a set of objective relocation guidelines. S. 782, 100th Cong., 1st Sess. (1987). In introducing his compromise legislation, Senator Specter stated: "I urge my colleagues to join me in supporting a compromise proposal now, when there are no proposed relocations pending or under discussion, and we are thus free to approach the issue objectively." 133 CONG. REC. S3511 (daily ed. Mar. 19, 1987) (statement of Sen. Specter). The bill represents a compromise of earlier legislative proposals. For discussions of earlier legislative proposals, *see generally* Gray, *supra* note 5; Note, *Professional Sports Team Relocations: The Oakland Raider's Antitrust Case and Beyond*, 17 RUTGERS L.J. 283 (1986); Wong, *supra* note 6.

Even a league commissioner, basketball's David Stern, has rejected a complete antitrust exemption as the solution. In qualifying this view, he stated: "I think that the professional sports leagues can be properly regulated by the antitrust laws . . . if the actual business of the sports league is properly understood by the courts." *Interview with David Stern, NBA Commissioner*, 1 ANTITRUST 3, 24 (Summer 1987).

49. During initial applications of the Sherman Act, courts determined that a blanket ban on "every" contract that restrained trade in any way was inappropriate and surely not what Congress had intended; thus, a "rule of reason" was adopted. *See United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) (Sherman Act forbids all restraint of interstate commerce without exception); *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911) (Sherman Act should be construed in light of reason); *see also* Cardozo & Mishkin, *supra* note 43, at 24.

50. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 468 F. Supp. 154 (C.D. Cal. 1979), *rev'd*, 634 F.2d 1197 (9th Cir. 1980).

51. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 484 F. Supp. 1274 (C.D. Cal.), *rev'd*, 634 F.2d 1197 (9th Cir. 1980). At various times, LAMCC also deliberated regarding moves by the Minnesota Vikings, St. Louis Cardinals and Philadelphia Eagles. *See generally*, D. HARRIS, *supra* note 16.

Los Angeles.<sup>52</sup> The Ninth Circuit reversed, holding that LAMCC had not shown the probability of irreparable harm, which is a prerequisite to the granting of an injunction.<sup>53</sup>

Following protracted negotiations with LAMCC and the denial of permission to move by the NFL, Davis determined that it would be advantageous to enter into an agreement with LAMCC to move the Oakland Raiders to Los Angeles. On March 1, 1980, Davis, representing the Raiders' organization, signed a "Memorandum of Agreement" with LAMCC agreeing to terms for the Raiders' move to Los Angeles.<sup>54</sup> Nine days later, on March 10, 1980, the NFL owners voted twenty-two to zero, with five abstentions, to bar the Raiders' move to Los Angeles, pursuant to rule 4.3.<sup>55</sup>

Following the NFL's negative vote, LAMCC renewed its action against the NFL and its member clubs.<sup>56</sup> In addition, the Raiders cross-claimed and the team was aligned by the court as a plaintiff in the action.<sup>57</sup>

At the trial court level, the initial trial resulted in a hung jury and a mistrial.<sup>58</sup> The second trial resulted in a damage award of \$11.55 million to the Raiders for the antitrust violation, trebled to \$34.6 million pursuant to 15 U.S.C. section 15.<sup>59</sup> The trial court determined that the league was not a single entity and that by not allowing the Raiders to relocate the league had committed an antitrust violation.<sup>60</sup> The judge issued an injunction that, after two years of delay, allowed the Raiders to move to Los Angeles.<sup>61</sup> The Raiders were also awarded another \$11.55 million in actual contract damages for a breach by the NFL of the implied covenant of good faith and fair dealing.<sup>62</sup> LAMCC was awarded \$4.86 million for the antitrust violation to the stadium, trebled to \$14.6 million.<sup>63</sup>

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52. Los Angeles Memorial Coliseum Comm'n, 484 F. Supp. at 1278.

53. Los Angeles Memorial Coliseum Comm'n, 634 F.2d at 1203-04.

54. Davis signed the agreement and then proceeded to announce his intentions to move to Los Angeles in a March 3, 1980 meeting of the NFL owners. *Raiders I*, 726 F.2d at 1385. The ensuing lawsuits included an eminent domain action by the city of Oakland. See *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 606, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

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

56. *Id.*

57. *Id.*

58. *Id.*

59. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1359 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 92 (1987).

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

61. *Id.* at 1386.

62. *Id.*

63. *Id.*

### 1. *Raiders I*

The trial and the appeals were bifurcated, and the liability and damage issues were reviewed separately.<sup>64</sup> *Raiders I* focused on liability issues<sup>65</sup> whereas *Raiders II* focused on damages.<sup>66</sup>

In the initial liability portion of the appeal, the Ninth Circuit upheld the district court's decision that the NFL was not a single entity, and that application of the rule of reason in analyzing the antitrust issues was proper.<sup>67</sup> The court then confronted the issue of whether the rule requiring league permission to relocate, as applied, was unreasonable. The court of appeals affirmed the trial court's decision that the league had applied rule 4.3 to the Raiders in an unreasonable manner.<sup>68</sup>

Regarding NFL rule 4.3, the court stated that the guidelines must set forth standards that are clear, including a "procedural mechanism" for reviewing a franchise relocation request.<sup>69</sup> The court suggested that factors such as "population, economic projections, facilities, [and] regional balance" be considered when reviewing requests.<sup>70</sup> The court noted further that "fan loyalty and location continuity" should be considered.<sup>71</sup> In addition, the court noted that the league should provide the team desiring to relocate with procedures for presenting its case.<sup>72</sup>

### 2. *Raiders II*

In *Raiders II*, the final appeal in *Los Angeles Memorial Coliseum*

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64. *Id.*

65. *Id.* at 1385.

66. 791 F.2d 1356.

67. 726 F.2d at 1387.

68. *Id.* at 1390-98. The district court cited three reasons for holding that the NFL was not a single entity: first, the fear that declaring that the NFL was a single entity would impliedly grant the league blanket immunity from future antitrust actions; second, other entities that produced a product that was just as unitary as the NFL's had been found to violate the Sherman Act; third, that the argument of a single entity was based on a "false premise"—that the NFL member "clubs are not separate business entities whose products have an independent value." *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 519 F. Supp. 581, 583-84 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

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

70. *Id.*; see also, Kurlantzick, *Thoughts of Professional Sports and the Antitrust Laws*, 15 CONN. L. REV. 183, 206-07 (1983), suggesting more extensive guidelines including "population, income statistics, and the number of college teams in the area." Kurlantzick also notes that Major League Baseball will consider blocking a relocation only if the population of the city to which the team desires to relocate has a population of less than 2.4 million. *Id.* at 206; Major League Rule 1(c); Gray, *supra* note 5, at 140.

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

72. *Id.* Following *Raiders I*, both the NFL and the NBA issued new guidelines regarding relocations. They include the major factors suggested by the court. See, e.g., NBA CONST. & BY-LAWS art. 9A, *cited in* Wong, *supra* note 6, at 55 n.198.

*Commission v. National Football League*, the primary issue was whether the damage awards were appropriate.<sup>73</sup> Specifically, the court examined whether the trebled antitrust damage award of \$34.6 million to the Raiders should be offset by the value of the Los Angeles franchise opportunity received by the Raiders, minus the value of the vacated Oakland franchise location.<sup>74</sup> In addition, if offset was proper, the court had to decide whether the offset should occur before or after trebling of the damage award.<sup>75</sup> The court determined that offset was appropriate and should occur prior to trebling, thus reducing the size of the antitrust award.<sup>76</sup>

The other damage issue reviewed by the court of appeals was whether the trial court's award of damages to the Raiders for the league's breach of the implied covenant of good faith and fair dealing in contract was appropriate.<sup>77</sup> The court concluded that such damages were inappropriate since both parties had breached their duty to act in good faith.<sup>78</sup>

*a. antitrust offset*

In effect, offset before trebling would have reduced or completely nullified the \$11.55 million award that the Raiders won in the trial court. In testimony, Raiders owner Al Davis specifically stated that the net value of the Raiders franchise increased by \$25 million simply by moving to Los Angeles and surrendering the Oakland franchise.<sup>79</sup> If this is an accurate estimate, the Raiders may have been required to *pay* the NFL approximately \$13.5 million rather than recover damages. If the offset came after trebling, however, the Raiders damage award would still have been approximately \$9.5 million.

Regarding this dramatic difference, the court stated that, "assuming that their award of monetary damages will be wholly offset, there is nothing necessarily wrong with a 'damage assessment producing no net recovery.'"<sup>80</sup> Thus, the law is satisfied because an antitrust violation has been proved and the illegal activity enjoined.

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73. *Raiders II*, 791 F.2d at 1360.

74. *Id.* at 1366.

75. *Id.* at 1366-68.

76. *Id.* at 1374.

77. *Id.* at 1361; *see also infra* notes 85-88 and accompanying text.

78. *Id.* at 1361-63.

79. *Id.* at 1371.

80. *Id.* at 1374 (citing Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1136 (1976)).

*b. breach of the implied covenant of good faith and fair dealing*

California is one of a growing number of states that recognizes a tort cause of action known as the breach of the implied covenant of good faith and fair dealing. This covenant is implied in all contracts. The leading California case is *Seaman's Direct Buying Service v. Standard Oil of California*,<sup>81</sup> wherein the California Supreme Court stated "[i]t is well settled that, in California, the law implies in every contract a covenant of good faith and fair dealing."<sup>82</sup>

In *Raiders II*, the court stated that a plaintiff could not succeed in an action for breach of the covenant of good faith and fair dealing where both parties had acted in bad faith.<sup>83</sup> The court recognized elements of bad faith both in the league's denial of the Raiders' relocation request, as well as in the Raiders' notifying the NFL that the franchise had "officially and unilaterally moved" without league permission.<sup>84</sup> In holding that the jury was incorrect in its findings, the court drew an analogy with the standard equitable principles associated with the doctrine of unclean hands.<sup>85</sup> The court stated that the evidence presented permitted only one of two possible conclusions: that either both parties breached the covenant or neither did.<sup>86</sup> The court did not acknowledge the possibility that the NFL had alone breached, as the jury concluded. Therefore, the court ordered that on remand, the NFL motion for judgment notwithstanding the verdict should be reversed, and the award of \$11.55 million to the Raiders vacated.<sup>87</sup>

Although determined to be inapplicable in the *Raiders* case, this Article will show that the law regarding a breach of the covenant of good faith and fair dealing may play a key role in modern day opportunistic franchise relocations.<sup>88</sup>

*B. Clippers: Opportunistic Franchise Relocations*

The litigation revolving around the National Basketball Association Clippers' franchise move from San Diego to Los Angeles adds further judicial gloss to opportunistic sports franchise relocation law. The now Los Angeles Clippers have been one of the most mobile professional

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81. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

82. *Id.* at 768, 686 P.2d at 1166, 206 Cal. Rptr. at 362; see *infra* text accompanying notes 198-211.

83. *Raiders II*, 791 F.2d at 1361.

84. *Id.*

85. *Id.* at 1362-63.

86. *Id.* at 1361.

87. *Id.* at 1363.

88. See *infra* notes 198-211 and accompanying text.

sports franchises in the past two decades. The franchise originated as the Buffalo Braves, and was admitted into the NBA in 1970.<sup>89</sup> In a move that characterizes the restless personality of the franchise, the owner of the Boston Celtics, Irving Levin, traded that multiple NBA championship title winning Boston Celtics franchise for the Buffalo Braves in 1978, and proceeded to move the Buffalo Braves franchise to San Diego where the team was christened the "Clippers."<sup>90</sup>

Successful Beverly Hills attorney and real estate investor Donald Sterling subsequently obtained the San Diego Clippers franchise. After an unprofitable year of operation in San Diego, he tried to move the team to Los Angeles.<sup>91</sup> After some contemplation, and a suit filed by the NBA,<sup>92</sup> Sterling decided to remain in San Diego.

When Alan Rothenberg became president of the Clippers franchise, he noted that at the time there was "a feeling of despair, if not desperation, in San Diego, we couldn't give tickets away, we lost our television contract, [and] our radio broadcasts were tape-delayed."<sup>93</sup> With no financial improvement in sight and following the success of the Los Angeles Raiders in court, Rothenberg announced in a press conference on May 15, 1984 at the Los Angeles Sports Arena that the Clippers had moved their franchise to Los Angeles.<sup>94</sup> He stated that their games would be played in the Los Angeles Sports Arena, which, ironically, is a facility adjacent to the Los Angeles Memorial Coliseum and managed by LAMCC.<sup>95</sup> In addition, Rothenberg specifically stated that he did not foresee any legal problems, even though the Clippers had not sought league approval prior to the move, which the NBA alleged was required by the NBA Constitution.<sup>96</sup> Rothenberg stated, "I don't think the league's going to say no. In my opinion, the Raiders' decision has something to do with it."<sup>97</sup>

The NBA did not act immediately to bar the move, no doubt conscious of the recent multi-million dollar award in *Los Angeles Memorial Coliseum Commission v. National Football League*.<sup>98</sup> Instead, NBA

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89. Lancaster, *Hoop Headaches: L.A. Clippers Show Perils of Owning Pro Team*, Wall St. J., Apr. 17, 1987, § 2, at 18, col. 4.

90. *Id.*

91. *Id.*

92. National Basketball Ass'n v. SDC Basketball Club, Inc. [*Clippers*], 815 F.2d 562, 564 (9th Cir.), *cert. dismissed*, 108 S. Ct. 362 (1987).

93. Lancaster, *supra* note 89, § 2, at 18, col. 4.

94. *Clippers Moving to Los Angeles*, N.Y. Times, May 16, 1984, § II, at B12, col. 3.

95. *Id.*

96. *Id.*

97. *Id.*

98. 791 F.2d 1356 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 92 (1987).

Commissioner David Stern stated that the move would "be studied by a special committee" prior to the league taking any specific action.<sup>99</sup> The NBA even scheduled the Clippers' home games for the upcoming season in Los Angeles.<sup>100</sup>

On June 15, 1984 the NBA filed an action for a declaratory judgment in federal district court against the Clippers for relocating to Los Angeles from San Diego in violation of the NBA Constitution. In *National Basketball Association v. SDC Basketball Club*,<sup>101</sup> (*Clippers*), the NBA sought a declaratory judgment claiming that the NBA could consider a member-franchise's relocation without violating antitrust laws and that the NBA could impose a charge for the "unilateral usurpation of the 'franchise opportunity' available in the Los Angeles market."<sup>102</sup>

The Clippers cross-complained, contending that the league rules on relocation violated the Sherman Act.<sup>103</sup> In the voluminous action, several initial motions for summary judgment were denied.<sup>104</sup> Then, on the heels of the *Raiders I* decision, the court granted a motion by the Clippers to dismiss.<sup>105</sup> The district court judge did not write an opinion even though NBA counsel requested that he do so.<sup>106</sup> The judge stated only that the court of appeals for the Ninth Circuit would not heed what he had to say and that he could not "see spending my time . . . on this case without instruction from the circuit."<sup>107</sup>

On appeal, the case was reviewed by the Ninth Circuit,<sup>108</sup> the court that had reviewed the *Raiders*' cases. In its opinion, the court re-affirmed some of the statements it had made in *Raiders I* and *Raiders II*.<sup>109</sup> The court stated that a league's rules that regulate relocations by member franchises do not automatically violate the antitrust laws.<sup>110</sup> The court stated, however, that actions on relocations are subject to a Sherman Act rule of reason analysis.<sup>111</sup> No rule of reason analysis had been performed by the trial court.<sup>112</sup> The Ninth Circuit found that there were

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99. *Clippers Moving to Los Angeles*, *supra* note 94, § II, at B12, col. 3.

100. *Clippers*, 815 F.2d at 568.

101. 815 F.2d 562 (9th Cir. 1987).

102. *Id.* at 563.

103. 15 U.S.C. § 1 (1982); *see supra* note 18.

104. *Clippers*, 815 F.2d at 565.

105. *Id.*

106. *Id.* at 563.

107. *Id.* at 565.

108. *Id.* at 562.

109. *Id.* at 564.

110. *Id.* at 567-68.

111. *Id.* at 567.

112. *Id.* at 567-68.



outstanding questions of fact in the case and therefore reversed the summary judgment and remanded the case.<sup>113</sup>

The court then distinguished the application of the breach of the implied covenant of good faith and fair dealing at issue in this case from its application in *Raiders II*.<sup>114</sup> In *Raiders II*, the court had found that either both parties violated the covenant or that neither did.<sup>115</sup> In *Clippers*, the court noted that the factual circumstances surrounding the relocation differed markedly from that of the Raiders' case.<sup>116</sup> The Clippers had moved without seeking league approval first, by simply announcing to the league that the franchise would be, from that point on, playing its home games in Los Angeles. The NBA did not respond, as did the NFL, by attempting to block the relocation by the Clippers.<sup>117</sup> Since it was unclear which party, if any, had breached the duty of good faith and fair dealing, the court remanded this issue for determination by the district court.<sup>118</sup>

The court also did not determine whether the Clippers had usurped a league-franchise opportunity. The panel found the Raiders' case inapplicable on this issue,<sup>119</sup> reasoning that the offset ordered in *Raiders II* related to the appropriate size of an antitrust award and whether an offset against any antitrust award was appropriate.<sup>120</sup> The court noted that the majority in *Raiders II* "revealed nothing about the origin of the offset" and that a basis for damages for the Clippers' alleged usurpation of a league-franchise opportunity had to be found elsewhere.<sup>121</sup> The court pointed to the express or implied provisions of the league constitution as the probable source of the basis for damages.<sup>122</sup> Before this issue could be decided on remand, the parties settled out of court.<sup>123</sup>

### III. THE AFTERMATH: HOW HAVE PROFESSIONAL SPORTS LEAGUES AND FRANCHISES REACTED?

The net result of the Raiders' and Clippers' litigation is "franchise

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113. *Id.* at 570.

114. *Id.*

115. *Id.* at 569-70 (citing *Raiders II*, 791 F.2d at 1362-63).

116. *Id.*

117. *Id.* at 568.

118. *Id.* at 569-70.

119. *Id.*

120. *Id.*

121. *Id.* at 570.

122. *Id.*

123. See Cardozo & Mishkin, *supra* note 43, reporting a settlement payment by the Clippers to the NBA of \$5.6 million.

free agency."<sup>124</sup> The *Clippers* court passed up the opportunity to rule on the legality of league rules pertaining to relocation. This lack of judicial guidance left league officials with only the general guidelines set forth in *Raiders I*,<sup>125</sup> and the strong indication by the *Clippers* court that those teams that did relocate would have to compensate their leagues for the geographic location taken.<sup>126</sup>

The franchises, leagues and even municipalities and fans may be harshly affected by the *Raiders* and *Clippers* cases.<sup>127</sup> Oakland, Baltimore, St. Louis and other cities that have lost franchises presently have no legal recourse to regain them.<sup>128</sup> The threat of treble damages, coupled with only the obligation to pay for a relocation, will have a major

124. See *supra* note 16 and accompanying text; see, e.g., *Raiders I*, 726 F.2d at 1395-98.

125. See *supra* note 70 and accompanying text.

126. See *supra* note 121 and accompanying text; see also *Clippers*, 815 F.2d at 570.

127. See Lancaster, *Football-Hungry Cities Feign Cool But Hustle Hard to Get Pro Team*, Wall St. J., Mar. 29, 1985, at 31, col. 4. Although the direct and immediate financial impact is important and persuasive, many journalists point simply to the effect of the city no longer maintaining "big league" status.

Behind this clash of economic interests and civic egos is the concept of being "big league," an idea that confers on a city an intangible but invaluable image of influence and sophistication. . . . But if you lose a professional team, you're viewed in the eyes of some as a city that once was but maybe ain't no more.

Roberts, *The Importance of Where Pros Play the Game*, N.Y. Times, May 23, 1986, at A16, col. 3.

A number of studies have been conducted showing the value a sports franchise has, has had, or will have to a given community. See *id.* Similarly, a study of the economy in Jacksonville, Florida indicates that a professional football franchise would generate \$60 million annually for the Jacksonville economy. Sports Indus. News, Oct. 9, 1987, at 318. But cf., Noll, *supra* note 22, at 32 stating that these financial claims "[f]or the most part . . . are vastly overblown"; Baade, *Is There an Economic Rationale for Subsidizing Sports Stadiums?* HEARTLAND INSTITUTE POLICY STUDY NO. 13 1 (Feb. 23, 1987). Baade maintains that in the long run entertainment dollars are fairly constant and if not spent at a sporting event, due to the absence or departure of a sport's franchise, those leisure dollars will simply be spent in that same municipality on other leisure activities. *Id.* at 18.

Thus, there appears to be a financial impact from both the general economic standpoint as well as from an employment perspective. Further, there is an unascertainable impact that the presence or loss of a franchise has on the individual municipality from a psychological perspective. In separate commentaries by Professor Baade and Professor Roberts, both maintain that it is in many ways worse for a city's image to lose a major league team than to have never had one at all. See Baade, *supra*, at 1; Roberts, *supra*, at A16, col. 3.

The important factor is that the contractual relationship between a franchise and a league has an effect, probably financial, upon municipalities which necessarily affects its resident fans. If there is no stability in the league-franchise relationship, municipalities have little recourse. See *supra* note 54.

This financial and emotional impact, in conjunction with the league-franchise fiduciary relationship, further reflects the necessity of encouraging stability and establishing a degree of certainty regarding sports franchise relocations.

128. See *supra* text accompanying note 127.

impact on the stability of sports franchise locations.<sup>129</sup> Even baseball, a sport that has not been affected by relocations in this decade, was confronted with the possibility of the Chicago White Sox moving to St. Petersburg, Florida.<sup>130</sup>

The most problematic result stemming from the *Raiders* and *Clippers* cases, however, is the new-found "franchise-free agency."<sup>131</sup> Generally, it is not in the leagues' overall best interest to make an unreasonable decision on a relocation request.<sup>132</sup> However, a franchise may exploit the opportunity for individual short-term gains that result from a relocation without regard to the league's overall best interest.<sup>133</sup> A franchise like the Clippers may feel free to relocate when an opportunity arises even if it does not receive league approval.<sup>134</sup> A franchise knows that if an action is brought against it, it may have to pay only the increased value of the franchise location, with no threat of having to pay more.<sup>135</sup> A franchise is thus confronted simply with a "pay-now-or-pay-later" situation. All that a franchise may be required to do is to compensate its league for the value of the geographic franchise-location taken, minus the value of the franchise-location it turned in.<sup>136</sup> This effectively allows an

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129. With the law in this condition, a league may continue to unreasonably ban franchise relocations and hope that a court will interpret their relocation request denials as objective. If a relocation request denial is interpreted as subjective, full treble damages are not a threat. Although damages will be offset by the increased value of the relocated franchise as ordered in *Raiders II*, leagues must hope that the increased value of the new franchise location will exceed the damage award prior to trebling.

130. See Swift, *The Sunshine Sox*, SPORTS ILLUSTRATED, May 30, 1988, at 40.

131. See *supra* note 16 and accompanying text.

132. In addition to the potential antitrust damage consequences, a league has no financial incentive to make a bad decision.

133. Although a more attractive lease or increased gate and concession revenues may benefit a franchise and its balance sheet, these types of income do not increase the shared revenues of the league. See *supra* text accompanying note 28.

134. The Los Angeles Raiders have announced that they plan to relocate again. Without NFL consent, the franchise announced plans to move to Irwindale, California. The Irwindale group has provided the Raiders with several incentives including a gross stadium revenue guarantee of \$2.5 million per annum. Sports Indus. News, Sept. 11, 1987, at 286. Also, according to Irving Azoff, one of the new private managers of the Los Angeles Coliseum, the NFL's Los Angeles Rams have asked about the possibility of returning to the Coliseum. *Rams Backtracking?*, U.S.A. Today, Aug. 4, 1988, at C-1, col. 1. The Rams left the Coliseum in 1980 to play in Anaheim Stadium. *Id.*

In addition, the owner of the NFL's Phoenix Cardinals, Bill Bidwill, openly met with officials from Baltimore, Maryland, Phoenix and Tempe, Arizona, among others, to discuss the franchise's relocation without first seeking league approval. Sports Indus. News, Nov. 6, 1987, at 350.

135. There is precedent for having to pay nothing. When the former Baltimore Colts moved to Indianapolis, no action was brought by the NFL, and no payments were reported to have been made. See Wong, *supra* note 6, at 18.

136. See *supra* note 121.

individual franchise to make a franchise relocation decision on its own, without considering the league as a whole.<sup>137</sup>

#### IV. A PROPOSED SOLUTION: COMPENSATION FOR USURPATION PLUS PUNITIVE DAMAGES AS A DETERRENT

##### A. *League Structure: League-Franchise Fiduciary Relationship*

Compensating a league for usurping a league-developed opportunity, as well as awarding punitive damages against a franchise would deter franchises from relocating without league approval. However, in order to award damages for usurpation, as well as to award punitive damages, a court would first have to examine the relationship of the parties. The initial discussion in this section contends that the league-franchise relationship is fiduciary in nature. Because of this relationship, compensatory damages for usurpation of a league-developed opportunity and punitive damages for breach of contract should be available in franchise-relocation cases.<sup>138</sup>

Team owners in all sports are members of a select group.<sup>139</sup> None would dispute the fact that the success of a league, and thus of the individual franchises, largely depends upon the degree of cooperation among member franchises.<sup>140</sup> The primary purpose of professional sports league rules regulating relocation is embodied in the philosophy espoused by NFL Commissioner Pete Rozelle: "One of the key things a sports league needs is unity of purpose. It needs harmony . . . . When you have unity and harmony and move basically as one, you have a successful sports league."<sup>141</sup> This philosophy is further amplified by commentators who argue that a professional sports league is not a group of individual busi-

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137. *Id.*

138. See *infra* text accompanying notes 166-228.

139. See *Levin v. National Basketball Ass'n*, 385 F. Supp. 149 (1974), where the court recognized that a league could be selective as to who may enter their "partnership." When a franchise is available, the price is high. See *Greyhound Partners Agree to Buy Phoenix Suns Pro Basketball Team*, Wall St. J., Oct. 14, 1987, at 38, col. 5 (partnership paid \$44.5 million for existing franchise that was originally purchased in 1968 for \$2 million; Boston Celtics are valued at \$120 million). In 1987, the NBA granted franchises to the following cities for \$32.5 million each: Charlotte, North Carolina; Miami, Florida; Minneapolis, Minnesota; and Orlando, Florida. See *Sports Indus. News*, June 5, 1987, at 130. The most recent franchises to join the National Football League were the Seattle Seahawks and Tampa Bay Buccaneers, who joined in 1976 for between \$16-17 million each; see also *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) [*Raiders I*]. The publicized "asking" price for the NFL Dallas Cowboys franchise is \$200 million. See *Duke, Like Many Other Texas Institutions, The Cowboys Haven't Found A Buyer*, Wall St. J., Sept. 8, 1988, at 16, col. 1.

140. See R. BERRY & G. WONG, *supra* note 1, at 1-4.

141. D. HARRIS, *supra* note 16, at 13-14.

nesses, but a single business entity.<sup>142</sup>

There is much confusion in sports cases regarding the single entity issue.<sup>143</sup> The problem stems from the unique nature of sports leagues. Although the individual franchises, and necessarily their owners, are quite competitive on the playing field or in the arena, cooperation among franchises exists in the overall management of a league.<sup>144</sup> Professor Roberts has noted that confusion concerning the economic structure of sports leagues is caused by the mistaken equation of a "sports league" with the "service organization each league creates to perform certain functions that are better left to administrators than to the league's quasi-legislative governing body."<sup>145</sup> These administrative functions include "scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations."<sup>146</sup> The interactions of the clubs are not necessarily analogous to the functions of the league office. A key element in this confusion is that the league office traditionally carries the name of the league itself such as the "National Football League" and the "National Basketball Association."<sup>147</sup> Commentators are quite correct when they state that a league does not precisely resemble any standard form of organization.<sup>148</sup> Although the leagues have not been set up as partnerships, many view that form of association as the best approximation of the way in which the leagues operate.<sup>149</sup>

The confusion regarding franchise cooperation and the function of the league must not obscure the belief that the league franchise relocation rules should be designed to promote the financial success of all league members. The geographic placement of franchises obviously has an ef-

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142. See, e.g., Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943 (1988); Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157 (1984); 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).

143. *Id.*

144. *Id.* This unity was exemplified in 1987 by the unity of owners during the NFL players strike. See Lancaster & Barnes, *As NFL's Replacement Games Kick Off, Both Sides in Strike Feel Costs of Tactics*, Wall St. J., Oct. 5, 1987, at 26, col. 4.

145. See Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 241 n.72 (1984).

146. *Raiders I*, 726 F.2d at 1389.

147. Roberts, *supra* note 145, at 241.

148. *Id.*

149. See generally 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). See also Levin, 385 F. Supp. at 152 (equating joint venturers in the NBA with a partnership). *But cf.* Roberts, *supra* note 145, at 225 (insisting that a league resembles no other business entity "including a partnership").

fect on the development of regional rivalries as well as on whether the sport is exposed to new geographic regions to increase the television audience.<sup>150</sup>

Outside of the antitrust context, courts have clearly recognized that franchises must rely so much upon each other for their success that their relationship should be viewed as fiduciary in nature. In *Professional Hockey Corp. v. World Hockey Association*,<sup>151</sup> the court held that the franchises within the National Hockey League (NHL) owe fiduciary duties to each other.<sup>152</sup> Referring to the relationship among World Hockey Association franchises, the California Court of Appeal stated that "there is a duty of loyalty which requires directors-trustees not to act in their own self-interest when the interest of the corporation will be damaged thereby."<sup>153</sup> The fact that the NHL league office is organized as a Delaware non-profit corporation had some bearing on the court's determination that a fiduciary duty exists.

The court also noted in dicta that a fiduciary duty exists in other leagues as well.<sup>154</sup> The court rejected the hypothetical suggestion that former San Diego Chargers owner Gene Klein owed no fiduciary duty to Los Angeles Raiders owner Al Davis.<sup>155</sup> The National Football League, unlike the National Hockey League, is an unincorporated association; however, the court implied that a fiduciary duty exists among its members as well.<sup>156</sup> That same court stated that "irrespective of the competitive personal feelings of the various owners of teams may have towards each other . . . they have a duty to make decisions for the benefit of the . . . league as a whole."<sup>157</sup>

A court's desire to put a league's goals ahead of the individual own-

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150. Television revenues are a primary source of income for most leagues. See *supra* text accompanying note 28. An increased viewership obviously gives a sports league increased leverage in subsequent negotiations with television networks.

151. 143 Cal. App. 3d 410, 415-16, 191 Cal. Rptr. 773, 776-77 (1983). The actual facts of this case are of little import here. The case involved an approval of a sale by the World Hockey Association Board of Trustees. See also J. WEISTART & C. LOWELL, *supra* note 3, wherein the authors state that: "[t]he court's asserted standard appears to ascribe a type of behavior to club owners that is more subservient than is the case in the real world." *Id.* at Supp. § 3.15, at 46 (1985).

152. 143 Cal. App. 3d at 415, 191 Cal. Rptr. at 777.

153. *Id.* The fact that the NHL league office is organized as a Delaware non-profit corporation had some bearing on the court's determination that a fiduciary duty exists. *Id.* at 415-16, 191 Cal. Rptr. at 777.

154. *Id.* at 415, 191 Cal. Rptr. at 777.

155. *Id.* It is commonly acknowledged in the industry that Gene Klein and Al Davis do not like each other. See generally G. KLEIN, FIRST DOWN AND A BILLION (1986).

156. 143 Cal. App. 3d at 416, 191 Cal. Rptr. at 777.

157. 143 Cal. App. 3d at 415, 191 Cal. Rptr. at 777.

ers' has merit.<sup>158</sup> Even if the requirement to always act in the league's best interest—sometimes to the individual franchise's own detriment—is harsh, the court at least established a minimum standard of conduct under which a franchise may not act to harm the league.

The California Court of Appeal is not alone in believing that a fiduciary relationship exists between a professional sports league and its franchises. Commentators agree with the court that the relationship between a professional sports league and its franchises should be viewed as a fiduciary one similar to other fiduciary relationships, such as partnerships.<sup>159</sup> Elaborating on this belief, Professor Roberts has remarked that "there is no other economic entity incapable of producing revenues without another entity in the same business."<sup>160</sup>

Elementary partnership law provides that partners owe each other a fiduciary duty.<sup>161</sup> Assuming the validity of the partnership/sports league-franchise analogy, partnership law indicates that franchises of a sports league owe fiduciary duties to each other and to their league. In *Meinhard v. Salmon*,<sup>162</sup> a classic case decided by the New York Court of Appeals regarding fiduciary duties within a partnership, a joint venture was formed to operate a hotel lease. The defendant then unilaterally negotiated a lease renewal, failed to reveal it to the plaintiff, and took the new lease opportunity for himself, acting in his own self-interest.<sup>163</sup> The court held that the defendant breached his fiduciary relationship to the other members of the partnership.<sup>164</sup> In his opinion, Judge (later Justice) Cardozo remarked on the taking of the opportunity that: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties."<sup>165</sup> Thus, once it is accepted that franchises and leagues owe each other fiduciary duties, a number of causes of action and damage theories become applicable to the franchise relocation scenario.

### *B. Usurpation of a League-Developed Opportunity as a Proper Cause of Action*

No court has yet specifically held that a league should be compen-

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158. J. WEISTART & C. LOWELL, *supra* note 3, Supp. § 3.15, at 48.

159. *Id.* at 47; H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* §§ 235-38 (1983).

160. Roberts, *supra* note 145, at 227-28.

161. J. CRANE & A. BROMBERG, *LAW OF PARTNERSHIP* § 68 (1968).

162. 249 N.Y. 458, 164 N.E. 545 (1928).

163. *Id.* at 462-63, 164 N.E. at 546.

164. *Id.* at 463, 164 N.E. at 546.

165. *Id.* at 464, 164 N.E. at 546.

sated for the taking of a geographic location.<sup>166</sup> The following discussion, however, sets forth a justification for recognizing such a cause of action.

In *Raiders II*,<sup>167</sup> the court noted that a team could not usurp "the value of the league's expansion opportunities [which] belonged to the league as a whole."<sup>168</sup> This statement indicates that there is some recognition by the courts that a geographic franchise location is a by-product of the league-partnership and thus, the property or opportunity of the league, similar to the hotel lease in *Meinhard v. Salmon*.<sup>169</sup>

Where a usurpation of a partnership opportunity occurs, the violators are required to compensate the partnership for the amount taken.<sup>170</sup> Therefore, in the franchise relocation context, a franchise should be required to compensate the league for the taking of a "partnership" opportunity. However, courts thus far have stopped short of declaring that a taking of a franchise opportunity requires reimbursement for the taking.<sup>171</sup> As previously noted, the Clippers and the National Basketball Association settled out of court before this issue could be decided on remand.<sup>172</sup>

Even if courts award compensatory damages for the taking of a franchise opportunity, does the award of damages adequately deter franchises from relocating without league approval? The primary concern of a league is to prevent these takings from occurring at all.<sup>173</sup> In terms of preventing opportunistic takings of league-developed opportunities by a franchise, courts must have the power to award more than mere compensatory damages. If not, teams such as the Clippers may relocate when it is in their own best interest, and not necessarily consider the best interest of the league and its member franchises.<sup>174</sup> A solution may be to award punitive damages against franchises that relocate without first obtaining their league's permission.

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166. *National Basketball Ass'n v. SDC Basketball Club, Inc. [Clippers]*, 815 F.2d 562, 570 (9th Cir.), cert. dismissed, 108 S. Ct. 362 (1987); see also text accompanying note 121.

167. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356 (9th Cir. 1986), cert. denied, 108 S. Ct. 92 (1987).

168. *Id.* at 1371.

169. 249 N.Y. 458, 164 N.E. 545 (1928).

170. *Meinhard*, 249 N.Y. at 464, 164 N.E. at 546.

171. See *Clippers*, 815 F.2d at 570.

172. See *supra* note 123.

173. The injunction option has not been the most successful legal tool for a league. The use of an injunction has simply triggered an antitrust action by the affected franchise.

174. The Phoenix Cardinals might have moved unilaterally if they had not received league approval.



### C. Punitive Damages for Breach of Contract

#### 1. Contract damages: the American rule

The general rule has long been that there is no recovery beyond compensatory damages for a breach of contract.<sup>175</sup> The American rule, supported by law and economic scholars,<sup>176</sup> maintains that only damages that compensate the non-breaching party for his or her expectation interests at the time of entering into the contract should be awarded to an aggrieved party. Of course, tort law, on the other hand, recognizes that utilizing damages as punishment for wrongdoers in civil actions is appropriate in some cases.<sup>177</sup> Punitive damages are generally assessable when the wrongdoer acts maliciously, willfully, wantonly, recklessly or with conscious disregard for the interests or welfare of others.<sup>178</sup>

Supporting the American rule in contract are economic theories of "efficient breach" that maintain that a party will breach only where there will be an efficient reallocation of resources.<sup>179</sup> Specifically, the theory holds that a party would not breach unless he or she perceived that the gain from the breach would exceed the mandated compensatory penalty that the law would require to be paid. The net result is that the breaching party gains, the non-breaching party receives the benefit of his or her bargain, and society as a whole has a positive, as opposed to a negative, reallocation of resources.<sup>180</sup> The breaching party, in a sense, calculates the known cost of his or her breach into that decision process.

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175. RESTATEMENT OF CONTRACTS § 342 (1932); 5 CORBIN ON CONTRACTS § 1077, at 438 (1964); see also Sebert, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1600 n.122 (1986). There is also an exception in the recent Second Restatement of Contracts stating that punitive damages may be awarded in contract if "[t]he conduct constituting breach is also a tort for which punitive damages are recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981). See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982), for a history of the rule limiting contract damages to compensation.

176. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 93-95, 105-15 (3d ed. 1986); Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972); Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427 (1983). For specific criticism of the expansion of punitive damages in the commercial context, see Note, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 402-06 (1986); see also Geller & Levy, *The Constitutionality of Punitive Damages*, A.B.A. J., Dec. 1, 1987, 88-91.

177. D. DOBBS, *HANDBOOK OF THE LAW OF REMEDIES* § 3.9, at 205 (1977); W. PROSSER, *PROSSER AND KEETON ON THE LAW OF TORTS* § 2, at 9-15 (5th ed. 1984); K. REDDEN, *PUNITIVE DAMAGES* § 2.6, at 42 (1980).

178. See sources cited *supra* note 177.

179. Sebert, *supra* note 175, at 1572. See generally R. THOMPSON & J. SEBERT, *REMEDIES: DAMAGES, EQUITY AND RESTITUTION*, viii-ix (1983).

180. See sources cited *supra* note 179.

Punishment has traditionally played no role in contract remedies.<sup>181</sup> In contrast to tort law, contract law maintains that there is "no necessity for satisfying . . . feelings and allaying community resentment by fines or physical punishment."<sup>182</sup> Thus, if a party breaches a contract, the law generally does not allow for punishment of the breaching party, and only requires that he or she pay the non-breaching party compensatory damages.

Professor Sebert has stated that, "economic theory provides *one* important basis for critiquing legal rules"; therefore, "encouraging an economically efficient allocation of revenues should be *one* important objective of contract remedies."<sup>183</sup> Professor Sebert's primary concern is that when the only possible award is compensatory damages, there exists a potential for under-compensation.<sup>184</sup> He points out that actual damages are often difficult to measure.<sup>185</sup> For example, how does one account for potential or lost profits? Obviously, such a concern is not an improper one in the franchise relocation scenario.<sup>186</sup>

Coupled with Professor Sebert's observations regarding potential under-compensation, there is the corollary concern that a party contemplating breach may actually be encouraged to breach, because the measure of damages enforced against the party will probably be low.<sup>187</sup> If there is a potential for under-compensation, then franchises have little monetary disincentive to unilaterally relocate. Had there been some potential for punitive damages, the Clippers, for example, may have sought the NBA's approval prior to relocating. If it had been denied, they might not have relocated. Although under-compensation may not be the primary concern in the sports franchise relocation game, it is an important factor.

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181. See sources cited *supra* note 175.

182. 5 CORBIN, *supra* note 175.

183. Sebert, *supra* note 175, at 1572.

184. *Id.* at 1571-84.

185. *Id.* at 1575-77.

186. It can be argued that the value of damages is the value of the most recent franchise fee charged. In the NBA this would be \$32.5 million. However, if the value is that of an existing franchise, it should be noted, for example, that the Phoenix Suns of the National Basketball Association sold for \$44.5 million and the Boston Celtics have been valued at \$120 million. See *supra* text accompanying note 139. How much is a franchise opportunity worth? Has the usurpation disrupted some plan by the league to profit from the value of a franchise location at a predetermined time? What is the value of a turned-in franchise? In some cases, is the turned-in franchise of any value at all? The NFL has not put a replacement franchise in Oakland and is therefore not "recouping" that franchise fee. The NBA has not placed another franchise in San Diego since the departure of the Clippers in 1984. See generally, Sebert, *supra* note 175, at 1573-79.

187. Ellis, *supra* note 175, at 26-31, 33.

## 2. Punitive damages in contract: the exception

Deterrence is one of several reasons advanced for awarding damages that exceed compensation.<sup>188</sup> Commentators have often cited the power of punitive damages in deterring undesired activity.<sup>189</sup> Under the present compensatory damage-based structure, franchises are not confronted with any damage remedy severe enough to deter them from their potentially opportunistic behavior.<sup>190</sup> Therefore, extracontractual damages could be an effective means to deter arbitrary franchise behavior.

A number of jurisdictions award punitive damages for certain breaches of a contractual relationship.<sup>191</sup> Most often, extracontractual damages are awarded in cases where the breach of a contractual duty is accompanied by a breach of a tort duty owed to the plaintiff.<sup>192</sup> The "act" that sets the stage for punitive damages in contract has acquired a variety of names since its development, including "contort,"<sup>193</sup> "bad faith breach,"<sup>194</sup> and "tortious breach of contract."<sup>195</sup> In some instances, punitive damages should be awarded where there is an extensive "departure from commercially acceptable norms."<sup>196</sup> Probably the most rele-

188. See Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 648 (1980). Others include punishment, encouraging private suits, and compensation for those costs that actual damages may not cover, such as attorneys fees. See Ellis, *supra* note 175, at 3. Ellis continues that "compensatory damages alone produce less than optimal deterrence." *Id.* at 9.

189. See, e.g., Mallor & Roberts, *supra* note 188, at 648.

190. Obviously, even with offset damage awards, the leagues have experienced greater deterrence than the franchises have. By having the award offset, they are still not receiving the full value they could have received for the franchise location "taken." As noted with the Raiders, rather than paying \$25 million the franchise would pay \$13.5 million. *Raiders II*, 791 F.2d at 1374-75; see also *supra* text accompanying notes 74-88. Thus a penalty of \$11.5 million is still assessed in addition to the injunction that allowed the move to occur. *Id.* It is also not clear that the turned-in franchises actually have any "resale" value at all. Baltimore, Oakland and San Diego are examples of major league cities that are without franchises after relocations. The true value to the individual leagues may have been having franchises present in each of these markets.

191. See generally Sebert, *supra* note 175. Punitive damages have been awarded for breach of the implied covenant of good faith in insurance contracts, for promissory fraud relating to misrepresentation at the formation of a contract, and other areas where an independent tort is found in addition to the breach of contract. *Id.* at 1600-29.

192. *Id.*

193. See generally Note, "Contort": *Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance, Commercial Contracts—Its Existence and Desirability*, 60 NOTRE DAME L. REV. 511 (1985).

194. See generally Note, *Damage Measurements for Bad Faith Breach of Contract: An Economic Analysis*, 39 STAN. L. REV. 161 (1986).

195. See Note, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CALIF. L. REV. 2033, 2046 (1986).

196. *Id.* at 2036.

vant causes of action in the league-franchise relocation scenario are breach of a contract involving fiduciaries and breach of the implied covenant of good faith and fair dealing. The key, as with the usurpation issue, is for courts to recognize that a fiduciary relationship exists among league-member franchises.<sup>197</sup>

*a. breach of the implied covenant of good faith and fair dealing*

A number of courts have held that there is an implied covenant of good faith and fair dealing in every contract which "requires each party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement."<sup>198</sup> A primary benefit of sports league franchising agreements is the potential profits derived from the careful planning and development of the league—in particular, the placement and the timing of placement of franchises. When a franchise does not adhere to a relocation rule, other member franchises may not receive the full benefit of their bargain.<sup>199</sup>

The implied covenant or promise in each contract requires the parties to perform their respective obligations under the terms of the relevant contract in good faith. This covenant has been most frequently litigated in insurance cases when, for instance, an insurance company in bad faith fails to pay a claim under a policy to an insured. For various reasons, including the disadvantaged position the insured is usually in, a court may deem non-performance or inadequate performance by the insurer to constitute a "bad faith" breach of the insurance policy.<sup>200</sup>

In some jurisdictions, such a cause of action has expanded beyond the insurance industry to other commercial contexts as well.<sup>201</sup> The case

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197. It is argued that the same "malice" standard that exists in tort should apply here as well. See Sebert, *supra* note 175, at 1629-32 & nn.230-51, where the author cites cases in Indiana where a breach which is "tortious in nature" is adequate. Professor Sebert suggests that punitive damages in contract should be awarded in two circumstances:

- a) When the breach involved conduct that independently amounted to a tort for which punitive damages would be assessed under tort law; or
- b) When the breach was intentional and the breaching party knew that there was no legal justification for his nonperformance or breached in reckless disregard of whether a justification existed.

*Id.* at 1657.

198. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1361 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 2 (1987) (quoting *Seaman's Direct Buying Serv. v. Standard Oil Co.*, 36 Cal. 3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984); *San Jose Prod. Credit Ass'n v. Old Republic Life Ins. Co.*, 723 F.2d 700, 703 (9th Cir. 1984)).

199. For instance, the shared network television revenues may be decreased because a market previously occupied was abandoned.

200. See *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

201. See, e.g., *Seaman's Direct Buying Serv. v. Standard Oil Co.*, 36 Cal. 3d 752, 768, 686

often cited to support this expansion is *Seaman's Direct Buying Service v. Standard Oil Co.* decided by the California Supreme Court.<sup>202</sup> *Seaman's* involved a contract between Standard Oil and Seaman's, a ship fuel supply dealer.<sup>203</sup> Under the agreement, Standard Oil was to supply Seaman's with its fuel requirements.<sup>204</sup> Seaman's sued when Standard Oil denied the existence of a binding contract between them.<sup>205</sup> At the trial level, the jury awarded Seaman's punitive damages for the tortious breach of the implied covenant of good faith and fair dealing.<sup>206</sup>

The California Supreme Court reversed the award due to an error in the jury instructions.<sup>207</sup> However, the court took the initiative to state that the breach of the implied covenant of good faith and fair dealing is a tort and is applicable beyond insurance contracts to other contracts with "similar characteristics."<sup>208</sup> Although the court did not state specifically what these "similar characteristics" might be, it did cite "public interest" and "fiduciary responsibility" as possible elements.<sup>209</sup>

In her dissent, Chief Justice Rose Bird stated that courts should award punitive damages for breach of contract where the breach extends beyond the reasonable expectations of either party:

A breach of contract may also constitute a tortious breach of the covenant of good faith and fair dealing in a situation where the possibility that the contract will be breached is not expected or reasonably expected by the parties. This could happen, for example, if at the time of contracting, the parties expressly indicate their understanding that a breach would be impermissible. Or, it could happen if it were clear from the inception of the contract that contract damages would be unavailable or would be inadequate compensation for a breach.<sup>210</sup>

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P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984); see also Temper, *Commercial Bad Faith: Tort Recovery For Breach of Implied Covenant In Ordinary Commercial Contracts*, 48 MONT. L. REV. 349 (1987) (discussing expansion by the Montana Supreme Court to ordinary commercial contracts in *Nicholson v. United Pacific Ins. Co.*, 710 P.2d 1342 (Mont. 1985)).

202. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984); see also Sebert, *supra* note 175, at 1620 (no convincing reason why only insurance industry should be subject to punitive damages for breach of contract).

203. *Seaman's*, 36 Cal. 3d at 759, 686 P.2d at 1160, 206 Cal. Rptr. at 356.

204. *Id.*

205. *Id.* at 762, 686 P.2d at 1162, 206 Cal. Rptr. at 358.

206. *Id.*

207. *Id.* at 770, 686 P.2d at 1167, 206 Cal. Rptr. at 363. "Since Standard's denial of the existence of a binding contract would not have been tortious if made in good faith, the trial court erred in failing to so instruct the jury." *Id.*

208. *Id.* at 769, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

209. *Id.* at 768, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

210. *Id.* at 780, 686 P.2d at 1174, 206 Cal. Rptr. at 370 (Bird, C.J., dissenting).

In the franchise relocation context, the parties initially expect that they are entering into a fiduciary relationship. That is, the parties expect each other to comply with a fair set of rules and further expect that those rules will be followed and applied in good faith with particular regard to changing market conditions. Thus, a logical application of the implied covenant of good faith and fair dealing to the league-franchise relationship is that a franchise violates the covenant if it relocates without league consent. Such an action impairs the right of the league to receive the benefits of the contract.<sup>211</sup>

*b. the breach of fiduciary duty as grounds for punitive damages*

Outside of the professional sports context, there is precedent to support the contention that breach of contract between fiduciaries is proper grounds for punitive damages. These cases involve real estate brokers, partners and trustees.<sup>212</sup> The Fifth Circuit case of *Palmer v. Fuqua*<sup>213</sup> involved an action brought by members of a partnership against one of the partners for the taking of a partnership opportunity. The limited partners claimed that the general partner had taken property for his individual use, without offering the opportunity to the partnership first.<sup>214</sup> The court found that the partner breached his fiduciary duty in taking the partnership property.<sup>215</sup> Citing another Texas case, the court stated: "It must be borne in mind that we are not here dealing with an arm's length transaction between strangers but, on the contrary, we are confronted with the relationship between partners who had [a] fiduciary relationship with each other . . ."<sup>216</sup> Based on the breach of fiduciary duty, the court held that awarding punitive damages against the general partner was proper.<sup>217</sup>

The court applied Texas law which recognizes a cause of action for punitive damages for breach of contract in certain instances, including

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211. Conversely, a league may violate the covenant if it bars a relocation for no objective reason.

212. See, e.g., *Palmer v. Fuqua*, 641 F.2d 1146 (5th Cir. 1981) (general partner breaches fiduciary duty to partnership); *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958) (real estate agent breaches fiduciary duty); *Youngblood v. Mock*, 143 Ga. App. 320, 238 S.E.2d 250 (1977) (agent selling equipment converts equipment to own use); *Kirby v. Cruce*, 688 S.W.2d 161 (Tex. 1985) (punitive damages awarded for breach of fiduciary duties to other members of joint property venture).

213. 641 F.2d 1146 (5th Cir. 1981).

214. *Id.* at 1142.

215. *Id.* at 1153.

216. *Id.* at 1161 (citing *Morgan v. Arnold*, 441 S.W.2d 897, 905 (Tex. 1969)).

217. *Id.* The court held that the limited partners were entitled to a constructive trust consisting of the property obtained by the defendant. *Id.* at 1155.

those which involve a breach of fiduciary duty.<sup>218</sup> Thus, when a partner breaches a contract, he or she also breaches a fiduciary duty. Again, the relationship of the parties is the important factor.<sup>219</sup>

In the sports franchise context, the prospective application of punitive damages for breach of fiduciary duty arising out of contract would encourage franchises that are similarly situated to the Clippers to seek league approval prior to relocating. Further, the same principles may be applicable to a league in a Raiders-type case if the league does not objectively review a relocation request. Thus far, treble damages, even with offset, have adequately deterred leagues from acting arbitrarily on relocation decisions. Since the original damage award in the Raiders litigation,<sup>220</sup> leagues have been quite hesitant to try and bar franchise relocations.<sup>221</sup> Courts should consider, however, that if unreasonable denials continue to recur, there are legal theories available that may encourage leagues to act in a reasonable manner. Punitive damages may be awarded for breach of contract in the franchise-league context.<sup>222</sup>

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218. *Id.* at 1160-61.

219. *See, e.g., Dunfee v. Baskin-Robbins, Inc.*, 720 P.2d 1148 (Mont. 1986) (franchisor has fiduciary duty to franchisee); *see also Spandorf, Gurnick & Fern, Implications of Good Faith: Its Extension to Franchising*, 5 FRANCHISE L.J. 3 (1985). Curiously, it appears that the expansion has usually applied in awards against franchisors and not franchisees. *See Wulff, Franchising Currents*, 6 FRANCHISE L.J. 11 (1986).

220. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 725 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984).

221. *See supra* note 15 and accompanying text.

222. Another possibility is to award treble damages and not offset until after trebling, rather than before as was done in *Raiders II*. *See Raiders II*, 791 F.2d at 1374. By doing so, the monetary impact of the antitrust damage award is significantly increased. Apart from this deterrent effect, there are also strong legal arguments for offsetting after trebling.

The historical purpose of treble damages is not clear. The legislative history behind the treble damage remedy has been called "unilluminating" and the basis for it is "shrouded in mystery." *See Cavanagh, Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 782 (1987).

The legislative theory behind treble damages indicates that the potential remedy provides motivation for the private litigant to bring an antitrust action. *Id.* at 783. As previously noted, offsetting before trebling at least takes a substantial bite out of the size of the antitrust award. Although encouraging suits in the franchise versus league context is probably of little importance, leagues should be compelled to make objective analyses of franchise relocation requests.

The offset of antitrust damages before trebling may serve as an adequate deterrent; however, if in the future that proves inadequate, some consideration should be given to the dissent in *Raiders II*. *See Raiders II*, 791 F.2d at 1376-81 (Nelson, J., dissenting). The dissenting judge in *Raiders II* observed that the majority, by offsetting the antitrust damage award before trebling, "effectively require[d] the Raiders to pay the league three times the value of an opportunity that was only *once* received." *Raiders II*, 791 F.2d at 1379 (Nelson, J., dissenting) (emphasis in original). In a footnote, Judge Nelson articulated a logical extension of the majority's pre-trebling offset:

What if the Raiders had not sought injunctive relief? In that case, there would be no question of offsetting the value of an equitable remedy. First, the Raiders would

### 3. The impact of extracontractual awards in sports relocation cases

The clearest evidence of the potential impact of extracontractual damage awards is the reaction of the major sports leagues to franchise relocations following the Raiders litigation. For example, when the Baltimore Colts relocated to Indianapolis without the permission of the National Football League,<sup>223</sup> the NFL did not seek to prevent the move.<sup>224</sup> The most likely reason for the league's inaction was the large antitrust award issued against the NFL in the Raiders' action.<sup>225</sup> Other franchises formally reserved their right to unilaterally relocate.<sup>226</sup> Also, when the Cardinals franchise sought to relocate, the NFL owners begrudgingly approved the request alluding to the deterrent effect of the damage award in the Raiders litigation.<sup>227</sup> The impact of the Raiders litigation has even extended to other sports leagues, such as the National Basketball Association. When the Clippers franchise sought to relocate, the NBA did not take any immediate action to halt the Clippers' relocation, as the NFL had during the Baltimore franchise relocation.<sup>228</sup>

The reaction of leagues to the Raiders litigation illustrates that parties' conduct in a league-franchise relationship can be influenced by the availability of extracontractual damages. However, while monetary damages have been an effective deterrent against leagues blocking franchise relocations, they obviously have encouraged franchises to opportunistically relocate. Thus, a balance must be established by the courts in appropriate breach of contract cases through the application of punitive damages. Punitive damages should be available in actions in-

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receive three times their actual antitrust damages (i.e., three times the lost financial advantages between 1980 and 1982 [the period of time which the NFL prevented the franchise from relocating]). Only afterwards would the court prevent the ongoing antitrust violation by prohibiting the restraint of the move, but permitting the NFL to charge the Raiders for the value of the move.

*Id.* at 1379 n.9 (Nelson, J., dissenting).

The majority noted that there was no precedent for offsetting prior to trebling. *Id.* at 1374. The court held that offsetting after trebling would allow damages in excess of the injuries caused by the antitrust violation. *Id.* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)). The court stated that the value of the injunction allowing the move, together with any monetary damages, would fully compensate the Raiders for their injury. *Id.* at 1375. The court insisted that there is nothing wrong with an antitrust award with no net recovery. *Id.* at 1374.

223. See Axthelm, *The Colts: A Cause for Anger*, NEWSWEEK, Apr. 9, 1984, at 105; D. HARRIS, *supra* note 16, at 602-07.

224. *Id.*

225. *Raiders I*, 726 F.2d at 1386; see *supra* notes 57-63 and accompanying text.

226. See Janofsky, *Saints Reserve Right to Relocate*, N.Y. Times, Jan. 19, 1985, § 1, at 27, col. 1.

227. See *supra* text accompanying note 15.

228. See *supra* note 96 and accompanying text.



volving opportunistic franchise relocations in all professional sports leagues.

#### IV. THE REVENGE OF THE SPORTS LEAGUES: A HYPOTHETICAL SCENARIO

Antitrust damage awards appear to be adequate to deter sports leagues from disregarding their relocation rules.<sup>229</sup> In extreme circumstances, however, punitive damages may also be used against leagues as well. Assume that "Franchise," a franchise like the Raiders, has relocated and has had the same success in court as the Raiders—a successful antitrust action and an unsuccessful contract action for the breach of the covenant of good faith and fair dealing.<sup>230</sup> Assume further that the territory to which Franchise relocated is known as "Metropolis." Franchise has become anxious again and has engaged in fruitless negotiations with the Metropolis Stadium Authority. The stadium authority made a number of promises, on which it is now renegeing. "Suburbia," a community thirty miles outside of Metropolis, has offered to build a stadium for Franchise. Franchise accepts Suburbia's offer and moves again without the consent of the "League." Counsel for Franchise informs it that the exclusive grant of territory it received initially in its agreement with the league grants it all territory within a fifty-mile radius of Metropolis.<sup>231</sup>

With the Metropolis Stadium now open, League encourages another member-franchise to relocate to Metropolis. Franchise's owner is livid. He watches his profits plummet as very few fans drive out to Suburbia to attend games. Franchise again brings an action based on three theories: antitrust; breach of contract; and punitive damages for breach of contract in a fiduciary relationship.<sup>232</sup>

In its first action, Franchise was unsuccessful in recovering under the bad faith theory, because both parties were held to have acted in bad faith. The court's analysis in *Raiders II* provides some guidance for an analysis of this scenario.

In *Raiders II*, the court, in reversing the finding regarding the

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229. See *supra* text accompanying note 15.

230. *Raiders II*, 791 F.2d at 1361, 1363.

231. The territorial rights of a franchise are set out in the league constitutions. The NFL, for example, defines "home territory" as "the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city." NFL CONST. & BY-LAWS art. IV, § 4.1.

232. Even with appropriate awards in place, a relocation within a franchise's territory would be difficult to prevent unless the territory was specifically spelled out in the original franchising agreement. *Id.* The important issue in this hypothetical scenario is the action taken by the league.

breach of the covenant of good faith and fair dealing, stated that the implied covenant is "reciprocal" or a "two-way street," demanding that both parties to the contract must comply with the covenant.<sup>233</sup> The court went on to hold that there was not enough evidence to support the jury finding that the NFL acted in bad faith in denying the Raiders the right to relocate, while finding that the Raiders acted in good faith when they relocated without the consent of the NFL.<sup>234</sup> The court stated that a plaintiff could not be successful in a bad faith action where the plaintiff had also acted in bad faith.<sup>235</sup>

It should be kept in mind in this hypothetical scenario that Franchise is the same franchise that initially acted in "bad faith" by moving without consent. Would that action apply to this transaction as well or is a new "transaction or occurrence" involved? Franchise would contend, of course, that this transaction is entirely new and that it is within the framework and spirit of the league-franchise agreement. Surely fellow franchise owners would not want Franchise to be bound to an unfavorable lease. In *Raiders II*, the court stated that:

Had the Raiders displayed bad faith during a *different* dispute with the NFL, a dispute that was unrelated in time and manner to the proposed relocation of the Raiders franchise, the Raiders would not have been precluded from recovering for the breach of the League Agreement in the present case.<sup>236</sup>

The obvious question is whether this second move by Franchise is "unrelated in time and manner" and therefore a "different" dispute.<sup>237</sup> It would seem that it is. Assuming that the dust had settled from the first relocation, this second move constitutes a new relocation and thus, creates a "different" dispute.<sup>238</sup> Further, this relocation is one that would appear contractually permissible. If found to be unrelated, this breach by League could be found to be in bad faith and possibly subject it to punitive damages.

Punitive damages should be available for breach of contract by the hypothetical league. In *Photovest Corporation v. Fotomat Corporations*,<sup>239</sup> a photo developing franchise was awarded punitive damages

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233. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1361 (9th Cir. 1986), cert. denied, 108 S. Ct. 92 (1987).

234. *Id.*

235. *Id.* at 1362. The court there noted that whether bad faith breaches cancel out each other was an issue of first impression. *Id.*

236. *Id.* at 1363 (emphasis in original).

237. *Id.*

238. *Id.*

239. 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

under similar circumstances. In *Photovest*, the franchisor saturated the plaintiff's market with company-owned stores in violation of their agreement.<sup>240</sup> The court found punitive damages were appropriate because the franchisor's multiple breaches of contract constituted "an oppressive, intentional, tortious wrong."<sup>241</sup> In this hypothetical sports franchise scenario, the grounds justifying punitive damages would be even stronger because of the greater sharing of revenues and need for interrelation among the teams than was necessary among the Fotomat franchises.<sup>242</sup> Clearly, there is no need for another Fotomat to exist for one to stay in business. In marked contrast, it would be impossible to hold a sporting event with only one team.<sup>243</sup>

In the hypothetical, since there is a breach of a specific clause in the league-franchise agreement and no "offsetting" bad-faith breaches by Franchise, a punitive damage award is appropriate for the breach of fiduciary duty. All factors concerning the relocation, of course, should be considered. Clearly, if League's placement of Franchise in Metropolis is actually in League's and Franchise's best interests, then awarding punitive damages would not be appropriate. In that case, compensatory damages would be possible for whatever loss could be calculated for the breach of the territorial exclusivity provision in the franchising agreement.

## V. CONCLUSION

With appropriate remedies available, opportunistic sports franchise relocations should occur less frequently because there would be a genuine penalty assessed, hopefully serving as a deterrent to breaches of the various league constitutions and by-laws and the corresponding fiduciary duties that they create. The goal of inserting punitive damages into franchise free agency is to prevent opportunistic and unreasonable actions by franchises and leagues. With punitive damages available, individual franchises will have an economic incentive to seek league permission prior to relocation; in fact, the economic incentive will encourage franchises to comply with the established, objective league guidelines. These same principles will deter unreasonable league actions as well.

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240. *Id.* at 728.

241. *Id.* at 729.

242. *See* Roberts, *supra* note 145, at 250.

243. *Id.*