1-1-1990

Who Said There's no Place like Home - Franchise Relocation in Professional Sports

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Recommended Citation
Available at: http://digitalcommons.lmu.edu/elr/vol10/iss1/3
The old adage "Home, Sweet Home" implies that one would never be unhappy in that special environment called home. In the *Wizard of Oz*, the story of Dorothy's desperate longing journey to return to her home in Kansas, the Good Witch of the North finally tells her to close her eyes, tap her heels and say, "There's no place like home! There's no place like home!" The question then is why, if home is such a great place to be, would anyone want to leave it?

In the world of sports, the local franchise is called "the home team." If a team is successful, it can inspire local fan support that goes beyond the imaginable. The team and its players are usually well-established, recognized members of their community, and the favorites are often local heroes.

On the other hand, visiting teams are often poorly received by the partial hometown fans. When visitors beat the home team, some fans may become vengeful and bombard the visitors with boos or even stadium trash. Visiting teams usually cannot wait to get back home. So, if indeed "there's no place like home," why would a sports franchise want to leave its hometown and relocate?

The National Basketball Association's San Diego Clippers franchise apparently did not think home was so sweet, or maybe did not think that San Diego was truly their home. When Alan Rothenberg, president of the Clippers, decided to move his team to Los Angeles, he caused quite an uproar because the National Basketball Association ("NBA") claimed the move violated its rule on relocation. This casenote explores the reasons why the San Diego Clippers wanted to move, the basis for the NBA's franchise relocation rule, and finally focuses on National Basket-

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ball Association v. SDC Basketball Club ("SDC Basketball Club"), the lawsuit resulting from the Clippers' relocation. In addition, a brief history of federal antitrust law will be examined, followed by a thorough discussion of how the Ninth Circuit Court of Appeals applied federal antitrust laws to franchise relocation restrictions in professional sports. The conclusion will concentrate on the application of the Ninth Circuit's analysis to the SDC Basketball Club case.

II. WHY THE SAN DIEGO CLIPPERS MOVED NORTH

Until May 15, 1984, the Clippers basketball team, an NBA franchise member, played their home games in the San Diego Sports Arena. While in San Diego, the Clippers consistently had among the worst win-loss records in the NBA. As a result of their unaccomplished play and poor winning percentage, the Clippers lost fan support in great numbers.

In the early 1980's, the San Diego Clippers ownership notified the NBA that they wanted to move to Los Angeles. In response, the NBA filed suit against the Clippers in the United States District Court for the Southern District of California to enjoin the move. The suit was brought by the NBA so that it could sanction the Clippers for moving to

3. 815 F.2d 562 (9th Cir. 1987).
4. The principal federal antitrust law that applies to the San Diego Clippers case is the Sherman Act, which is designed to protect trade and commerce against unlawful restraints and monopolies. The applicable sections state in part:

§ 1:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

§ 2:
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .


Direct evidence of an agreement or concerted action between two or more people is required to violate § 1. The mere fact that people act similarly does not mean they have conspired.


8. See Brief of Appellee SDC Basketball Club, Inc., at 8, 815 F.2d 562 (9th Cir. 1987) (No. 86-5891).
Los Angeles without first obtaining league approval. As a result of the NBA's action, the Clippers were forced to abort their effort to move because the NBA refused to schedule their home games in Los Angeles. The parties eventually resolved the suit by entering into stipulations and orders dismissing the pending lawsuits.

Consequently, the Clippers continued to play basketball in San Diego. But the team was frustrated by the San Diego Sports Arena building; which, according to the San Diego appellate court, was considered damaged and structurally unfit for professional basketball. In fact, the Clippers obtained a breach of contract judgment against the arena operators because the court found that they had failed to adequately maintain the stadium according to the terms of the contract.

Undaunted, Alan Rothenberg declared that the Clippers were moving to Los Angeles in 1984. He claimed that any attempt by the NBA to restrain the move would violate federal antitrust laws. This announcement was made following the decision in Los Angeles Memorial Coliseum Comm'n v. National Football League ("Raiders I"). In Raiders I, the United States Court of Appeals for the Ninth Circuit, applying a "rule of reason" analysis, held that the franchise relocation restriction of the National Football League ("NFL") was not immune from antitrust law. Because the NFL's franchise relocation restriction was so similar

9. SDC Basketball Club, 815 F.2d at 564-65.
10. Id.
11. L.A. Times, Aug. 2, 1986, § 3, at 2, col. 1. On December 12, 1982, and February 11, 1983, the parties entered into stipulations and orders dismissing the pending lawsuits. At the NBA's insistence, the stipulated dismissal order contained a "venue clause" stating: If any action shall be commenced by or against any of the plaintiffs on the one hand, by or against SDC or their successors or assigns, within two years from the date hereof, concerning in any way the relocation or transfer of the San Diego NBA franchise, any such action shall be commenced and maintained only in the United States District Court, Southern District of California, in the city of San Diego. Brief of Appellee SDC Basketball Club, Inc. at 8, SDC Basketball Club, 815 F.2d 562 (9th Cir. 1987).
13. Id.
14. SDC Basketball Club, 815 F.2d at 564.
15. 726 F.2d 1381, 1382 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1984). The United States Court of Appeals for the Ninth Circuit held that: (1) the NFL was not [a] "single entity" for purposes of federal antitrust law; (2) [the] evidence supported [the] jury's determination that the rule was an unreasonable restraint of trade; (3) [the] trial court was not obliged to specifically instruct [the] jury on [the] NFL's theory that the restraint involved was ancillary to [a] valid joint venture agreement; and (4) [the] trial court did not abuse its discretion in denying [a] change of venue motion based on pretrial publicity. Id.
17. See supra note 15. Also see addendum for the NFL's rule on franchise relocation.
to the NBA's franchise relocation restriction, the NBA chose not to interfere with the Clippers' move at that time.\textsuperscript{18} In fact, the NBA scheduled the Clippers' home games in Los Angeles to avoid any potential liability.\textsuperscript{19} Relentlessly, however, the NBA continued to attack the Clippers' relocation as a violation of NBA rules, and the dispute culminated in the \textit{SDC Basketball Club} case.\textsuperscript{20}

\section*{III. The NBA's Franchise Relocation Rule}

From its inception, the NBA has restricted and prohibited team franchise movement.\textsuperscript{21} The restriction, originally stated in article 9 of the NBA Constitution, categorically denied NBA teams from journeying into another team's territory with plans to remain indefinitely and conduct business, without first obtaining the resident team's permission.\textsuperscript{22} Moreover, article 9 could not be amended without the express consent of all the existing NBA member teams.\textsuperscript{23}

Article 9 was invalidated, although not removed from the NBA Constitution, on June 26, 1984.\textsuperscript{24} The NBA Commissioner declared article 9 void upon NBA counsel's opinion that the provision was probably unenforceable given the ruling in the \textit{Raiders I} case.\textsuperscript{25} In \textit{SDC Basketball Club}, the trial court judge stated: "I think, based on the \textit{Raiders} decision . . . that rule [article 9] is no damn good."\textsuperscript{26} As a result, there was "a void in the NBA Constitution with respect to club relocations."\textsuperscript{27}

As an attempt to fill this void, the NBA drafted and adopted the current rule, article 9A. Article 9A is the NBA's dispositive modern franchise relocation rule that regulates franchise movement.\textsuperscript{28} To qualify for relocation under article 9A, the moving franchise must, among other prerequisites, obtain approval from a simple majority of member teams.\textsuperscript{29}

\begin{thebibliography}{99}
\bibitem{18} \textit{SDC Basketball Club}, 815 F.2d at 564.
\bibitem{19} \textit{Id.} at 564.
\bibitem{20} 815 F.2d 562 (9th Cir. 1987), \textit{cert. dismissed}, 108 S. Ct. 362 (1987).
\bibitem{21} \textit{See infra} addendum for articles 9 and 9A of the NBA Constitution.
\bibitem{22} \textit{Id.}
\bibitem{23} \textit{Id.}
\bibitem{24} \textit{See} Brief of Appellant National Basketball Association, at 22, n.16, \textit{SDC Basketball Club}, 815 F.2d 562 (9th Cir. 1987) (No. 86-5891).
\bibitem{25} \textit{Id.}
\bibitem{26} \textit{See} Brief of Appellee SDC Basketball Club, Inc., at 22, \textit{SDC Basketball Club}, 815 F.2d 562 (9th Cir. 1987).
\bibitem{27} \textit{Id.} at 24.
\bibitem{28} \textit{See infra} addendum for article 9A of the NBA Constitution.
\bibitem{29} \textit{See} Brief of Appellee SDC Basketball Club, Inc., at 35, \textit{SDC Basketball Club}, 815 F.2d 562 (9th Cir. 1987). \textit{Also see} addendum.
\end{thebibliography}
IV. NATIONAL BASKETBALL ASSOCIATION v. SDC BASKETBALL CLUB

A. Rules Are Rules — Or Are They?

The NBA contended that the Clippers could not move to Los Angeles because article 9 of the NBA Constitution provided that no team could move into a territory occupied by another franchise without that franchise's prior approval. 30 However, since the Los Angeles Lakers waived their rights in writing under article 9, the Clippers satisfied this requirement. 31 The NBA argued that in addition to the Lakers' waiver, the "league as a body must be permitted to consider [all franchise] moves in order to give effect to a number of constitutional provisions for the exclusiveness of franchise territories." 32 In other words, the NBA contended that article 9 only limited its actions as a league, but did "not prescribe the only strictures on franchise movement." 33 In response, the Clippers argued that such "consideration by the NBA of the Clippers' move would violate the antitrust laws." 34

Meanwhile, the NBA began drafting what became article 9A, and then attempted to apply it retroactively to the Clippers' move. 35 The Clippers claimed that such an amendment to article 9 could not be applied to their move retroactively because the NBA had not complied with the NBA Constitution, which required unanimous approval from member teams before such an amendment could become effective. 36 The NBA countered by arguing that article 9A was a "new constitutional provision codifying previous practice." 37 In other words, the NBA argued that article 9A was an amendment to the NBA Constitution and not an amendment to article 9; thus, it was not necessary for the NBA to obtain unanimous member approval.

The Clippers attacked the NBA's contention that article 9A was a "new" constitutional provision rather than an amendment to article 9. 38 The Clippers pointed out that the NBA had labelled the new rule "article 9A," thus showing by its own title that it was an amendment to article 9. 39 The Clippers cited article 17(a) of the NBA Constitution entitled

30. See infra addendum for the NBA's rule on franchise relocation.
31. SDC Basketball Club, 815 F.2d at 564.
32. Id.
33. Id.
34. Id. at 565.
35. Id. at 564. See infra addendum for article 9A.
36. SDC Basketball Club, 815 F.2d at 564.
37. Id.
38. Id.
39. The Clippers argued in their brief that:
“Amendments” which provides:

Except as otherwise provided for in this Constitution, the Constitution of the Association may be amended by the votes of three-fourths (3/4) of all the Governors. Article 17(a) by its express terms is only applicable where there is no otherwise applicable provision with respect to the votes required for valid amendment.40

The Clippers argued that the language of article 9 is clear and unequivocal.41 It states, “this provision as to territorial restrictions may be amended only with the consent of all [the NBA member clubs].”42 Therefore, the three-fourths (3/4) rule of article 17, arguably, does not apply to article 9 because article 9 has its own amendment provision. Furthermore, because the Clippers voted against adopting article 9A at the June 1984 Board of Governors meeting, article 9A was not unanimously approved. Thus, the Clippers argued, article 9A does not apply to their move since it was not properly incorporated into the NBA Constitution before they moved to Los Angeles.43

The Clippers next argued that even if article 9A was properly incorporated into the NBA Constitution, it could not be retroactively applied because the NBA Constitution does not contain a provision allowing for such retroactive application.44 Therefore, article 9A could not be applied to the Clippers’ May 1984 move because it would not have gone into

before [the NBA] had litigation-inspired motives for twisting the facts, the NBA itself recognized that provisions adding a new lettered section to an article are amendments to that article itself. For example, article 35 was amended by the addition of new paragraphs (j) and (k); the resolution described these additions as amendments to article 35. . . . Furthermore, article 9A deals with the very same subject matter as did article 9—club relocations—and it changes the substantive rights and obligations of the parties which had been codified in article 9. It is, therefore, an amendment to article 9 in the ordinary sense of the term. (Emphasis original)

Brief of Appellee SDC Basketball Club, Inc. at 26, n.11, SDC Basketball Club, 815 F.2d 562.

40. Brief of Appellee SDC Basketball Club, Inc. at 26, SDC Basketball Club, 815 F.2d 562 (9th Cir. 1987). All of the NBA teams have a vote when amendments to the NBA Constitution are proposed. Presently the teams are: Atlanta Hawks, Boston Celtics, Chicago Bulls, Cleveland Cavaliers, Dallas Mavericks, Denver Nuggets, Detroit Pistons, Golden State Warriors (San Francisco), Houston Rockets, Indiana Pacers, Los Angeles Clippers, Los Angeles Lakers, Milwaukee Bucks, New Jersey Nets, New York Knickerbockers, Philadelphia 76ers, Phoenix Suns, Portland Trailblazers, Sacramento Kings, San Antonio Spurs, Seattle Supersonics, Utah Jazz and the Washington Bullets. The Charlotte Hornets and the Miami Heat entered the NBA starting with the 1988-89 season. The Minnesota Timberwolves and the Orlando Magic will enter the NBA starting with the 1989-90 season.

41. Brief of Appellee SDC Basketball Club, Inc. at 27, SDC Basketball Club, 815 F.2d 562 (9th Cir. 1987).

42. Id.

43. Id.

44. Id. at 24, n.10.
effect until sometime in June 1984, when the NBA Board of Governors convened.\textsuperscript{45} The Clippers' final argument was that even if article 9 or article 9A did apply, the notion of franchise relocation rules in professional sports violates antitrust law under the rule of reason analysis,\textsuperscript{46} and therefore, it could not be used to bar their move.

\section*{B. NBA's Response To The Clippers' Move}

The NBA brought suit in the United States District Court for the Southern District of California seeking a declaratory judgment to prohibit the Clippers' move to Los Angeles without seeking prior league approval.\textsuperscript{47} In addition, the NBA sought damages from the Clippers for breach of fiduciary duty and breach of contract,\textsuperscript{48} as well as from the Los Angeles Memorial Coliseum Commission ("LAMCC") for tortious interference with contractual relations between the NBA and one of its league members.\textsuperscript{49} In response, the Clippers and LAMCC counter-claimed against the NBA and the other individual league teams, seeking a "declaratory judgment that consideration by the NBA of the Clippers' move would violate the antitrust laws."\textsuperscript{50}

After reviewing a multitude of pleadings and denying five motions for summary judgment, Judge Nielsen of the district court suggested that the NBA could not win given the ruling in \textit{Raiders I}.\textsuperscript{51} Judge Nielsen relied on the \textit{Raiders I} decision, and granted the Clippers summary judgment,\textsuperscript{52} stating:

I have to say that, although I felt the law required me to deny the motions for summary judgment all the way around, I really don't see how the NBA can win this lawsuit. I think your chances of winning are somewhere between slim and none in light of the \textit{Raiders} case . . . I think you're in deep water with-

\textsuperscript{45} \textit{Id.} at 24.
\textsuperscript{46} \textit{See infra} text accompanying notes 79-91.
\textsuperscript{47} \textit{SDC Basketball Club}, 815 F.2d at 564-65.
\textsuperscript{48} \textit{Id.} at 565.
\textsuperscript{49} \textit{Id.} The Los Angeles Memorial Coliseum Commission owns and operates the Los Angeles Sports Arena where the Clippers play their home games.
\textsuperscript{50} \textit{Id.} at 565. \textit{See supra} note 40 for list of league teams.
\textsuperscript{51} \textit{SDC Basketball Club}, 815 F.2d at 565. The court's exact language was: "Well, I can't see spending what I now foresee as at least two to three months of my time and the jury's time on this case without some instruction from the circuit. So the motion for summary judgment is granted." Appellant's Memorandum of Points and Authorities in support of their motion for summary reversal at 4, \textit{SDC Basketball Club}, 815 F.2d 562 (9th Cir. 1987) (No. 86-5891).
\textsuperscript{52} Brief for Appellee National Basketball Association at 12, \textit{SDC Basketball Club}, 815 F.2d 562 (9th Cir. 1987).
out a paddle and your life jacket is leaking.53

The court's order granted the Clippers and LAMCC declaratory relief, but dismissed the Clippers' and LAMCC's claims for damages for violation of antitrust laws.54

Shortly thereafter, the Ninth Circuit issued its decision in *Los Angeles Memorial Coliseum Comm'n v. National Football League*55 ("Raiders II") regarding damages and state law claims. The Ninth Circuit in *Raiders II* found that:

the "expansion opportunity" in Los Angeles represented an extremely valuable expansion possibility for the league. . . . The value of the Los Angeles opportunity arose not only from the economic potential of one of the nation's largest media markets, but also from the NFL's well-established and widely followed nationwide entertainment product. That product had developed over the years into a geographically diverse structure of teams, with traditions, rivalries, well-known players and national media interest, all of which greatly enhanced the value of any expansion opportunity. If and when the NFL placed an expansion team in the Los Angeles area, the accumulated value of the Los Angeles opportunity would have been realized by the NFL through charging the new expansion team owner for the expansion opportunity.56

In other words, when the Raiders moved from Oakland to Los Angeles, they reaped a windfall represented by the "expansion opportunity" in Los Angeles. Accordingly, the *Raiders II* court found that the Raiders, by moving to Los Angeles, should compensate the NFL for taking the expansion opportunity.57 The *Raiders II* court, therefore, determined that the judgment in *Raiders I*, given to the Raiders, should be offset by the value of the Los Angeles opportunity.58

In light of the above, it is obvious why the NBA, in *SDC Basketball Club*, argued for compensation for the "expansion opportunity" usurped by the San Diego Clippers when they moved to Los Angeles. Additionally, the NBA requested that the Ninth Circuit reverse the district court's summary judgment ruling on all other counts and remand the

53. *Id.*
54. *SDC Basketball Club*, 815 F.2d at 565.
57. *Id.* at 1373.
58. *Id.*
C. Summary Judgment For SDC Basketball Club Reversed

In SDC Basketball Club, the Ninth Circuit Court of Appeals acknowledged that there was a justiciable controversy. Although the court of appeals did not use a precise test to determine the difference between an abstract question and an actual controversy, it declared that a district court's determination of whether a ruling for summary judgment is proper depends on whether there are facts alleged showing that "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

The circuit court stated that summary judgment could only be upheld if there were no issues of material fact. The circuit court determined that summary judgment was rare with antitrust cases because of the factually complex issues of motive and intent. The court of appeals concluded that there were pervasive issues of material fact including: (1) Whether there was a duty of good faith and fair dealing between the NBA and the Clippers; (2) Whether either party breached that duty; and (3) Whether the NBA Constitution expressly or impliedly provided for recovery of "expansion opportunity" damages. Because issues of material fact existed, the summary judgment granted to SDC Basketball Club by the district court was reversed and the whole case remanded to the

59. SDC Basketball Club, 815 F.2d at 565 (citing Raiders II, 791 F.2d at 1371-73).
60. Id. at 566.
61. Id. at 565 (quoting Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 273 (1941)).
62. SDC Basketball Club, 815 F.2d at 566-67. See e.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Columbia Steel Co., 334 U.S. 495 (1948), reh'g denied, 334 U.S. 862 (1948). In Times-Picayune, the Court stated:

While the completed offense of monopolization under § 2 [of the Sherman Act] demands only a general intent to do the act, "for no monopolist monopolizes unconsciously of what he is doing," a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged. (citations)


63. Id. In section 2 of the Sherman Act, motive and intent are two of the elements constituting an attempt to monopolize. See supra note 4 for Sherman Act § 2.
64. SDC Basketball Club, 815 F.2d at 569-70. Also see supra text accompanying note 56 for "expansion opportunity" explanation.
district court for determination.  

The circuit court also focused on the NBA's declaratory judgment claim, and again perceived a substantial controversy. The NBA asked for allowance to assess and evaluate the limits of franchise relocation within the NBA without violating antitrust laws.  

In response, the Clippers asserted that if the NBA imposed or considered a sanction on a team for relocating, it would be an unreasonable restraint of trade in violation of the antitrust laws. The circuit court found each party in direct conflict and held that "[s]ince the NBA's 'real and reasonable apprehension,' [citation omitted] was that any action on the Clippers' move could result in antitrust liability, the case is justiciable."  

The court of appeals did not rule on whether or not the NBA's franchise relocation rule comported with federal antitrust laws, but did state that the antitrust issue of professional sports franchise relocation restrictions should be decided according to Raiders I and Raiders II. This casenote will focus on the fact that the NBA's franchise relocation rule, as applied to the San Diego Clippers' move, violated federal antitrust law, and therefore, the Clippers' move could not have been barred by the NBA.

V. BRIEF HISTORY OF FEDERAL ANTITRUST LAW

Section 1 of the Sherman Act provides: "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal." The purpose of section 1 of the Sherman Act is to prevent competitors from making agreements which would tend to unreasonably eliminate or reduce competition resulting in harm to consumers. Thus, to have a section 1 violation, there must be an agreement made by a plurality of actors that inhibits competition and harms consumers. Because Con-

65. Id.
66. SDC Basketball Club, 815 F.2d at 566-67.
67. Id.
68. Id.
69. SDC Basketball Club, 815 F.2d at 567.
71. Raiders I, 726 F.2d at 1391.
gress could not have intended to have "every contract" declared illegal, courts have developed two tests to determine (a) whether the agreement is so anticompetitive that it is illegal per se, or (b) whether the agreement requires a more in-depth review provided for by the rule of reason analysis. This section will discuss two main points: (1) the necessity of concerted action to violate section 1 of the Sherman Act; and (2) the two tests courts use to determine the legality of agreements questioned by federal antitrust laws.

A. Concerted Action: Wholly Owned Subsidiaries (Single Business Entities) Are Not Scrutinized Under Section 1 Of The Sherman Act

To violate section 1 of the Sherman Act, it is imperative that concerted action exist. In Copperweld Corp. v. Independence Tube Corp. ("Copperweld"), the United States Supreme Court found that conduct which is wholly unilateral is not reached by the restraint of trade provision of the Sherman Act. The issue in Copperweld was whether coordinated activity of a parent company and its wholly-owned subsidiary should be viewed as a single business enterprise, or as a combination capable of conspiracy under section 1 of the Sherman Act. Chief Justice Burger, writing for the majority, held that it is impossible as a matter of law for a wholly-owned subsidiary to conspire with a parent company under section 1 of the Sherman Act. The limited holding concluded only that "the coordinated behavior of a parent and subsidiary falls outside the reach of section 1." In other words, a single business entity, acting unilaterally, cannot violate section 1, despite its anti-competitive behavior.

B. Per Se Rule Of Illegality vs. Rule Of Reason

Once it is determined that there is concerted action between two separate business entities, the question becomes whether or not that action violates section 1 of the Sherman Act. In National Society of Professional Engineers v. United States ("Professional Engineers"), Just-
Justice Stevens, writing for the majority, cited two categories of antitrust analysis:

In the first category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal per se." [In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.]

1. Per Se Rule

Justice Stevens first focused on agreements that are illegal per se. Illegal per se agreements include, for example, price fixing agreements, agreements to divide markets, and tying agreements. However, in Standard Oil Co. v. United States ("Standard Oil"), the Supreme Court determined that the antitrust act "should be construed in the light of reason; and, as so construed, it prohibits all contracts and combinations which amount to an unreasonable or undue restraint of trade . . . ." As a result, Standard Oil suggests that the evidence in a case is weighed to determine whether the restrictive practice imposes an "unreasonable or undue restraint of trade" on competition. As courts have become more experienced with issues involving antitrust problems, they have found that agreements which are so consistently unreasonable are illegal per se, and do not require an elaborate inquiry into the purported justifications

84. 221 U.S. 1 (1911).
86. Id.
for these agreements. Courts opt to use the per se approach for types of business agreements which, over time, have been found to be "consistently unreasonable and . . . plainly anticompetitive." Thus, when antitrust issues arise in areas where courts have limited experience, the rule of reason analysis should be utilized instead.

2. Rule Of Reason

If a particular kind of business agreement is not illegal per se, then the rule of reason analysis will be employed. This judicially created rule requires the fact finder to consider all of the evidence presented and to balance the anti-competitive effects against the pro-competitive virtues to determine whether there is an unreasonable restraint of trade in violation of antitrust laws. The accepted approach to rule of reason analysis is found in Justice Brandeis' opinion in Chicago Board of Trade v. United States ("Chicago Board"), which states:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

VI. THE APPLICATION OF ANTITRUST LAW TO SPORTS LEAGUE RESTRICTIONS

The unique business nature of a sports league or franchise requires cooperation among its participants in order to survive. Each league team must cooperate with the other league teams to produce its sport. Teams must agree on, among other things, a site to play at and rules to follow. The unique nature of agreements between teams in sports leagues, as well

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87. Raiders I, 726 F.2d at 1388-89.
89. Raiders I, 726 F.2d at 1387.
90. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
91. Id.
as their business practices, has become the subject of many antitrust cases.92

Sports leagues generally establish rules and regulations which govern the agreements and business practices of league members. Without such agreements, the league would not be able to produce its sport. Because sports leagues create these rules and regulations, they claim to be single business entities.93 As a single business entity, a sports league would be exempt from section 1 of the Sherman Act.94 This section will discuss two issues in analyzing antitrust law as applied to sports leagues. The first is whether courts accept the argument that a sports league is a single business entity not governed by section 1 restrictions. The second point explores what test to apply to resolve antitrust issues in sports leagues.

A. Single Entity Exemption From Section 1?

In the past, the NFL has asserted that the unitary nature of the product it creates — NFL football — implies that it is a single entity.95 However, in Raiders I, the district court found that the NFL is not the "'parent' of any league member, nor do any two clubs have a common owner. The clubs do not share key operational personnel. [In fact,] the NFL itself has conceded that the 'existence of actual or potential interclub competition in certain areas [does not exist].'"96 Consequently, the district court in Raiders I directed a verdict for the plaintiffs and declared that the "NFL's member teams should be treated as separate business enterprises... rather than as components of a single business entity."97 On appeal, the Ninth Circuit affirmed the district court's decision finding that each NFL team is an entity distinct from the NFL for purposes of federal antitrust law.98 After it was determined that the NFL's single entity defense for a violation of section 1 would not succeed, the court went on to determine whether or not to apply the per se or rule of reason analysis to the NFL's franchise relocation rule.99

92. See supra note 70 for example of antitrust cases.
94. See supra text accompanying notes 74-78.
95. Raiders I, 519 F. Supp. at 583.
96. Id. at 583, n.1.
97. Id. at 585.
98. Raiders I, 726 F.2d at 1390.
99. Id.
B. Per Se Rule Of Illegality vs. Rule Of Reason As Applied To League Sports

Courts are hesitant to use per se rules in league sports because of the unique nature of such leagues. It is difficult to analyze the "negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context." Thus, courts tend to apply the rule of reason analysis. In Smith v. Pro Football, Inc. ("Smith"), the appellate court relied on the rule of reason to determine whether a restraint arising out of the NFL player draft was significantly anti-competitive in purpose or effect. The court had to decide if the NFL clubs had combined to exclude competitors or potential competitors from the market via the player draft. The Smith court relied on the Supreme Court's analysis in Standard Oil, and stated that "Standard Oil established a judicial gloss on the statute which made the 'rule of reason' the prevailing mode of analysis." Therefore, the Smith court did not invoke a per se rule of illegality even though the NFL clubs operate as a joint venture, which in other markets would be considered per se illegal. The court stated:

The NFL player draft differs from the classic group boycott (joint venture) in two significant respects. First, the NFL clubs which have "combined" to implement the draft are not competitors in any economic sense. The clubs operate basically as a joint venture... in producing an entertainment product—football games and telecasts. No NFL club can produce this product without agreements and joint action with every other team. To this end, the League not only determines franchise locations, playing schedules, and broadcast terms, but also ensures that the clubs receive equal shares of telecast and ticket revenues. These economic joint ventures "compete" on the playing field, to be sure, but here as well cooperation is essential if the entertainment product is to attain a high quality: only if the teams are "competitively balanced" will spectator interest be maintained at a high pitch. No NFL team, in short, is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails,

100. Raiders I, 726 F.2d 1381, 1391 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1984).
101. 593 F.2d 1173, 1178 (D.C. Cir. 1978).
103. Id.
104. Id. at 1178.
105. Id. at 1179-80.
no single team can survive.\textsuperscript{106}
The Smith court determined that although the restraint may have had legitimate business purposes, the "anti-competitive evils" outweighed any "pro-competitive virtues," and thus violated antitrust laws.\textsuperscript{107}

The rule of reason was the mode of analysis in another popular antitrust sports league case. In National Collegiate Athletic Ass'n v. Board of Regents\textsuperscript{108} ("Board of Regents"), the NCAA's rule regulating the televising of college football games was questioned as a restraint of trade in violation of antitrust laws.\textsuperscript{109} The rule constituted a restraint of trade because "it limited members' freedom to negotiate and enter into their own television contracts."\textsuperscript{110} This restraint would violate section 1 of the Sherman Act if it was an unreasonable restraint of trade. Justice Stevens, writing for the majority, found that the NCAA's rule constituted price fixing, but, because of the nature of the NCAA's industry, "restraints on competition are essential if the product is to be available at all."\textsuperscript{111} Thus, even though this type of price fixing is generally presumed to be unreasonable and illegal per se in other markets,\textsuperscript{112} the rule of reason was utilized here because the NCAA provided such a unique product.\textsuperscript{113} Notwithstanding the rule of reason analysis, the NCAA restraints were found to be unjustified and thus illegal under the antitrust laws.\textsuperscript{114}

This decision reflects the Supreme Court's preference to apply the rule of reason analysis when a trade restraint restriction exists, provided that such a restriction is necessary for that product to be produced. In professional sports leagues, teams cooperate with one another with league restrictions in order for that league's sport to be produced. Thus, if a professional sports league argues that its relocation restriction is necessary for the league to exist and produce its product, given Board of Regents, it is arguable that the rule of reason analysis should apply to professional sports leagues.

Because of the limited number of cases involving franchise relocation in professional sports, it is not clear whether league rules are per se

\textsuperscript{106} Id. at 1178-79 (citations omitted).
\textsuperscript{107} Smith, 593 F.2d at 1183 (citing Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977, 77 COLUM. L. REV. 979, 983 (1977)).
\textsuperscript{110} Id. at 96-97.
\textsuperscript{111} Id. at 101.
\textsuperscript{112} Id. at 99.
\textsuperscript{113} Id. at 99-100.
\textsuperscript{114} Board of Regents, 468 U.S. at 100.
invalid. As a result, and given the Supreme Court's preference for the rule of reason, courts have opted to apply rule of reason analysis when confronted with a professional sports franchise relocation restriction.

VII. RAIDERS I: THE ESTABLISHMENT OF ANTITRUST LAW IN THE NINTH CIRCUIT PERTAINING TO SPORTS LEAGUES' FRANCHISE RELOCATION RULES

The Ninth Circuit's current interpretation of antitrust law regarding the relocation of a professional sports franchise developed when the Oakland Raiders' lease with the Oakland Coliseum was due to expire, and managing general partner Al Davis requested Oakland officials to enhance and improve the Raiders' stadium. When Oakland officials rejected his requests, Davis searched for a better stadium. When Davis contacted the Los Angeles Coliseum, a Raiders' move seemed imminent. Once an announcement was made that the Raiders were moving to Los Angeles, the NFL sought an injunction to prevent the move.

The above events led to Los Angeles Memorial Coliseum Comm'n v. National Football League ("Raiders I"), which is the precedential case in the Ninth Circuit. In Raiders I, the Oakland Raiders challenged NFL rule 4.3 which required approval by three-fourths of the member teams before one team could relocate into another team's league territory. The Raiders claimed that rule 4.3 violated federal antitrust law. The Ninth Circuit Court of Appeals concluded that NFL teams are separate business entities with products having an independent value. The appellate court, therefore, determined that the NFL's relocation rule warranted rule of reason scrutiny under section 1 of the Sherman Act. Given the unique nature or "peculiarity" of the NFL, the Raiders I court, under Professional Engineers, properly applied the rule of reason test. The court's application was proper because it relied on the district court's finding that professional football is a unique business, and as such, made the application of a per se rule inappropriate.

115. Raiders I, 726 F.2d at 1387.
116. Id.
117. Id. at 1385.
118. Id.
119. 726 F.2d 1381 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1984).
120. Id. at 1381-82.
121. Raiders I, 519 F. Supp. at 585.
122. Raiders I, 726 F.2d at 1389.
123. See supra text accompanying notes 79-80.
124. Raiders I, 726 F.2d at 1387 (citing Los Angeles Memorial Coliseum Comm'n v. N.F.L., 468 F. Supp. 154, 164-68 (C.D. Cal. 1979)).
A. Raiders I: Three Part Rule Of Reason Analysis

1. Professional Sports Leagues Are Not Single Business Entities

The district court first considered whether the NFL was a single business entity for purposes of the Raiders' lawsuit. The court stated that "[o]n its face, the NFL certainly appears to be an association of separate business entities rather than one single enterprise." The district court found that the NFL did not possess features ordinarily found in a single entity. On appeal, the Ninth Circuit Court of Appeals considered the fact that: (1) no individual team in the NFL shares its profits or losses; (2) NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly; (3) each franchise is managed independently; and (4) each makes its own decisions on hiring staff and players, and on entering contracts for concession and ticket sales, advertising and community work.

The Ninth Circuit affirmed the district court's ruling that the NFL is not a single business entity. Essentially, the Ninth Circuit did not want to immunize the NFL from scrutiny under section 1 of the Sherman Act. The court found that although NFL clubs have certain common purposes, they do not operate as a single business entity. Thus, the plaintiff satisfied the first element necessary to demonstrate a cause of action for restraint of trade in violation of section 1 of the Sherman Act.

2. Anti-Competitive Action

The district court next considered whether the NFL's exclusive territory rule, rule 4.3, was intended to harm or unreasonably restrain trade. The NFL adopted rule 4.3 to assure franchise owners that no

125. Raiders I, 519 F. Supp. at 582.
126. Id.
127. Id. at 583.
128. Raiders I, 726 F.2d at 1388-89.
129. Id.
130. Id.
131. Id.
132. Id. at 1387.
To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anti-competitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.
134. Raiders I, 726 F.2d at 1388-89.
135. Id. at 1394-95.
other NFL team would move into their team's exclusive area to compete economically.\textsuperscript{136} Team owners viewed rule 4.3 as a keystone to their franchise's success and stability.\textsuperscript{137}

At trial, the NFL admitted that the purpose of rule 4.3 was to restrain competition within the league.\textsuperscript{138} As a result of this admission, the \textit{Raiders I} court declared that the NFL's relocation rule "on its face [is] an agreement to control, if not prevent, competition among NFL teams through territorial divisions."\textsuperscript{139} Accordingly, rule 4.3 was found to be anti-competitive in nature, and a violation of antitrust law.\textsuperscript{140}

3. Harm To Consumers

Unlike the first two elements, the Raiders found the final element, actual injury, more difficult to establish. The court required actual injury or "[p]roof that the defendant's activities had an impact upon competition in a relevant market."\textsuperscript{141} However, the relevant market was not clearly defined in court because each party previously stipulated as to how the relevant market would be defined.\textsuperscript{142} In fact, as an aid to the jury, economic expert reports and exhibits were supposedly incorporated into the court transcript.\textsuperscript{143} The Ninth Circuit's review, however, indicated that no such evidence was presented to the jury.\textsuperscript{144} Nonetheless, the court found the subject satisfactorily covered in other testimony which substantiated "the jury's finding that rule 4.3 [was] an unreasonable restraint of trade [resulting in harm]."\textsuperscript{145}

Additionally, the court examined the doctrine of ancillary restraints which would have allowed rule 4.3 to restrain trade if it was subordinate or collateral to another legitimate purpose.\textsuperscript{146} Despite the ancillary restraint doctrine, the court properly found that the NFL's goal of franchise stability and maintaining regional balance could be achieved

\begin{thebibliography}{99}
\bibitem{136} Id.
\bibitem{137} Id.
\bibitem{138} Id. at 1395.
\bibitem{139} \textit{Raiders I}, 726 F.2d at 1391. Rule 4.3, which is reprinted in the addendum in full, is the rule referred to here.
\bibitem{140} Id. at 1382.
\bibitem{141} Id. at 1391 (quoting Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980)).
\bibitem{142} Id. at 1392.
\bibitem{143} Id.
\bibitem{144} \textit{Raiders I}, 726 F.2d at 1392.
\bibitem{145} Id.
\bibitem{146} Id. at 1395.
\end{thebibliography}
with less restrictive and less harmful alternatives than rule 4.3. In essence, and without further discussion of the ancillary restraint doctrine, the court found that the plaintiff had proved the third element of the cause of action.

Because professional sports leagues do not have single entity status, relocation restrictions can be viewed as agreements between two or more persons which may unreasonably restrain trade. Therefore, when this issue arises, courts will opt to use the rule of reason test. In Raiders I, the court applied the rule of reason analysis and established that the NFL's franchise relocation rule was: "(1) An agreement among two or more persons or distinct business entities; (2) Which [was] intended to harm or unreasonably restrain competition; (3) And which actually cause[d] injury to competition."

B. Significance Of Raiders I Case

When the rule of reason was applied to the NFL's franchise relocation restriction, the circuit court in Raiders I thoroughly analyzed the industry at issue, and balanced the positive and negative effects on competition. The court found that the NFL's relocation rule, was "on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions." The court looked to the relevant market to balance the positive and negative effects of the restraint on competition. The Raiders I court noted that the "relevant market" has two components: (1) the product market and (2) the geographic market.

The product market involves:

The process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager poten-

147. Id. at 1396. The Ninth Circuit did not expand on what these alternatives were, but merely stated "there was substantial evidence going to the existence of such alternatives." Id.
148. See supra text accompanying notes 100-116.
149. Raiders I, 726 F.2d at 1391 (quoting Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980)).
150. Id. at 1391.
151. Id.
152. See infra addendum for NFL relocation rule.
153. Raiders I, 726 F.2d at 1391.
154. Id. at 1392, citing Kaplan, 611 F.2d at 292 (quoting Smith K-line Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir. 1978), cert. denied, 439 U.S. 838 (1978)).
155. Id. at 1392-94.
tial entrants to the market.\textsuperscript{156}

The geographic market is defined as where the seller sells and where the buyer will practically buy.\textsuperscript{157} Taking the above into account, the circuit court determined that the critical question was whether the relocation rule reasonably promoted the NFL's product or harmed its competition.\textsuperscript{158} The division of exclusive territories, the court concluded, insulated teams from competition within the NFL market,\textsuperscript{159} and "effectively foreclose[d] free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants."\textsuperscript{160} Because of the above findings, and because less restrictive alternatives were available, the jury correctly found the NFL's relocation rule to be an unreasonable restraint of trade in violation of antitrust laws.\textsuperscript{161}

The circuit court recognized that:

[T]he NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.\textsuperscript{162}

Furthermore, the \textit{Raiders I} court stated:

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised.\textsuperscript{163}

Taking the above findings into account, \textit{Raiders I} established the Ninth Circuit's approach to this area by "applying the rule of reason [analysis] to a sports league's franchise relocation rule, a business practice in an

\begin{itemize}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.} at 1393.
\item \textsuperscript{158} \textit{Raiders I}, 726 F.2d at 1394.
\item \textsuperscript{159} \textit{Id.} at 1395. The court noted that exclusive territories allow each individual team to set monopoly prices to the detriment of the consuming public. \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 1395.
\item \textsuperscript{161} \textit{Id.} at 1396.
\item \textsuperscript{162} \textit{Id.} at 1397.
\item \textsuperscript{163} \textit{Raiders I}, 726 F.2d at 1397.
\end{itemize}
industry which does not readily fit into the antitrust context.\textsuperscript{164}

VIII. **APPLICATION OF THE NINTH CIRCUIT RULE TO THE NBA’S FRANCHISE RELOCATION RULE IN SDC BASKETBALL CLUB**

**A. Single Entity Exemption From Section 1?**

Whether or not the NBA is a single business entity is a question of fact. The NBA attempts to restrict franchises from relocating into an already existing franchise territory by requiring prior approval from the team encroached upon.\textsuperscript{165} In effect, assuming that the NBA does not compete in a broad market defined as entertainment, the NBA attempts to divide sales territories of the NBA’s product—professional basketball—into exclusive areas free of competition.\textsuperscript{166} This division of territory, given *Raiders I*,\textsuperscript{167} seems to unreasonably restrain trade and reduce competition, resulting in harm to consumers.

Any attempt by the NBA to assert that it comes within the *Copperweld* holding should fail. For example, the NBA may argue that because it is a single business entity comprised of wholly owned subsidiaries, it cannot conspire under section 1.\textsuperscript{168} However, the NBA is similar to the NFL in several respects. Aside from the obvious differ-

\textsuperscript{164} *SDC Basketball Club*, 815 F.2d at 567, (quoting *Raiders I*, 726 F.2d at 1391).

\textsuperscript{165} See infra addendum for rule.

\textsuperscript{166} See Darcy v. Allen ("Darcy"), 77 Eng. Rep. 1260 (1602). The *Darcy* court held that a patent granted to Darcy allowing for an exclusive right to manufacture and import playing cards was a monopoly and void. Similarly, one could argue that when the NBA granted an exclusive right allowing the Los Angeles Lakers to produce professional basketball in Los Angeles, it created a monopoly and should be void. To illustrate, if the product market is defined as professional basketball, and the geographic market is defined as Los Angeles, assuming the Clippers were not in Los Angeles, the Los Angeles Lakers would be a monopoly in the marketplace. (This casenote will not attempt to attack the argument that even with the Clippers in the marketplace, the 1986-1987 World Champion Lakers monopolize anyway—or at least on the court.) If the only show in town happens to be the best show in the world, the producer of that show or product could charge the consumer as much or as little as he wanted. Consequently, if someone wanted to purchase the product (ie., attend a professional basketball game), the consumer, by not having a choice, would be exposed to monopoly prices. Without the competition of other professional basketball teams in Los Angeles, combined with the NBA’s Constitutional rule which limits franchise movement and entry into the NBA, arguably, antitrust laws are violated because monopolies are created by the unlawful restraints of trade. This approach is very narrow, however, because by changing the definition of the product market to all basketball or an even broader definition of entertainment in general, there would be a great deal of competition in the market. Thus, the Lakers and the NBA would not have the monopolistic power to control price and exclude competition. Also, if the geographic definition was expanded to include the state of California or the United States, the Lakers and the NBA would not have the market power of a monopolist.

\textsuperscript{167} See supra text accompanying notes 135-40.

\textsuperscript{168} See *Copperweld*, 467 U.S. at 753.
ences of the sports, players, teams, coaches and so on, both the NBA and the NFL are professional sports leagues each having their own unique product. By analogy, therefore, the NBA, with twenty-five separate legal entities and no common owners, like the NFL, is not properly considered as a single enterprise incapable of Sherman Act conspiracy. To hold that the NBA is a single entity would be tantamount to saying that any group of separate entities who joined together (conspired) in any common organization is a single business.

Since the NBA clearly is not a single business entity, the question becomes what facts are sufficient to create an inference of conspiracy in violation of antitrust laws. Does the mere existence of a franchise relocation rule in the NBA Constitution constitute conspiracy?

Parallel conduct alone does not mean that there is a conspiracy. For example, two businesses in the same market who sell the same merchandise, may have the same prices on similar goods without any agreement. To have a Sherman Act section 1 violation, both concerted action and an agreement are necessary. Thus, to analyze the relocation rule of the NBA or any other professional sports league rule, the antitrust analyst must ask the initial question of whether there is concerted action and an express contract or agreement. If the answer is in the affirmative, then it must be determined whether to apply the rule of reason analysis or the per se rule of invalidity.

169. There have been some cases, however, where professional sports leagues have sought protection from § 1 of the Sherman Act by claiming to have single entity status. See, e.g., San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974). Where the court defined the product market as production of professional hockey games before live audiences and the geographic market was broadly defined as the United States and Canada. Thus, because at least two business entities are needed to conspire or combine to restrain trade, the San Francisco Seals, as a league member, did not compete in the economic sense with the league or other members. Id. at 970. Therefore, the territorial restraints imposed by the league did not restrain trade or commerce within the relevant market place in violation of section 1 of the Sherman Act. Id. The district court in Raiders II distinguished this case from Raiders I. For decisions reaching an opposite conclusion see Lazaroff, infra note 225, at 169, n.49.

170. SDC Basketball Club, 815 F.2d at 567.

171. See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. ("Paramount"), 346 U.S. 537, 541 (1954). In Paramount, Justice Clark writing for the majority, wrote that "this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." Id. at 541.

172. See Id.

B. Per Se Rule Of Illegality vs. Rule Of Reason As Applied To SDC Basketball Club

As previously discussed, the Raiders I court found the NFL’s relocation restriction to be an “agreement” by “distinct business entities,” that “harm[ed] or unreasonably restrain[ed] competition.” The presence of relocation restrictions in professional sports constitutions gives rise to the question of whether Sherman Act restraint of trade violations exist. Because professional sports leagues are unique, and because franchise relocation restrictions are relatively new to litigation, courts are hesitant to apply per se rules of illegality in sports league antitrust cases. In fact, the district court judge in Raiders I found that the unique nature of the business of professional football made application of a per se rule inappropriate. Therefore, the unique business nature of professional basketball should also make application of the per se rule inappropriate.

In Raiders I, the court held that a jury could find that it was an unreasonable restraint of trade to apply the NFL’s franchise movement rule. The Raiders II court affirmed the jury’s liability verdict in Raiders I, and held the franchise movement rule invalid only as it applied to the Raiders’ proposed move to Los Angeles. Neither the Raiders I nor the Raiders II opinion recognized that the NFL’s franchise movement rules were per se invalid under antitrust laws. Therefore, in SDC Basketball Club, the Clippers could not assert that the Raiders’ cases mandated summary judgment in its own case. However, the Clippers could assert that the Raiders court decisions should serve as a guideline for invalidating the NBA’s franchise relocation rule using the rule of reason under antitrust law.

174. See supra text accompanying notes 125-49.
175. Raiders I, 726 F.2d at 1391.
178. SDC Basketball Club, 815 F.2d at 567 (citing Raiders I, 726 F.2d at 1398).
179. Id. (citing Raiders II, 791 F.2d at 1369). See infra addendum for Franchise Movement Rule 4.3.
C. Summary Judgment Reversal And Remand In Favor Of Applying The Rule Of Reason Analysis To SDC Basketball Club

Although the district court judge in *SDC Basketball Club* only had the *Raiders I* opinion available to him, as *Raiders II* had not yet been decided, the circuit court relied on both the *Raiders I* and *Raiders II* opinions.\(^{181}\) According to *Raiders I* and *Raiders II*, a rule of reason analysis is to be used when a professional sports league attempts to restrict franchise relocation.\(^{182}\)

In *SDC Basketball Club*, the Ninth Circuit stated that a careful analysis of *Raiders I* clearly showed that franchise relocation restrictions in professional sports leagues were not illegal per se.\(^ {183}\) However, franchise relocation restrictions may be found invalid under the rule of reason.\(^ {184}\) It reasoned that the district court judge should not have granted summary judgment against the NBA since a jury could find facts indicating that there was no unreasonable restraint of trade.\(^ {185}\) The court, for example, pointed out that the mere existence of article 9, article 9A, and various other provisions for franchise relocation evaluation cannot violate antitrust law.\(^ {186}\) The question of what is a reasonable restraint of trade is a question of fact that should be decided by a jury.\(^ {187}\)

The Ninth Circuit noted that the factual issues presented in *SDC Basketball Club* were different from those presented in *Raiders I*.\(^ {188}\) Additionally, the court found the antitrust issue presented by the Clippers differed from the antitrust issues in *Raiders I* and *Raiders II*.\(^ {189}\) The court stated that the issue in *SDC Basketball Club* was "whether the mere requirement that a team seek [NBA] Board of Governors approval before it seizes a new franchise location violates the Sherman Act."\(^ {190}\) The circuit court reasoned that since the NBA scheduled the Clippers'
home games in Los Angeles, it did not attempt to forbid their move. The NBA, consequently, decided to bring suit for declaratory relief when it faced assertions of antitrust liability. As a result, the Ninth Circuit reversed the district court’s judgment against the NBA when it found that reasonableness of the restraint is an issue of fact that should be considered by a jury.

The Ninth Circuit also reversed the district court’s dismissal of the NBA’s request for a declaration stating that the NBA Constitution allowed the league to consider the Clippers’ move. The court focused on the briefs and pleadings of each party and discovered many factual disputes. For example, the Clippers asserted that the NBA Constitution had no other franchise relocation restriction at the time they moved to Los Angeles other than the admittedly invalid article 9. At the same time, the Clippers emphasized that article 9A should not be retroactively applied, and hence, the NBA had no right to evaluate the Clippers’ move. On the other hand, the NBA contended that their right to control franchise relocations is implied by NBA general provisions. The NBA cited precedent for the imposition of charges upon new franchises. The circuit court recognized an inconsistency in the arguments as to the imposition of charges on already existing franchises moving to new locations, and new franchises entering the NBA. The Clippers asserted that there should not be any regulation if it is not expressly agreed upon. The NBA, however, suggested that a regulation is implied based on the allocation of present franchise territories and precedent. The court reasoned that when past custom is in conflict with the language of a present agreement, an ambiguity results. Thus, the circuit court determined that evidence must be elicited to harmonize the conflict and concluded that the case must be decided by a jury.

191. Id.
192. Id.
193. Id.
194. SDC Basketball Club, 815 F.2d at 569.
195. Id. at 568.
196. See Brief of Appellee SDC Basketball Club, Inc. at 24, n.10, SDC Basketball Club, 815 F.2d 562.
197. SDC Basketball Club, 815 F.2d at 568.
198. Id. at 569.
199. Id.
200. Id.
201. Id.
202. SDC Basketball Club, 815 F.2d at 569.
203. Id. (citing Crestview Cemetery Ass’n v. Dieden, 54 Cal. 2d 744, 754, 356 P.2d 171, 178, 8 Cal. Rptr. 427, 434 (1960)).
204. Id.
Though the parties had presented a number of other pendent claims, the circuit court explained that as a result of the district court’s summary judgment it did not have a district court opinion, and thus could only assume that the state claims were dismissed because the federal claims were dismissed.\(^{206}\) The circuit court pointed out that the district court should have dismissed those claims without prejudice, thus allowing them to be brought at another time.\(^{207}\)

Relying on *Raiders II*, the Clippers contended that the NBA’s breach of the implied covenant of good faith and fair dealing necessitated the dismissal of the pendent state claims with prejudice.\(^{208}\) The circuit court concluded, however, that the issues in *Raiders II* and *SDC Basketball Club* were not identical.\(^{209}\) In *Raiders II*, the court concluded that the evidence presented supported a finding that either both parties had breached the implied promise of good faith and fair dealing or that neither party had.\(^{210}\) In *SDC Basketball Club*, the circuit court noted, it was not absolutely “clear which party, if any, violated the duty of good faith and fair dealing.”\(^{211}\) Essentially, the circuit court noted another issue of fact to be considered at the trial level.\(^{212}\)

The circuit court delineated a further issue of fact for the trial court to resolve when the NBA requested that the district court enter judgment for them under the “expansion opportunity” theory suggested in *Raiders II*.\(^{213}\) The circuit court pointed out that the expansion opportunity theory only reduced the Raiders’ recovery in antitrust damages.\(^{214}\) Accordingly, the court rejected the NBA’s request.\(^{215}\) At the same time, the circuit court suggested that the source of recovery under the expansion opportunity theory would have to come from the NBA Constitution and not antitrust law.\(^{216}\)

Finally, the circuit court emphasized that “pervasive issues of mate-
rial fact” exist, supporting “the return of this case, in its entirety, to the district court for trial.” Therefore, the circuit court reversed the summary judgment granted by the district court, and remanded the case back to the district court to be decided on its merits under the rule of reason analysis.

IX. CONCLUSION

In *SDC Basketball Club*, the Clippers and the NBA ultimately settled out of court. The Clippers were allowed to stay in Los Angeles in return for acknowledging the existence of article 9A of the NBA Constitution, and agreeing to forego expansion funds to which they were entitled.

However, had *SDC Basketball Club* gone back to trial to be decided on its merits, the district court would have found the NBA Constitution void of an enforceable rule governing franchise relocations—neither article 9 nor article 9A would have been enforceable. Even though article 9 existed when the Clippers moved from San Diego to Los Angeles on May 15, 1984, the *Raiders I* holding on February 28, 1984, essentially foreclosed the NBA’s use of that rule. In fact, the NBA apparently acknowledged as much by declaring article 9 void and unenforceable on June 26, 1984. Moreover, the NBA’s substitute rule, article 9A, was inapplicable because it was not in effect at the time the Clippers moved. In fact, the trial court in *SDC Basketball Club* stated during a pretrial conference that: “[the NBA] didn’t have such a rule in effect at the time. [It] had only the rule that required three-fourth’s vote [article 9] . . .” As a result, the NBA did not have a franchise relocation rule to apply when the Clippers moved.

Nonetheless, assuming arguendo that the NBA did not declare article 9 void, the court in *SDC Basketball Club* would have reached a similar result to that of the *Raiders I* court because: (1) The agreement (article 9 of the NBA Constitution) was an agreement among two or more business entities (each individual franchise and the league), subject to Sherman Act section 1 scrutiny because the NBA is not a single business entity; (2) The purpose of article 9 was intended to unreasonably

217. *Id.*
218. *Id.*
219. This information was provided by Christopher Layne, one of the attorneys for SDC Basketball Club.
221. *Id.* at 4.
222. *Id.* at 22.
restrain trade or harm competition (by prohibiting franchise movement creating exclusive territories); and (3) That such a rule if enforced would have caused actual injury (to both the Clippers and consumers if the Clippers were unable to move). Thus, according to the rule of reason applied in Raiders I, the NBA's relocation rule would also be an agreement to regulate competition among the NBA teams through territorial divisions. In addition, the NBA restraint would have been found to perpetuate the division of exclusive territories and would have foreclosed direct competition among teams and stadia. The competition between stadia, for example, would be to attract and keep reliable tenants, such as a professional sports team, by offering quality facilities and the ability to attract patronage. As a result, there would be less competition and the public would become exposed to monopoly prices.223

If the NBA or NFL, as professional athletic leagues, were treated as single business entities, the implication would be that any agreement by all league members could not violate section 1 of the Sherman Act.224 Without concerted action, which is essential to a section 1 violation, non-competitive unilateral conduct, such as a franchise relocation rule, would not be a violation.225 The Ninth Circuit has refused to accept the argument that the NFL, with twenty-eight separate legal entities and no common owners, is one single enterprise.226 Thus, arguably, under the rule of reason analysis, the Ninth Circuit would have refused to accept the NBA's argument that, with twenty-five separate legal entities and no common owners, it constitutes one single enterprise. Given the rule of reason analysis and holding of Raiders I, the NBA had no choice but to declare their own relocation restriction, article 9, void.227

223. See supra note 159.
227. In SDC Basketball Club, the trial court stated: "I think the question is the rule you had in effect, whether it's any good or was any good. . . . I think, based on the Raiders decision and the Circuit, that the rule is no damn good." Brief of Appellee SDC Basketball Club, Inc. at 22, SDC Basketball Club, 815 F.2d 562.
To summarize, it appears that the Clippers had the right to leave San Diego because: (1) article 9 of the NBA Constitution was voided, leaving the NBA Constitution without a rule governing the relocation of already existing franchises; (2) article 9A of the NBA Constitution was inapplicable to the Clippers’ move because the amendment was not adopted with unanimous franchise approval as the NBA Constitution requires.\textsuperscript{228} Since the Clippers’ voted against adopting the amendment, the amendment did not get incorporated properly into the NBA Constitution before the Clippers moved. Thus, as in (1) above, there would be a gap in the NBA Constitution leaving the NBA without a governing rule; (3) If article 9A was properly adopted into the NBA Constitution, it could not be retroactively applied to the Clippers’ move because the NBA Constitution does not have a retroactivity clause.

In combination, the above three arguments operate to defeat all of the NBA’s arguments. More important, however, is the fact that even if the prior three arguments failed, and if the NBA had not voided article 9 of the NBA Constitution, under the rule of reason analysis set forth in Raiders I, the only way the NBA’s argument could succeed is if the NBA were deemed a single business entity. If the NBA were a single entity, under Copperweld, it could establish such a relocation rule because it would not be able to conspire with itself in violation of section 1 of the Sherman Act.\textsuperscript{229} However, since the NFL is not a single business entity under the Raiders cases, the overwhelming likelihood is that the NBA is not a single business entity either. As a result, under the rule of reason analysis, the NBA’s franchise relocation rule would violate antitrust law and the Clippers’ move could not have been prevented by the NBA.

The foregoing analysis demonstrates that the NBA could not prevent the Clippers from relocating. Thus, the Clippers’ move could only be prevented by non-legal duties such as loyalty to their fans or an affinity for their San Diego home. The general notion that “There’s No Place Like Home” seems to ring true only in the context of professional sports if a team has proper playing facilities,\textsuperscript{230} fan support, and, above all, can generate adequate profits. All professional sports franchises are first and foremost business enterprises, and if the place they call home proves inhospitable in a business sense, it appears that at least some owners would prefer to find their “Home Sweet Home” in another town. In this case,

\textsuperscript{228} See infra addendum for rule.
\textsuperscript{229} See supra text accompanying note 77.
\textsuperscript{230} The Clippers received judgment for approximately $35,000 when the court found that the operators of the San Diego Arena failed to keep the facility in adequate condition as called for by their contract. See L.A. Times, Aug. 2, 1986, § 3, at 2, col. 1.
the Clippers simply could not survive economically in San Diego, and thus adopted a modified version of that old adage. The new version reads, "There is no place like a new home," namely, Los Angeles.

Daniel B. Rubanowitz
ADDENDUM

Article 9 of the NBA Constitution provides:

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. (emphasis added)

Article 9A of the NBA Constitution provides:

A Member may transfer its franchise, city of operation, or playing site of any or all of its home games, to a different location, within or outside its existing Territory, as defined in Article 10, only in accordance with and subject to the following provisions:

(a) Application to relocate must be made in writing to the Commissioner. The application shall identify the proposed new location and the arena in which the Member proposes to play its home games, and shall be accompanied by a certified check in the sum of $50,000 to defray the costs of the investigation of the application. Following the disposition of any application the Association shall repay to the applicant the sum of $50,000, less all expenses reasonably incurred in connection with the investigation of the application.

(b) No application to relocate may be made after the first day of March preceding the season in which the proposed relocation is to take effect. Within ten (10) days of the receipt of an application to relocate, the Commissioner shall refer the application to a Committee to investigate the application. The Committee shall be appointed by the Commissioner and shall consist of no fewer than five Governors or Alternate Governors. Within one hundred twenty (120) days from the Commissioner's receipt of the application, the Committee shall report to the Board of Governors with respect to the results of its investigation and its recommendation of whether the application should be granted or denied. The recommendation of the Committee shall be based solely and exclusively upon the following factors:

(i) Whether the proposed new location can support a franchise in the Association or, if the proposed new location is within the existing Territory of a Member, whether the proposed new location can support another franchise. In evaluat-
ing this factor, the Committee shall consider: existing and projected population, income levels and age distribution; existing and projected markets for radio, broadcast television, cable television, and other forms of audio-visual transmission of Association games; the size, quality and location of the arena in which the Member proposes to play its home games; and the presence, history and popularity in the proposed new location of other professional sports teams and major college basketball teams.

(ii) Whether the applicant has demonstrated that it will be able successfully to operate an Association team in the proposed new location. In evaluating this factor, the Committee shall consider the applicant's present and projected financial condition and resources and its past performance in operating a team in the Association.

(iii) Whether the proposed relocation is likely to have an adverse effect upon the Association's ability to market and promote Association basketball on a nationwide basis in a diverse group of geographic markets.

(iv) Whether the proposed new location presents particular disadvantages for the operation of the Association, such as by creating significant travelling or scheduling difficulties or because of adverse state or local laws or regulations.

(v) Whether other Association Members, in addition to the applicant, are interested in transferring their franchises to the proposed new location, or whether there are persons or entities interested in obtaining an expansion franchise in the proposed new location. In any such event:

(A) Except as otherwise provided herein, all applicants shall follow the procedures set forth in Article 6 or this Article, as the case may be. All additional applications to establish an NBA team in the proposed new location for the season to which the initial application relates shall be made within forty-five (45) days of the Commissioner's receipt of the initial application referred to in subparagraph (a), and the one hundred twenty (120) day period provided for in subparagraph (b) of this Article shall be extended to no longer than forty-five (45) days after the Commissioner's receipt of the initial application.

(B) The Committee appointed pursuant to this Article shall investigate each of the applications and shall rec-
ommend which of the applications, if any, should be granted. In reaching its recommendation, the Committee shall consider all factors listed in subparagraph (b)(i-iv) of this Article and shall also consider:

(i) which applicant is likely to operate most successfully in the proposed new location, or otherwise best serve the interests of the Association; and

(ii) in the case of a proposed expansion franchise, whether the interests of the Association would best be served by expanding the number of members in the Association.

(C) The Committee is empowered to require from the applicant, and applicant shall furnish, such information as the Committee deems appropriate for the conduct of its investigation. The Committee may engage consultants or other experts to assist it in the investigation of the application and may also request such additional information from the Commissioner as the Committee may deem appropriate for the conduct of its investigation. All information supplied to the Committee pursuant to this subparagraph (c) shall be made available to the applicant, and the applicant shall be afforded an opportunity to appear before the Committee to present whatever additional information or arguments the applicant desires. Any other Governor or his representative may also appear before the Committee to present whatever information or arguments such Governor desires.

(D) The report and recommendation of the Committee shall be delivered to each Member of the Board of Governors. The Commissioner shall call a meeting of the Board of Governors to consider the Committee's report and recommendation, which meeting shall be held no sooner than seven (7) days and no later than thirty (30) days of delivery of the Committee's report and recommendation. The applicant shall be afforded an opportunity to appear before the Board of Governors to present whatever information or arguments the applicant desires. The question whether to approve the proposed relocation shall be decided by a majority vote of all of the members, and no vote by proxy shall be permitted. The vote of each Governor on the proposed relocation shall be based solely and
exclusively upon the factors listed in subparagraph (b)(i through v) of this Article.

NBA CONST. art. 9A.

The NFL’s rule on franchise relocation is Rule 4.3. Rule 4.3 originally read:

Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

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.

Raiders I, 726 F.2d at 1385, n.1.