CHAPTER TWELVE -- ANTITRUST AND SPORTS: INTRA-LEAGUE RESTRAINTS -- LIMITATIONS ON OWNERSHIP, LEAGUE MEMBERSHIP, AND FRANCHISE RELOCATION

I. INTRODUCTION

This Chapter focuses on a variety of disputes that relate to sports league decision making. Ever since the Oakland Raiders joined the Los Angeles Memorial Coliseum Commission's lawsuit against the National Football League (and to some extent even before then), whenever a league decides to (1) turn down a prospective new owner, (2) deny a prospective expansion team's application, (3) restrict a team's relocation, (4) limit a team owner's right to transfer ownership to an entity or partial public ownership, or (5) place other limits on a team's business operations, the aggrieved party(ies) may consider filing an antitrust action against the league and its member teams. This Chapter explores some of the issues presented by those disputes, including a few of the most common league defenses against such actions.

The most commonly litigated issue is #3, league restrictions on team relocations. Pages 527-572 explore the history of team relocations is sports leagues and some of the litigation that has resulted. Pages 572-588 focus on the NFL's dispute with a former owner of the New England Patriots concerning the owner's efforts to solve his financial problems by selling a minority, non-voting ownership interest in the team to the public. Finally, pages 588-607 consider the National Basketball Association's six year battle with the Chicago Bulls concerning league limitations on the Bulls' right to authorize superstation broadcasts of Bulls games and the so-called "single entity defense," one of the primary defenses to Sherman Act Section 1 claims raised by teams in cases of the type addressed in this Chapter.

II. ANALYSIS OF THE CASES

Case: ***Los Angeles Memorial Coliseum Comm'n v. National Football League*****, 726 F.2d 1381 (9th Cir. 1984)**

Primary Reason for Inclusion: This is a landmark case, which opened the door for intra-league antitrust claims.

Points to Emphasize: This lawsuit was initially filed by the LAMCC. After the Rams agreed to leave the Coliseum and Los Angeles to relocate to Anaheim, the LAMCC sought a new NFL tenant for the Coliseum. The NFL rule then in effect required unanimous team approval for a team relocation out of its home territory. When it became clear that no team would even discuss a relocation to Los Angeles (because there was no chance of approval), the LAMCC sued the NFL, seeking a declaratory judgment that the NFL rule was unlawful. Eventually, the Oakland Raiders (who were a defendant in the original LAMCC suit) entered into negotiations to relocate to the Coliseum and moved from the defendant side of the lawsuit to become an additional plaintiff. Aware that a rule requiring unanimity would be much more difficult to defend, the NFL modified its rules to require only three quarters (3/4) of the teams to approve a relocation, and then voted to disapprove the move, with 22 team owners voting against and 5 teams abstaining. Because the rule requires three quarters of the teams, not three quarters of the votes

cast, an abstention counts as a "No" vote. It is interesting to note that a move that the jury concluded would be procompetitive could not garner a single vote in favor, thereby suggesting that the NFL's process was fundamentally flawed or unfair or simply not based on any factors approximating the analysis of the likely competitive effects of the relocation.

The court of appeals engaged in a fairly comprehensive analysis of the NFL's argument that it is a "single entity" and thereby not subject to scrutiny under Section 1 of the Sherman Act. This is a common argument, made by sports leagues ever since teams began filing suit against their leagues. The court of appeals incorrectly believed that 90% of the league's revenues were shared equally; that was absolutely not true, the correct figure was closer to 50%, yet the court nevertheless concluded that the NFL is not a single entity. Close to 90% of the league's revenues were *shared* to some extent, but only television revenue and NFL Properties' licensing and sponsorship revenue, which was minimal in 1984, was shared equally. Gate receipts were shared with 34% going to the visiting team, and parking, concessions, luxury box, and other stadium revenues were not shared at all. For a discussion of the tremendous difference between sharing revenues and sharing revenues *equally*, see page 568.

The students should study the court's discussion of the relevant market and its discussion of the ancillary restraints doctrine. Consider the different relevant markets alleged by the two plaintiffs (LAMCC and the Raiders) -- did the Raiders have standing to allege a restraint on the stadium market -- certainly, as the buyer of stadium services, but issues of antitrust injury and standing were not as clear in 1982 (when the trial was held) or in 1984. The opinion includes a useful summary of the process of identifying anticompetitive and procompetitive effects, to be compared and balanced in light of any reasonably less restrictive alternatives. Rather than immunize the defendants' conduct, the fact that the restraints on relocation were ancillary to the other cooperation among the NFL teams merely required application of the rule of reason.

Two issues to consider and revisit throughout the chapter are the court's admonitions that (1) the NFL should apply objective standards to assess proposed relocations, rather than unfettered voting by team owners with anticompetitive motives, and (2) to the extent the NFL disagreed with the federal antitrust laws, it should seek its remedy with the United States Congress. By this time, NFL Commissioner Rozelle had been seeking just such a remedy from Congress for more than two years, without success. *See* pages 570-72. The history of NFL relocation is described in Chapter 7 -- see pages 287-289 -- and later in Chapter 12 -- see pages 539-542, 546-548.

One point raised by the NFL was the procompetitive effects their restraint had of protecting competition between the Oakland Raiders and the San Francisco 49ers. The court of appeals dismissed the issue by saying the defendants were free to argue it to the jury. Is that a satisfactory response? Should the jury have balanced those effects?

The United States Court of Appeals for the Ninth Circuit affirmed the liability findings and subsequently affirmed the LAMCC damage award, but remanded the Raiders' damage award for a new trial. *See* 791 F.2d 1356, discussed at pages 547-548.

Should the people who formed the NFL be free to set any rules they want in forming their league? Could they have just agreed that there would be no relocation or that the league could purchase any team that proposes to relocate?

Notes and Questions: N&Q 1 provides additional information about the "single entity defense" of professional sports leagues and its development. N&Q 2 explores the concept of an eminent domain action to try to force a team to stay put, which was first attempted by Oakland to try to force the Raiders to stay.

N&Q 3-5 explores some of the history of NFL relocation that closely followed and were a function of the Ninth Circuit's decision affirming the NFL defendants' liability.

Material: NFL Provisions Concerning Franchise Relocation

Primary Reason for Inclusion: These are the rules Commissioner Rozelle promulgated in 1984. They include nine "guidelines" (*see* page 544) that were drafted by now-Commissioner, then outside counsel, Paul Tagliabue for submission to Congress as part of a bill that would have given the NFL an antitrust exemption if they applied those nine factors to deny a request to relocate.

Points to Emphasize: The NFL claims (during litigation) that the procedures were drafted in response to the recommendation of the Ninth Circuit in the above *LAMCC* decision that the NFL promulgate objective standards. However, an analysis of the nine guidelines does not suggest much in the way of objective standards.

Notes and Questions: N&Q 1 takes the students through the guidelines, asking questions about the nine factors and their application to focus on their significance (the team owners remain free to vote any way they want and for any reason), their application, their purposes, what it would take to satisfy the guidelines, and reasons why the Commissioner may have an incentive to report that no proposed relocation satisfies the guidelines.

N&Q 2 raises the possibility that the indefiniteness and open-ended references to other factors in the NFL Procedures might provide a basis for the NFL contending that the Guidelines were reasonable and consistent with the *Raiders* decision. However, it is extremely difficult to argue with a straight face that the NFL Procedures do any more than provide the Commissioner with a basis for concluding that every proposed relocation is impermissible. The factors are not objective, are not tailored to distinguish procompetitive from anticompetitive

relocations, and are designed to prevent relocation -- not to comply with the Ninth Circuit's opinion in *Raiders*.

N&Q 3 points out that the *Raiders* jury and the NFL owners disagreed completely about whether the Raiders' relocation to Los Angeles should have been permitted. The NFL blamed the difference on Los Angeles jurors wanting to bring another NFL team to Los Angeles, and prior to the trial had sought to transfer venue to avoid the jurors' alleged bias, but the court refused to transfer the case on that basis.

N&Q 4 and 5 discuss issues of antitrust standing and antitrust injury. N&Q 6 discusses the error in the court's understanding about the NFL sharing of revenues.

N&Q 7 explains the court's decision in *Raiders II* -- the Ninth Circuit's decision on the appeal of the damage verdict in the *Raiders* case. This decision was the judicial discussion that led to the leagues' claim that they have the right to assess an expansion opportunity fee or a relocation fee on teams that seek to relocate. In addition, in *Raiders II* the Ninth Circuit said that the initial *Raiders* decision did not hold that NFL Constitution Article 4.3 was unlawful on its face, but rather just that it was unlawful as applied to block the Raiders' proposed relocation from Oakland to Los Angeles.

N&Q 8 provides a lead-in to the *Clippers* case.

Case: *National Basketball Association v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987)

Primary Reason for Inclusion: The Ninth Circuit's decision in *Clippers* attempts to explain and apply the earlier Ninth Circuit decision in *Raiders*. In particular, it states that *Raiders* did not hold that a franchise movement rule is unlawful in and of itself and addresses the issue of league assessment of fees on relocating teams.

Points to Emphasize: The district court opinion in *Clippers* was issued after *Raiders*, but before the clarification of *Raiders II* (the appellate decision on the damage trial issues). The district court believed the NBA's rule that owner approval was necessary was unlawful without objective standards, as suggested by *Raiders I*. The court holds that *Raiders* was merely affirming a jury verdict and the recommended objective standards were well-advised, but were not necessary conditions to the legality of league rules that restrict relocation.

The court also made it clear that *Raiders II* did not validate league assessment of "expansion opportunity" fees or "relocation fees," but rather only held that league interference with a relocation violated the antitrust laws, there would be a damage offset to the extent that the league rule challenged by the plaintiff actually benefitted the plaintiff. If the NBA was seeking

the authorization for assessing such a fee, it would have to look to the NBA Constitution (either express or implied provisions) for such a right.

The court remanded the case to the district court for a trial of the plaintiff's claim under Section 1 of the Sherman Act under the Rule of Reason.

Notes and Questions: N&Q 1 discusses the aftermath of the *Clippers* case. It then poses some difficult questions -- if the relocation fee is part of a league effort to deter relocation in violation of the Sherman Act, the agreement to impose the fee can be unlawful. In addition, if there is no legal authority to assess the fee, as suggested by *Clippers*, it can be challenged as a breach of contract or a violation of the rules of the private association. It is unclear whether the non-relocating owners can vote to change the league Constitution & Bylaws to authorize a fee and then assess just such a fee on the relocating owner.

N&Q 2 discusses open questions about league efforts to impose a wide variety of conditions on relocating owners. If those conditions are part of an unlawful effort to deter and restrict relocation, they can violate the antitrust laws in the same way as an agreement to assess a relocation fee. *See* discussion of N&Q 1, above.

N&Q 3 -- the NBA made more substantive alterations in its relocation rules, in order to comply, as least in appearance, with the *Raiders* recommendations concerning objective guidelines. Those rules require team owners to base their votes about relocation solely on specified factors. What does that really mean? Is that enforceable in any meaningful way?

Materials: NBA Provisions Concerning Franchise Relocation and League-by-League History of Team Relocation

Primary Reason for Inclusion: These materials are intended to show the aftermath of the *Clippers* case -- the NBA's response in changing its Constitution & Bylaws. They also give the students a list of all of the teams in the four major sports and their history of name changes and relocation.

Points to Emphasize: The NBA rules are different than the NFL rules. The NFL rules have been challenged frequently, and the NFL has generally been forced to permit relocation in the face of a credible threat of litigation (Cardinals -- St. Louis to Phoenix, Rams -- Los Angeles to St. Louis, Raiders -- Los Angeles to Oakland, Browns -- Cleveland to Baltimore Ravens, Oilers, Houston to Nashville). There has been absolutely no relocation in the NBA during that same time period (since the Clippers' relocation discussed above).

There has been no relocation in Major League Baseball since the Seattle Pilots relocated to become the Milwaukee Brewers in 1970. Is the existence of the protection of the baseball exemption from the antitrust laws the reason?

Notes and Questions: N&Q 1-3 discusses the NBA's battle with one team that tried to relocate. The NBA utilized a strategy that flows out of the *Raiders* case and the NFL's battle with Leonard Tose and the Philadelphia Eagles in late 1984 -- sue the team that is seeking to relocate in its home territory -- ask the local court and a local jury to keep the team at home, thereby avoiding a judge and jury in the city that is seeking a new franchise.

Material: Franchise Relocation and the Business of Professional Sports Leagues

Primary Reason for Inclusion: This textual section is intended to put the students in the position of relocating owners, non-relocating owners, the Commissioner, and the league office, to understand their motivations when a franchise relocation is proposed.

Notes and Questions: N&Q 1-4 discuss possible legislative responses to the fact that league restrictions on franchise relocation may violate federal and state antitrust laws.

Case: *Sullivan v. National Football League*, 34 F.3d 1091 (1st Cir. 1994)

Primary Reason for Inclusion: Important recent decision concerning team owner's challenge to a league restriction on the sale of ownership interests in league teams to the public. Includes an important recent ruling rejecting leagues' argument they are a single entity that cannot conspire under Section 1 of the Sherman Act.

Points to Emphasize: This case considers a number of issues concerning the viability of plaintiffs' claim and the fairness of the trial that resulted in a substantial jury verdict for the plaintiff. The first two thirds of the edited opinion concerns NFL arguments that, if accepted, might have required entry of judgment for the NFL. The final third of the edited opinion concerns NFL arguments that the trial was unfair because of evidence submitted to the jury or because the NFL was precluded from arguing certain issues to the jury.

The NFL turned one argument -- that its teams are part of a single entity -- into several allegedly separate arguments. They argued that because they do not compete (with respect to the sale of ownership interests in NFL teams), (1) Billy Sullivan could not prove that competition was injured and (2) Billy Sullivan could not prove that he suffered injury that arose our of an injury to competition -- therefore he did not suffer antitrust injury. They also argued that the teams and the league are one single entity that could not conspire under the antitrust laws. The district court and/or the jury ruled against the NFL with respect to all of these arguments and the First Circuit affirmed those decisions.

Then, the First Circuit considered the NFL's attempt to revive and expand the "ancillary restraints" doctrine. That doctrine states that if parties enter into a procompetitive joint venture, restraints on competition that are closely related to the joint venture, which might otherwise be considered *per se* violations of Section 1, should instead be analyzed under the Rule of Reason. If the "ancillary restraint" is essential to achieving procompetitive benefits associated with the joint venture, those procompetitive benefits should be balanced against the anticompetitive effects of the ancillary restraint, in light of less restrictive alternatives -- the same basic analysis as any case under the Rule of Reason.

The NFL prevented Sullivan's plan to sell stock to the public from ever getting off of the ground. At trial (and in the First Circuit), the NFL argued that the fact that Sullivan never carried forward to request a formal NFL vote or to take steps to prove that the sale to the public would have been successful, meant that Sullivan could not prove that the NFL's conduct caused his injury. The First Circuit acknowledged that the evidence was thin, but that was because of the NFL's conduct, not Sullivan's, and it declined to dismiss Sullivan's case on that basis.

Having rejected all arguments that would have led to judgment for the NFL, the court turned to arguments that the trial was unfair and the case should be re-tried. The court accepted a number of these NFL arguments and remanded the case for a new trial. First, the court considered the issue of the "equal involvement defense." Under the antitrust laws, the mere fact that Billy Sullivan and his Patriots were parties to the NFL's rules does not constitute a bar to Sullivan's seeking treble damages and an injunction against the rules. However, if the plaintiff "bears at least substantially equal responsibility for an anticompetitive restriction by creating, approving, maintaining, continually and actively supporting, relying upon, or otherwise utilizing and implementing, that restriction to his or her benefit," that will bar a damage recovery for the equally involved plaintiff. The court considered the history of the NFL's bar on public ownership and concluded that the NFL's argument that Sullivan was equally involved because Sullivan, among other things, relied upon the rule to his benefit, was an argument that should have been submitted to the jury.

Then, the court said that because Sullivan failed to request a vote did not bar his claim, but it was an issue that should have been submitted to the jury.

The court also considered the question of proper rule of reason analysis of a restraint that causes anticompetitive effects in the relevant market (the market for ownership interests in NFL teams) and alleged procompetitive benefits in on or more other markets (the market for the NFL's games on television or the market for live attendance at NFL games -- referred to by the NFL as the market for the NFL's entertainment product). The court held that the rule of reason analysis should generally focus only on effects in the relevant market, but held that the procompetitive effects alleged by the NFL might have caused indirect procompetitive

effects in the relevant market. The court concluded that the instructions given by the district court may have mislead the jury to disregard the defendants' alleged procompetitive benefits in their entirety, and remanded the case for a new trial with instructions that the instructions to the jury should be improved.

The court also held that the plaintiffs' counsel's repeated references to the many prior antitrust decisions against the NFL was prejudicial, because they did not bear on the reasonableness of the NFL's policy at issue in this case. Therefore, the court held that on remand those decisions should not be mentioned.

Notes and Questions: N&Q 1 and 2 focus on the NFL's justifications for its prohibitions on public ownership of teams or ownership by corporations with other businesses. One justification offered by the NFL is a concern that the league will be unable to control transfers of ownership, such as a corporate takeover of an NFL team by a corporate raider. Another justification is that public corporations, with boards of directors, cannot respond quickly and make decisions like a team with a single decisionmaker, as mandated by the league's rules. The primary concern, however, is a concern of owners without great independent wealth that these other forms of ownership will give some teams additional financial wherewithal and resources such that the existing owners will be unable to compete. None of these concerns were implicated by the minority sale of ownership interests proposed by the Sullivan family.

N&Q 4 focuses on the issue of rule of reason analysis balancing procompetitive effects in another market against anticompetitive effects in the relevant market, which is discussed above.

N&Q 5-7 discuss the subsequent history of the *Sullivan* case and related litigation. N&Q 5 also discusses the advisability of the NFL's consistent approach -- prevent prospective plaintiffs from getting anywhere with their plans, so even if they eventually sue, the league can argue that their claims of injury or their estimates of damage are speculative.

N&Q 8 offers some thoughts about the NBA and the *Chicago Professional Sports Limited Partnership* case that follows.

Case: *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 34 F.3d 1091 (1st Cir. 1994)

Primary Reason for Inclusion: Final reported decision in six years of litigation about the NBA's restrictions on the Chicago Bulls' sale of television broadcast rights for broadcast on a superstation. Decision breathes new life into leagues' single entity arguments.

Points to Emphasize: This was the final judicial chapter in the six-year battle between the NBA and the Chicago Bulls. The origin of the dispute was simple -- the popularity of and public interest in Michael Jordan grew to a level that it exceeded the interest in the rest of the NBA. Therefore, there was a desire to broadcast every game in which Michael Jordan was playing. The problem that is the subject of the litigation was that certain local television stations are also superstations, meaning that they can be viewed by many cable subscribers around the United States. TBS in Atlanta and WGN in Chicago are two leading superstations. The question was how many of the Chicago Bulls' home game broadcasts could be made available on cable nationally as superstation broadcasts.

Is this an issue of one team unfairly capitalizing on the fact that it has the greatest basketball player in history, seeking to extract more than its share of national television revenue? Is this like the Jerry Jones/Dallas Cowboys dispute with the NFL, as one owner whose team is on top, seeking to benefit from its present popularity? Or, is it action by all but one of the owners in a league, trying to limit aggressive, permissible competition by one of the teams in the league?

As this opinion chronicles, earlier opinions in the case dealt with the proper interpretation of the Sports Broadcasting Act of 1961 and 1966 ("SBA"). The district court held the NBA's conduct outside the conduct for which the SBA grants antitrust immunity, and the Seventh Circuit affirmed that holding.

The prior Seventh Circuit opinion suggested certain NBA conduct that might be permissible and remanded the case. The NBA engaged in a course of conduct very close to that suggested by the Seventh Circuit, but the district court was not impressed. For example, the Seventh Circuit suggested that the NBA could assess the Bulls a fee for extra superstation broadcasts, and the NBA responded with a fee of $138,000 per telecast, which the district court found was impermissibly high. The Seventh Circuit in this opinion holds that the fee is only impermissible if it would have caused the Bulls not to broadcast the games and would, therefore, have reduced output.

The Seventh Circuit then launched into an analysis of whether the district court incorrectly rejected the NBA's argument that all the teams in the NBA constitute a single entity for antitrust purposes, who thereby cannot violate Section 1 of the Sherman Act. Despite the district court's rejection of that argument, the Seventh Circuit (Judge Easterbrook) remands the case back again to the district court, for further consideration of the issue. The analysis of the single entity issue is explored in the text that follows the decision at 600-07.

Notes and Questions: N&Q 1 discusses the long, tortured history of *the Chicago Professional Sports Limited Partnership* case, including the settlement that followed the Seventh Circuit's second opinion.

N&Q 2 chronicles another dispute between a rebel team owner and a major professional sports league – Jerry Jones against the NFL.

N&Q 3 identifies an issue that lurks in intra-league antitrust disputes in which the so-called “single entity defense” is litigated. The team that is suing its league wants to win, but all teams in the league, including the plaintiff team, would probably be better off if the league were insulated from all antitrust litigation under Section 1 of the Sherman Act if the court were to hold the league a single entity. This note asks whether the court should be mindful of that conflict when assessing whether the parties have fully litigated that issue or whether the parties are sufficiently adverse with respect to that issue.

N&Q 4 merely introduces the conflicting views about “single entity” treatment of sports leagues, as an introduction to the text that follows at the end of this Chapter.

Material: The "Single Entity Defense" by Traditional Model Sports Leagues -- A Historical and Functional Analysis

Primary Reason for Inclusion: Text to provide additional information concerning the "single entity" argument and professional sports leagues.