

# Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field

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# PROFESSIONAL SPORTS FRANCHISE RELOCATIONS FROM PRIVATE LAW AND PUBLIC LAW PERSPECTIVES: BALANCING MARKETPLACE COMPETITION, LEAGUE AUTONOMY, AND THE NEED FOR A LEVEL PLAYING FIELD

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## INTRODUCTION

For better or ill, a cultural hallmark of our era is the truism that almost any community's most visible and cherished asset is a local major league professional sports franchise, such as a National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), or National Hockey League (NHL) team. A central paradox of this phenomenon is that even though relatively few citizens regularly attend the home team's games in person,<sup>1</sup> a major league professional sports team provides a unique, highly valued form of entertainment that attracts the support of thousands (and sometimes millions) of fans within its local metropolitan area. Most fans follow their local teams and athletes through television, radio, or print

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1. See Roger G. Noll, *The Economics of Sports Leagues*, in 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS, at 17-1 (Gary A. Uberstine ed., 1995).

media. A professional sports team often symbolizes its home community and can become deeply ingrained in the local identity.<sup>2</sup>

By purchasing an array of tickets, concessions, souvenirs, and merchandise bearing the team's name or logo, fans provide direct economic support to local professional teams, which is essential to the team's profitability and survival.<sup>3</sup> More important, millions of local tax dollars are used to subsidize the construction and improvement of stadiums and playing arenas for local teams.<sup>4</sup> Taxpayer dollars also fund the public infrastructure necessary to support these venues.<sup>5</sup>

2. Some commentators have suggested that professional sports and organized religion are America's most popular unrequired activities and that both involve similar rituals that help people cope with life's struggles. See William Dean, *Rituals Vie for the U.S. Spirit*, *Soul*, *HOUS. CHRON.*, Nov. 4, 1995, at E1, available in 1995 WL 9412895.

3. See *Reynolds v. National Football League*, 584 F.2d 280, 287 (8th Cir. 1978) ("Without public support any professional sport would soon become unprofitable to the owners and the participants."). Because most of a city's inner-city and blue-collar families cannot afford to provide significant economic support for sports franchises, most teams derive game-attendance-related revenues from white-collar families, businesses, and tourists or vacationers. See KENNETH L. SHROPSHIRE, *THE SPORTS FRANCHISE GAME: CITIES IN PURSUIT OF SPORTS FRANCHISES, EVENTS, STADIUMS, AND ARENAS* 63 (1995).

4. See *infra* note 27 and accompanying text.

5. See *infra* note 29 and accompanying text. Courts generally hold that the use of public funds to construct or improve professional sports playing facilities is a legal expenditure for a legitimate public purpose. See, e.g., *City of Los Angeles v. Superior Court*, 333 P.2d 745, 751 (Cal. 1959) (in bank) (holding that the transfer of 300 acres of real property by the Brooklyn Dodgers to the City of Los Angeles and the ball club's construction of recreational facilities to be used by the city for 20 years were "obviously for proper public purposes"); *Alan v. County of Wayne*, 200 N.W.2d 628, 682 (Mich. 1972) (holding that a sports stadium could serve a public purpose if used exclusively for profit by a professional sports team); *Lifteau v. Metropolitan Sports Facilities Comm'n*, 270 N.W.2d 749, 753-55 (Minn. 1978) (taking "judicial notice of the important part that professional sports plays in our social life" and holding that the construction of a publicly owned sports facility for use by professional sports teams has a public purpose for which public funds may be expended); *Bazell v. City of Cincinnati*, 233 N.E.2d 864, 870 (Ohio 1968) (concluding that "a charter municipality may construct a stadium . . . and may rent that stadium to private persons . . . even though such private persons will derive profits from providing . . . [athletic and other] exhibitions [at the stadium]"); *Meyer v. City of Cleveland*, 171 N.E. 606, 608 (Ohio Ct. App. 1930) (holding that a stadium is a "public building" that can be constructed and maintained by a municipality); *Martin v. City of Philadelphia*, 215 A.2d 894, 898-99 (Pa. 1966) (stating that a city's lease of a stadium "to one or two football clubs having a major league franchise and to one or two professional baseball clubs having a major league franchise would be legally and constitutionally permissible"); *Libertarian Party of Wis. v. State*, 546 N.W.2d 424, 438 (Wis. 1996) (holding that bonds issued by a local professional baseball park district are "obligations of . . . a revenue-producing enterprise that serves a public purpose"); cf., e.g., *Brandes v. City of Deerfield Beach*, 186 So. 2d 6, 12 (Fla. 1966) (distinguishing public purpose from "[t]he mere incidental advantage to the public resulting from a public aid in the promotion of a private enterprise," but noting also that the "incidental benefits or advantages gained by private enterprise from expenditures made for a public purpose do not vitiate or diminish the public purpose"); *In re Opinion of the Justices*, 250 N.E.2d 547, 559-61 (Mass. 1969) (holding that public funds may be used for financing and constructing a stadium complex and other facilities "if

Such extensive public subsidization significantly contributes to a franchise's local revenue-generating capacity and, therefore, to its ultimate profitability.

Wisely or not, state and local governments place a high value on the potential benefits of hosting a professional sports franchise, as is apparent by the extravagant offers of public funds to attract or retain a franchise.<sup>6</sup> The substantial out-of-pocket costs of public subsidization spent on local sports franchises generally exceed the objectively quantifiable economic benefits to the community, its taxpayers, and area businesses.<sup>7</sup> Therefore, the "benefit of the bargain" that the community actually obtains in exchange for its multi-million dollar public subsidy to a local sports franchise largely consists of intangible benefits, such as enhanced national prestige, increased local pride and unity from hosting a team, and an additional entertainment option for its citizens.<sup>8</sup>

A professional sports franchise is generally given an exclusive geographical territory in which to operate without competition from other league teams.<sup>9</sup> This practice, combined with public subsidization of team playing facilities and strong home game attendance, suggests that these franchises will be financially profitable and athletically competitive in the host city, thereby obviating any economic reason to relocate. Despite this apparent market reality, the recent trend most resembles a game of musical chairs: In an effort to enhance the economic value of their respective franchises, team owners whose franchise values have skyrocketed casually engage in "franchise free

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adequate principles, standards, and safeguards governing the execution of the project are included in the enabling legislation to make the project one for a public purpose").

6. See *infra* notes 206-218 and accompanying text. The perceived benefits to cities from hosting a franchise include enhanced reputation and prestige, additional employment, increased sales and use taxes, additional recreational opportunities, and enhanced civic morale and youth interest in sports. See Benjamin A. Okner, *Subsidies of Stadiums and Arenas*, in GOVERNMENT AND THE SPORTS BUSINESS 325, 327-29 (Roger G. Noll ed., 1974). But see SHROPSHIRE, *supra* note 3, at 13-19 (noting that cities often receive only a "public image" perception of economic improvements, without actual improvement in overall employment, revenues, etc.).

7. See SHROPSHIRE, *supra* note 3, at 13-19 (summarizing economic impact studies regarding value of sports franchise to local community); see also generally John L. Crompton, *Economic Impact Analysis of Sports Facilities and Events: Eleven Sources of Misapplication*, 9 J. SPORT MGMT. 14 (1995) (discussing misuse of economic impact studies to justify public subsidization of playing facilities); Dennis Zimmerman, *Tax-Exempt Bonds and the Economics of Professional Sports Stadiums* 22 (Cong. Res. Serv. rep. May 29, 1996) (concluding that the economic benefits of stadiums to local communities do not justify multi-million dollar state and local subsidization of stadium construction and operating costs).

8. See Dean, *supra* note 2.

9. See Roger G. Noll, *The U.S. Team Sports Industry: An Introduction*, in GOVERNMENT AND THE SPORTS BUSINESS 1, 8-9 (Roger G. Noll ed., 1974).

agency" by moving, or threatening to move, their teams to cities that do not have a league franchise. These owner tactics generate a nationwide bidding war among cities that are forced to offer millions of dollars in publicly financed subsidies to try to retain an existing professional sports franchise or attract a new one.<sup>10</sup> This conduct has created a sellers' market. By selecting the best available offer, a team owner can enhance the franchise's profitability and value at taxpayer expense.

This sellers' market exists primarily because each of the four major professional sports leagues has monopoly power in its respective sport, thereby enabling each league to fix the supply of franchises below the existing demand for teams by cities.<sup>11</sup> The law, as currently interpreted by the judiciary, allows a league to tilt the supply-demand relationship through its power to limit the total number of teams, but restricts the same league's ability to prevent franchise relocation.<sup>12</sup> Therefore, team owners inevitably possess an incentive to engage in "opportunistic behavior,"<sup>13</sup> to the severe detriment of any team's host city.

For example, Cleveland Browns owner Art Modell recently entered into an agreement to relocate his franchise to Baltimore prior to the expiration of his stadium lease, despite a fifty-year history of exceptional fan support and without considering Cleveland's offer of \$175 million in stadium improvements.<sup>14</sup> Houston Oilers owner Bud Adams decided to move his profitable franchise to Nashville after Houston government officials rejected his take-it-or-leave-it demand for a new \$245 million, domed stadium.<sup>15</sup> He is leaving Harris County taxpayers saddled with approximately \$50 million of outstanding bond indebtedness, incurred to finance 1987 stadium improvements in an effort to prevent Adams from relocating his team to Jacksonville.<sup>16</sup> Meanwhile, Seattle Seahawks owner Ken Behring expressed a desire to relocate to Los Angeles to fill a market void created after the

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10. See *infra* notes 206-208 and accompanying text.

11. See generally Steven R. Rivkin, *Sports Leagues and the Federal Antitrust Laws*, in GOVERNMENT AND THE SPORTS BUSINESS 387 (Roger G. Noll ed., 1974) (discussing the application of antitrust laws to professional sports leagues).

12. See *infra* notes 196-203 and accompanying text.

13. Professor Oliver Williamson, an economist, has described "opportunism" as involving "self-interest seeking with guile." OLIVER WILLIAMSON, MARKETS AND HIERARCHIES 26 (1975).

14. See Peter King, *Down . . . and Out*, SPORTS ILLUS., Nov. 13, 1995, at 28, available in 1995 WL 12559615.

15. See *infra* notes 111-115 and accompanying text.

16. See Christopher Palmeri, *Bottom-Line Bud*, FORBES, Oct. 9, 1995, at 102, available in 1995 WL 8102356; John Williams, *Q & A—Is This Bud For You? Questions and Answers on the*

former Oakland-Los Angeles Raiders relocated to Oakland, and the former Cleveland-Los Angeles Rams moved to St. Louis, because the former Chicago-St. Louis Cardinals had relocated to Phoenix.<sup>17</sup>

The relocation efforts of the Browns, Oilers, and Seahawks have spawned litigation between each of the team owners and their host cities, states, or local governing bodies.<sup>18</sup> These lawsuits reflect efforts to keep the local team from moving before its stadium lease expires and the home city has had an opportunity to retain the franchise. Litigation has occurred because of the potential loss of economic benefits to a city and its local businesses, unrecouped expenditure of taxpayer funds, and the politically powerful issue of community pride to a city that loses a professional sports franchise.<sup>19</sup> Team owners generally assert a right to choose a home for their franchises based on economic factors that will maximize the current profitability of their investment in the team. Owners are willing to "buy out" existing stadium lease obligations in order to relocate prematurely.<sup>20</sup>

This Article discusses the nature and characteristics of the relationship between a professional sports franchise and its host city. It then reviews the traditional reluctance of courts to interfere with commercial contract relationships, to grant injunctive relief, or to require specific performance. The Article considers the implications of this reluctance for structuring the relationship between a host city and a franchise. This discussion will establish the need for cities to thoroughly and accurately analyze the costs and benefits of hosting a professional sports franchise and to maximize private ordering by negotiating contractual provisions necessary to adequately protect their constituents' interests.

The Article next examines how private law principles alone may not sufficiently protect fan and taxpayer interests, as a professional league's exclusive power to control supply creates a disparity of bargaining power in favor of a franchise. This imbalance provides team

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*Latest Oilers' Stadium Controversy*, HOUS. CHRON., Aug. 20, 1995, at A20, available in 1995 WL 9422388.

17. See Vincent Hanna, *Kind Hearts Fail Without Hard Arteries*, GUARDIAN, Sept. 4, 1996, available in 1996 WL 4042182.

18. See *infra* note 94; T.J. Simers, *Allen has Option to buy Seahawks; Pro Football: Deal Should Knock Out Behring and end Chances of Move to Southern California*, L.A. TIMES, Apr. 21, 1996, at C1, available in 1996 WL 5262225.

19. See *infra* notes 73-80 and accompanying text.

20. For example, Houston Oilers owner Bud Adams expressed an interest in buying out the remaining two years of his lease to play football games in the Astrodome, so that the Oilers might begin playing in Tennessee before the lease's 1997 expiration. See John McClain, *Don't Plan on Oilers Waiting for Expiration Date*, HOUS. CHRON., Sept. 15, 1995, at B8, available in 1995 WL 9403957.

owners with the ability to reject a city's proposed contract terms and to engage in opportunistic behavior by threatening to relocate unless the team owners' demands are met. The inadequacy of antitrust law to prevent exploitation of a host city by a franchise and team relocation will also be addressed.

The Article's thesis is that free market principles generally should govern the relationship between a host city and its professional sports franchises and should determine the most efficient locations of franchises. However, limited federal statutory remedies should be available to protect a host city's benefit of the bargain and to prevent taxpayer and fan exploitation. Congressional regulation is necessary to protect taxpayers and fans by leveling the playing field between a team owner and its current or prospective host city.

## I. COMMON LAW PRINCIPLES

### A. *Symbiotic Relationships*

If a local team plays in a publicly owned facility, the legal relationship between a host community and a professional sports franchise is that of a landlord and tenant. The team covenants to play its home games in an arena or stadium for a designated number of years and to pay rent to the facility owner or operator out of revenues derived from that activity.<sup>21</sup> Ancillary revenues generated from the sale of concessions, parking, souvenirs, and other items are allocated between the franchise and its lessor in agreed percentages.<sup>22</sup> The specifics of the parties' respective rights and obligations under the lease arrangement are subject to negotiation and agreement like most other commercial transactions.<sup>23</sup>

In fact, the nature of the relationship between a host community and a professional team extends beyond the parameters of the ordinary, commercial, landlord-tenant lease because a sports franchise often receives a multi-million dollar subsidy from state and local taxpayers. In recent years, local governments have spent, or have offered to spend, millions of dollars to retain, or attract, sports franchises.<sup>24</sup>

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21. See Okner, *supra* note 6, at 334-39.

22. See *id.*

23. See *infra* notes 48-94 and accompanying text.

24. See generally CHARLES C. EUCHNER, PLAYING THE FIELD 55 (1993) (exploring the "feverish competition among North American cities to attract professional sports teams"); Dan McGraw, *Playing the Stadium Game*, U.S. NEWS & WORLD REP., June 3, 1996, at 46, available in 1996 WL 7810802 (discussing public subsidy of sports facility construction or renovation in most United States cities).



In effect, taxpayers are investors in the local sports franchises, but they do not share directly in team profits.

Most sports facilities are publicly owned, there customarily being no incentive for wholly privately financed construction.<sup>25</sup> This is particularly true because the costs of facility development and maintenance usually exceed the revenues generated, and it is usually not possible for team owners, or other private parties, to capture all of the positive economic externalities that arise from maintaining a team in the community.<sup>26</sup> The vast public cost and its accelerating pace is staggering. From 1975 to 1990, cities and states spent an aggregate \$1.2 billion in tax revenues to construct or improve arenas and stadiums housing professional sports teams.<sup>27</sup> Since 1992, cities have spent an additional \$1 billion on professional sports facilities, with another \$5 billion to be spent within five years if all planned construction occurs.<sup>28</sup> Huge additional public subsidies in the form of government financing of roads and other necessary infrastructure around a playing facility are also expended. In 1988, two economists estimated that a city's total financial contribution to a new stadium project can easily exceed \$100 million.<sup>29</sup> That figure is undoubtedly higher today.<sup>30</sup>

What accounts for such extraordinary public investment? Although other private businesses and public facilities, such as performing arts theaters and museums, receive public subsidies, tax abatements, or both, professional sports franchises are unique in energizing some core of tribalism in local residents through the teams' ability to develop a bond with a community and to symbolize its identity and spirit.<sup>31</sup> As former Missouri Senator John C. Danforth stated: "[A] sports team is different from the normal business. . . . A sports

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25. See EUCHNER, *supra* note 24, at 65-77.

26. See *id.*

27. See DEAN V. BAIM, *THE SPORTS STADIUM AS A MUNICIPAL INVESTMENT* 1-2 (1994).

28. See *Outside the Lines: Brownout in Cleveland* (ESPN cable television broadcast, Dec. 15, 1995) [hereinafter *Brownout*].

29. See Robert A. Baade & Richard F. Dye, *Sports Stadiums and Area Development: A Critical Review*, *ECON. DEV. Q.*, Aug. 1988, at 268. However, the owners, and not the fans or cities, are normally the primary beneficiaries of these subsidies. Cf. Okner, *supra* note 6, at 345-47 (presenting data that most cities with publicly owned sports facilities operated them at a net loss to local government during the 1970-71 season and asserting that "to the extent that subsidized rentals are not passed on to consumers in the form of lower prices or to players in the form of higher salaries, the prime beneficiaries of the local government subsidies are the owners of sports teams—most of whom are extremely wealthy").

30. See Jonathan R. Laing, *Foul Play?*, *BARRONS*, Aug. 19, 1996, at 23, available in 1996 WL-BARRONS 10421857 (stating cost of the new football stadium for the Baltimore Ravens to be \$200 million).

31. See John Beisner, *Sports Franchise Relocation: Competitive Markets and Taxpayer Protection*, 6 *YALE L. & POL'Y REV.* 429, 437-38 (1988).

team carries with it the support of the community, the identity of the community, and the spirit of the community.”<sup>32</sup> Professional team sports provide a method by which cities can compare themselves to each other, as measured by the success of their respective local teams. A community that hosts a professional team views itself as superior to those “bush-league,” “backwater,” or “second-tier” communities that lack a professional sports franchise.<sup>33</sup> The loss of a sports franchise by relocation has adverse, intangible consequences to a community that generally do not result from the loss of any other business.<sup>34</sup> These are epic themes better comprehended by Homeric poets or Freudian analysts than by economists, but they are nonetheless real.

These intangibles create enormous bargaining leverage in favor of owners.<sup>35</sup> Teams are able to gain favorable lease terms and other concessions because local governing officials want to avoid the loss of community pride and esteem that occurs when a franchise relocates.<sup>36</sup> Customarily, teams pay rents below competitive market rates.<sup>37</sup> Moreover, heavy public subsidization of a franchise’s playing facility significantly contributes to the team’s revenue-generating capacity, thereby increasing its profitability.<sup>38</sup>

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32. Daniel S. York, Note, *The Professional Sports Community Protection Act: Congress’ Best Response to Raiders?*, 38 HASTINGS L.J. 345, 355 (1987) (quoting *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong. 84 (1985)). Robert Kraft, owner of the New England Patriots, recently acknowledged the psychological benefits of an NFL team to its host community: “[W]hen it does well, that cannot be duplicated anywhere else.” *The News Hour with Jim Lehrer* (PBS television broadcast, Feb. 8, 1996). Baltimore Ravens owner Art Modell has stated: “The pride and presence of a professional football team is far more important than 30 libraries.” *Perspectives*, NEWSWEEK, Sept. 2, 1996, at 19.

33. Wisconsin Representative Marlin Schneider has stated: “Without the Milwaukee Brewers, Bucks and Packers, [Wisconsin] ain’t nothing but another Nebraska.” Oscar Dixon & Mike Dodd, *Brewers’ Stadium Bill Stirs Response*, USA TODAY, Sept. 29, 1995, at C3, available in 1995 WL 2951713. Patrick L.M. Williams, president and general manager of the Orlando Magic NBA team, has stated: “You can have Disney World and every major attraction, but if you don’t have a team, in the eyes of the world you’re not a big league city.” Maria E. Recio, *Build an Arena Now, Get a Team Later—Maybe*, BUS. WK., Apr. 20, 1987, at 90, available in 1987 WL 2004694.

34. See BAIM, *supra* note 27, at 12.

35. See *infra* notes 200-210 and accompanying text.

36. See Beisner, *supra* note 31, at 434 n.26.

37. See Noll, *supra* note 1, at 17-28; BAIM, *supra* note 27, at 12; see also Glenn M. Wong, *Of Franchise Relocation, Expansion and Competition in Professional Team Sports: The Ultimate Political Football?*, 9 SETON HALL LEGIS. J. 7, 43-53 (1985) (discussing poor terms of lease from government stadium owner’s perspective).

38. See *infra* notes 209-211 and accompanying text.

Thus, a professional sports franchise that plays its games in a publicly owned facility has a symbiotic relationship<sup>39</sup> with its host city; the franchise benefits from public funds spent in connection with the facility, and the team constitutes a unique form of community entertainment that is irreplaceable if lost.<sup>40</sup> It is appropriate to characterize a city as a consumer and renter of a sports franchise, rather than viewing the team as merely a lessee of a publicly owned facility.<sup>41</sup> This is a particularly apt description because the primary community benefits of hosting a franchise are intangible psychological values and the corresponding entertainment option the team provides.<sup>42</sup> A city's loss of a franchise is perceived as devastating to its image, and unlike love, it may not be better to have had and lost a team than never to have had one in the first place.<sup>43</sup>

### B. Not a Joint Venture

Despite its symbiotic nature, the relationship between a professional sports franchise and its host city is not a legally recognized joint venture. Courts have refused to hold that an agreement by a city to lease its publicly owned athletic facilities to a private party creates an implied joint venture between the parties.<sup>44</sup> If the parties' relationship were a joint venture, a city and a sports franchise would owe each other a fiduciary duty, and a team owner would be subject to tort liability for engaging in opportunistic behavior.<sup>45</sup> Generally, a joint ven-

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39. See John P. Morris, *In the Wake of the Flood*, 38 LAW & CONTEMP. PROBS. 85, 88 (1973) (stating that a municipal corporation is a "major constituency" of the professional sports industry because it provides stadiums and arenas to house teams). New England Patriots owner Robert Kraft has characterized himself as the "custodian of a public asset." *The News Hour with Jim Lehrer* (PBS television broadcast, Feb. 8, 1996).

40. See *Weinberg v. Chicago Blackhawk Hockey Team, Inc.*, 653 N.E.2d 1322, 1325 (Ill. App. Ct. 1995).

41. See John Wunderli, *Squeeze Play: The Game of Owners, Cities, Leagues and Congress*, 5 MARQ. SPORTS L.J. 83, 86 (1994).

42. See Dean, *supra* note 2.

43. See Kenneth L. Shropshire, *Opportunistic Sports Franchise Relocations: Can Punitive Damages in Actions Based upon Contract Strike a Balance?*, 22 LOY. L.A. L. REV. 569, 585 n.127 (1989).

44. See, e.g., *Martin v. City of Washington*, 848 S.W.2d 487, 495 (Mo. 1993) (en banc) (holding that a private high school was not vicariously liable for an injury to a spectator caused by negligent maintenance of a city-owned stadium leased by the high school).

45. Courts have held that persons or entities engaged in a business joint venture have a fiduciary relationship and must act in good faith, fairness, and honesty in their dealings with each other. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (holding that coadventurers undertaking the conversion of a hotel to a retail and office complex were "subject to fiduciary duties akin to those of partners"); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264-65 (Tex. 1951) (holding that parties to a joint venture agreement regarding an oil and gas lease owed the highest duty to one another to further their common interest).

ture is created only if the parties have a community of interests in a business endeavor, an equal right to direct and govern their undertaking, and an agreement to share profits and losses.<sup>46</sup> The franchise's mere receipt of a significant public subsidy does not evidence the existence of such an arrangement.<sup>47</sup>

### C. *Franchisor-Franchisee Relationship of Team and City*

In determining the respective rights and obligations of a professional sports team and its host city, the nature of the parties' relationship justifies treating it like other well-recognized business relationships, whereby one party's financial investment in a commercial endeavor inures to the benefit of the other. A city essentially "rents" a league franchise by providing public subsidization, thereby enabling its citizens to consume professional sports entertainment.<sup>48</sup> The relationship between a professional team and its host city is compellingly similar to a franchising arrangement; both extend beyond the typical landlord-tenant relationship and involve a type of symbiotic commercial venture.<sup>49</sup> Therefore, common law principles governing the franchisor-franchisee relationship appear sufficiently analogous to apply here. The team owner functions as a "franchisor" in locating its team (subject to league approval) and the host city as a "franchisee" in housing a team. However, such common law principles may be of limited value in governing the parties' relationship.

Absent applicable statutory provisions,<sup>50</sup> the express terms of the franchise agreement govern the franchisor-franchisee relationship. Courts are reluctant to impose obligations on a franchisor inconsistent with the express terms of the franchise agreement.<sup>51</sup> Most courts hold that a franchisor does not owe a general fiduciary duty to its franchisee, because the relationship is viewed as the product of arm's length commercial dealing, despite any disparity of bargaining power

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46. See *Wilson v. American Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989); 46 AM. JUR. 2D (rev.) *Joint Ventures* § 9 (1994).

47. See 46 AM. JUR. 2D (rev.) *Joint Ventures* § 9.

48. See Wunderli, *supra* note 41, at 86.

49. See *Arnott v. American Oil Co.*, 609 F.2d 873, 881-82 (8th Cir. 1979) (distinguishing between nature and characteristics of landlord-tenant relationship and that of franchisor-franchisee); see also *supra* notes 24-43 and accompanying text.

50. Most states have enacted statutes that govern the relationship between a franchisor and its franchisees. See 2 GLADYS GLICKMAN, *FRANCHISING* § 13.04 (1991).

51. See, e.g., *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 484-85 (5th Cir. 1984) (refusing to construe a hotel franchise agreement provision that a franchisor could "construct and operate" hotels of the chain at sites other than the one licensed as proscribing acquisition of an *existing* hotel by the franchisor (emphasis added)).

in the franchisor's favor.<sup>52</sup> Thus, a professional sports franchise is legally able to place its own economic interests above the public welfare of its host community if it does so in a manner consistent with the written agreements governing the parties' relationship.

Some courts have implied a contractual duty of good faith and fair dealing in franchise agreements to prevent a franchisor from reducing or destroying the franchisee's ability to receive the economic benefits of the parties' business relationship.<sup>53</sup> Whereas imposition of a fiduciary duty "requires a party to place the interest of the other party before his own," a duty of good faith and fair dealing "merely requires the parties to 'deal fairly' with one another."<sup>54</sup> It is appropri-

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52. See, e.g., *id.* at 485 (applying Louisiana law and stating that "[e]xcept in cases of franchise termination, in which courts have refused to give literal effect to the language of the franchise agreement, courts have not imposed general fiduciary obligations upon franchisors . . . . We also refuse to do so."); *Bain v. Champlin Petroleum Co.*, 692 F.2d 43, 48 (8th Cir. 1982) (applying Missouri law and noting that the duty of "good faith and fair dealing" inherent in every business relationship does not necessarily render the duties owned by parties to a gasoline consignment agreement "fiduciary" in nature); *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 354-56 (7th Cir. 1982) (applying Wisconsin law and declining to impose a fiduciary obligation upon a convenience store franchisor); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 696 F. Supp. 57, 72-75 (D. Del. 1988) (finding no fiduciary relationship between a soft drink company and bottlers of its product, despite the company's characterization of the relationship as a "partnership"); *Power Motive Corp. v. Mannesmann Demag Corp.*, 617 F. Supp. 1048, 1051-52 (D. Colo. 1985) (applying Ohio law and holding that a franchise relationship does not give rise to fiduciary duties between the parties that would allow for recovery of punitive damages); *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858, 869 (E.D. Va. 1980) (holding that "it is not appropriate for [the] [c]ourt to elevate the duty of fair dealing to a fiduciary duty nor to create an additional cause of action for its breach" in a case involving a franchisor-franchisee relationship between a recreational vehicle campground owner and its operator); *Newark Motor Inn Corp. v. Holiday Inns, Inc.*, 472 F. Supp. 1143, 1151-53 (D.N.J. 1979) (declining to "raise the duty of good faith and fair dealing which [a motel chain franchisor] owed its franchisees to the level of a fiduciary duty"); *Weight Watchers of Quebec Ltd. v. Weight Watchers Int'l Inc.*, 398 F. Supp. 1047, 1053-54 (E.D.N.Y. 1975) (holding that a trademark license alone does not create a fiduciary relationship and that the rights and duties of the franchisor and franchisee are governed by their underlying contract); *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 596 (Tex. 1992) (refusing to impose a common law fiduciary duty upon franchisors in the termination of a franchise agreement). But see *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 390 (5th Cir. 1982) (holding that the power, authority, and bargaining position of the franchisor and franchisee are critical in determining whether a fiduciary relationship exists).

53. See, e.g., *Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929, 937-40 (D. Mass. 1995) (holding that Massachusetts law implies a covenant of good faith and fair dealing in every contract, but concluding that a covenant was not breached when franchisor terminated a baked goods consignment agreement under the terms of the agreement).

54. *Crim Truck & Tractor*, 823 S.W.2d at 594. See generally Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 992 (1990) (advocating judicial application of the relational structure of franchising when interpreting franchise contracts and resolving franchise disputes).

ate to impose a duty of good faith and fair dealing on the owner of a professional sports franchise in its business relationship with the team's host city. As in the more typical franchise relationship, the team owner's or franchisor's superior bargaining power enables it to take unfair advantage of its host city or franchisee.<sup>55</sup>

Imposing this implied duty may prevent a team owner from depriving a host city of its return on millions of dollars in playing facility-related public subsidies. However, the post hoc judicial application of an implied duty of good faith and fair dealing in this context will create uncertainty, interfere with freedom of contract, and may result in inconsistent obligations established by different state courts. Federal legislation offers a uniform and predictable measure of protection to host cities and would be a better and more effective alternative to a common law duty, developed on a case-by-case basis.<sup>56</sup>

#### *D. The Right to Breach a Contract*

Apart from the limited potential for specific performance,<sup>57</sup> a party to a contract, including a franchisor or sports team owner, may pursue its own interests by choosing to breach the agreement and pay damages, rather than perform its obligations.<sup>58</sup> The rationale for this rule is that the non-breaching party is "made whole" by damages and receives its bargained-for benefits under the contract.<sup>59</sup> The law encourages certain intentional contract breaches on utilitarian grounds, thereby promoting an efficient economy when the promisor's gains from the breach exceed damages paid to cover the expected losses of the promisee.<sup>60</sup>

Breach of contract normally exposes a party only to liability for contract damages, rather than to a potentially larger measure of recovery based on tort law.<sup>61</sup> Courts are reluctant to allow tort recovery for noninsurance contract breaches.<sup>62</sup> Even when courts have imposed an obligation of implied good faith to perform a commercial contract,

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55. See *infra* notes 206-213 and accompanying text.

56. See *infra* notes 512-516 and accompanying text.

57. See *infra* notes 73-94 and accompanying text.

58. See *Nicholson v. United Pac. Ins. Co.*, 710 P.2d 1342, 1348 (Mont. 1985).

59. *Id.*

60. See *id.*

61. See, e.g., *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 679-80 (Cal. 1995) (adopting "a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law' other than the bad faith denial of the existence of, or liability under, the breached contract" (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 460 (Cal. 1994))).

62. See *id.*

breach of this duty has given rise to contractual, rather than tort, liability.<sup>63</sup> Tort liability usually arises only if a franchisor makes fraudulent material representations to induce a franchisee to enter into an agreement,<sup>64</sup> or if the franchisor enters into a contract with no intention of fully performing its contractual duties.<sup>65</sup>

Judicial application of the foregoing principles would allow a team owner to breach a stadium lease agreement by relocating its club to another city prior to the lease's expiration in exchange for the payment of contract damages caused by the breach.<sup>66</sup> Tort damages may be recovered only if the team owner knowingly provided false assurances that the team would not be relocated prematurely and did so to obtain certain promises or actions from city officials. A team owner's refusal to perform its obligations under the lease would not, in itself, establish his intent not to perform fully at the time the lease was executed—a showing that is necessary to recover tort damages.<sup>67</sup> Under these circumstances, the city's recovery for loss of a sports franchise will usually be limited to contract damages.<sup>68</sup>

Merely allowing a city to recover contract damages for the premature loss of a team does not provide adequate compensation for the city's lost "benefit of the bargain" in providing the public, financial inducements necessary to attract or retain a sports franchise. Aside from specified amounts of rent and income from ancillary revenues, such as parking and concessions, the city's economic benefits from hosting a sports franchise are difficult to determine and are probably too speculative to recover as contract damages.<sup>69</sup> The city's real bene-

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63. See, e.g., *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858, 864 (E.D. Va. 1980) ("It is the general rule that no cause of action in tort can arise from the breach of a duty existing by virtue of a contract between the defendant and the person injured.").

64. See *Arnott v. American Oil Co.*, 609 F.2d 873, 879-80 (8th Cir. 1970).

65. See *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 597 (Tex. 1992).

66. A former host city may have a tortious interference with contract claim for damages against another city that lures a franchise away prior to the expiration of its lease obligations. See, e.g., *City of New York v. New York Jets Football Club, Inc.*, 429 F. Supp. 987, 989-90, 992 n.14 (S.D.N.Y. 1977) ("Under New York law, an essential element of inducing a breach of contract is the breach of contract itself.").

67. See *Crim Truck & Tractor*, 823 S.W.2d at 597. Independent proof of the team owner's intent to move the team prematurely at the time the stadium lease was negotiated and executed is required to obtain tort damages. See *id.*

68. See *id.*

69. See *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1381 (Colo. 1993) (holding that in a breach of a commercial lease, "damages are not recoverable for losses beyond an amount that a plaintiff can establish with reasonable certainty by a preponderance of evidence").

fits of the bargain are the highly valued, intangible benefits noted above.<sup>70</sup> A professional sports team is a unique community asset that cannot be readily replaced. For example, it has taken Baltimore more than a decade to attract another NFL franchise after the Colts moved to Indianapolis in March 1984.<sup>71</sup> Other cities, such as Washington D.C., whose major league baseball team (the "Senators") moved to Texas more than twenty years ago, have been unable to replace their lost teams.<sup>72</sup> The value of such benefits is virtually impossible to quantify and, therefore, is not recoverable for a team owner's breach of contract.

### *E. Injunctive Relief and Specific Performance*

Courts have suggested that a stadium lease is the most effective means of protecting a community's investment in the playing facility that houses a professional franchise.<sup>73</sup> Because contract damages do not provide an adequate remedy at law for breach of a lease with a publicly owned playing facility and the premature relocation of a team causes irreparable harm to a city and its fans, some courts have enjoined teams from scheduling and playing home games outside their host cities. In *City of New York v. New York Jets Football Club, Inc.*,<sup>74</sup> a New York State trial court preliminarily enjoined an NFL team from violating a municipal stadium lease that expressly prohibited the team from playing home games in any other city or location while the lease was in effect.<sup>75</sup> The court noted that the lease granted the city a right to injunctive relief against a threatened breach.<sup>76</sup> After weighing the equities, the court held that injunctive relief was necessary to prevent irreparable harm to the "welfare, recreation, prestige, prosperity and trade and commerce" of the city's residents.<sup>77</sup>

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70. See *supra* notes 31-34 and accompanying text.

71. See Jon Morgan, *Inside the Browns Deal*, BALT. SUN, Dec. 17, 1995, at C1, available in 1995 WL 2489851.

72. See Mark Maske, *Collins Learns Rules of Game the Hard Way; After Much Wrangling, Northern Virginia Has No Team, but He Still Has Hope*, WASH. POST., Jan. 6, 1996, at F10, available in 1996 WL 3058343.

73. See, e.g., *Los Angeles Mem'l Coliseum Comm'n v. National Football League (Raiders I)*, 726 F.2d 1381, 1397 (9th Cir. 1984) ("[L]ocal governments ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia.").

74. 394 N.Y.S.2d 799 (Sup. Ct. 1977).

75. *Id.* at 802-05. The court also held that any league scheduling of games in violation of its injunction is null and void. *Id.* at 802.

76. *Id.* at 803.

77. *Id.*



In *City of New York v. New York Yankees*,<sup>78</sup> another New York State trial court enjoined a baseball team from agreeing to play home games in Denver, in violation of a lease term requiring the team to play all home games in New York's Yankee Stadium.<sup>79</sup> Finding that the threatened relocation of games would cause irreparable injury to New York City, the court waxed poetic when it wrote:

Much more is at stake than merely the loss of direct and indirect revenue to the City.

The Yankee pin stripes belong to New York like Central Park, like the Statue of Liberty, like the Metropolitan Museum of Art, like the Metropolitan Opera, like the Stock Exchange, like the lights of Broadway, etc. Collectively they are "The Big Apple." Any loss represents a diminution of the quality of life here, a blow to the City's standing at the top, however narcissistic that perception may be.<sup>80</sup>

The court's ruling precluded the team's owner from "grabbing a pretext to take his team to greener pastures—i.e. a larger stadium and a populace with an unfulfilled yearning for major league baseball."<sup>81</sup>

Courts have refused, however, to enjoin a professional sports team from breaching a lease by playing home games elsewhere once the team has relocated to another city. In *HMC Management Corp. v. New Orleans Basketball Club*,<sup>82</sup> the Louisiana Court of Appeal affirmed the trial court's denial of a preliminary injunction, requested by a stadium authority, to prevent the New Orleans Jazz from playing home basketball games outside the Louisiana Superdome after the franchise had already moved to Utah.<sup>83</sup> The trial court held that the lease did not expressly require the franchise to play its home games in the Superdome, that an affirmative injunction is not an available remedy for breach of a lease, and that damages would adequately compensate a stadium authority for the harm it suffered.<sup>84</sup> While the appellate court "[did] not agree completely with the trial judge's conclusions,"<sup>85</sup> it concluded that injunctive relief was inappropriate under the circumstances because the team had already moved outside of Louisiana.<sup>86</sup>

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78. 458 N.Y.S.2d 486 (Sup. Ct. 1983).

79. *Id.* at 487-88.

80. *Id.* at 489-90.

81. *Id.* at 489.

82. 375 So. 2d 700 (La. Ct. App. 1979).

83. *Id.* at 711.

84. *Id.*

85. *Id.*

86. *Id.*

Both the *HMC* trial and appellate courts refused to allow the City of New Orleans to intervene as a plaintiff because it did not own or have a financial interest in the stadium, and it was not a party to the lease between the basketball franchise and the state stadium authority.<sup>87</sup> The City was not a third party beneficiary of the lease because the lease's terms did not express an intention by the contracting parties to confer benefits on the City merely by having a professional team play home games in a state-owned facility in its downtown area.<sup>88</sup> The appellate court did not find an implied contract between the City and the franchise that would require the team to continue playing in New Orleans while still a member of the NBA, because there was no evidence of the parties' mutual intent to make such an agreement.<sup>89</sup> The court also held that the franchise would not be unjustly enriched at the expense of the City if the team relocated in breach of its lease with a state entity.<sup>90</sup> The City had no quasi-contract right to tax revenues and increased tourism generated by the presence of a professional sports team.<sup>91</sup>

Read narrowly, the *HMC* case reflects judicial reluctance to require a sports franchise to play home games in a particular facility absent an express agreement to do so, as well as an unwillingness to imply such a term into the parties' lease. Under a broad construction, *HMC* holds that damages are an adequate remedy when a franchise breaches a playing facility lease by moving to another locale prior to the expiration of the lease, thereby precluding the availability of injunctive relief.<sup>92</sup> Neither view recognizes the unique value of a professional sports franchise to its host city and the irreparable harm that

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87. *Id.* at 708-10.

88. *Id.* at 708-09.

89. *Id.*

90. *Id.* at 709-10. The court's refusal to allow the City of New Orleans to intervene and its denial of injunctive relief appear appropriate in *HMC* because there was no showing that the City had provided substantial public subsidies to the franchise and was subsequently being deprived of the intangible "benefits of the bargain" it expected to realize from its investment. *Id.* at 708-10.

91. *Id.* at 710.

92. A California court apparently reached this conclusion, despite a lease provision requiring that "Padres" baseball games be played in San Diego until expiration of its term, possibly because the parties' lease did not expressly provide for specific performance through injunctive relief. See *City of San Diego v. National League*, No. 343508 (Sup. Ct. for the County of San Diego 1973), discussed in William L. Babcock, Comment, "Can We Save Our Ball Club?": *The Availability of Injunctive Relief for a Municipality to Prevent the Threatened Breach of a Stadium Lease Agreement by a Professional Sports Franchise*, 2 COMM/ENT 97, 120-23 (1979).

results from the premature loss of a team.<sup>93</sup> It is appropriate for a court to enjoin a sports franchise from breaching a lease to play home games in a publicly owned or subsidized playing facility during the parties' agreed period of time.<sup>94</sup>

#### F. *Non-Renewal of Contract with Host City*

Absent a contract renewal provision, the parties to an agreement have no legal obligation to extend their relationship after it expires by its express terms. In *Barn-Chestnut, Inc. v. CFM Development Corp.*,<sup>95</sup> the West Virginia Supreme Court of Appeals held that, without an express renewal provision or statutory requirement, a franchisor need not offer a subsequent lease agreement to a franchisee upon expiration of a lease.<sup>96</sup> The court refused to establish an implied obligation of good faith, fair dealing, and commercial reasonableness, which would require a franchisor to renew the parties' business relationship.<sup>97</sup> Observing that both parties openly accepted certain risks by entering into a long-term lease with no renewal clauses or options for either party,<sup>98</sup> the court declined to create a contrary intent by implication.<sup>99</sup>

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93. See generally Babcock, *supra* note 92 (arguing in favor of injunctive remedy to prevent team's breach of lease and relocation); John A. Gray, *Section 1 of the Sherman Act and Control Over NFL Franchise Locations: The Problem of Opportunistic Behavior*, 25 AM. BUS. L.J. 123, 143 n.69 (1987) (suggesting that specific performance should be available to prevent premature loss of sports franchise).

94. See *City of Cleveland v. Cleveland Browns Football Co.*, No. 297833 (C.P. Cuyahoga, Nov. 24, 1995) (preliminarily enjoining Cleveland Browns from relocating to Baltimore in violation of sublease to play home games in municipally owned stadium). To settle litigation involving its relocation to Nashville, the Houston Oilers agreed to play all of its home games through the 1997 NFL season in the Astrodome and that a federal court has the authority to compel performance of this obligation. See Final Consent Decree, *Houston Oilers, Inc. v. Harris County, Texas*, Civ. Action H-95-4193 (S.D. Tex., filed Sept. 13, 1995).

95. 457 S.E.2d 502 (W. Va. 1995).

96. *Id.* at 509.

97. *Id.* at 508-09.

98. *Id.* at 506 n.9.

99. *Id.* at 509. Other courts have also rejected an invitation to impose an implied duty to renew a business relationship contrary to the express terms of a written agreement. See, e.g., *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, No. 88-0644, 1995 WL 12297, at \*4 (N.D. Ill. Jan. 11, 1995) (mem.) ("Although parties to an existing contract owe one another a duty to negotiate in good faith over a term which they purposely leave open . . . the parties owe one another no duty to negotiate in good faith before a contract is executed or after it expires."); *Bryant Corp. v. Outboard Marine Corp.*, No. C 93-1365R, 1994 WL 745159, at \*3 (W.D. Wash. Sept. 29, 1994) (rejecting a distributor's argument that his prior course of dealing with an outboard motor manufacturer implied an obligation on the part of the manufacturer to renew the distributing contract), *aff'd*, 77 F.3d 488 (9th Cir. 1996); *Ball Martty Med. Corp. v. St. Jude Med., Inc.*, CIV. A. No. 87-4434, 1988 WL 72871, at \*4 (E.D. La. July 5, 1988) (declining to "interpret the Uniform Commercial Code to forbid bad faith or arbitrary terminations of distributorship contracts"); cf. *Stanley v. University of S. Cal.*, No. CV 93-4708, 1995 U.S. Dist. LEXIS 5026, at \*1 (C.D. Cal. Mar. 8, 1995) (finding

In some instances, courts have created an implied right of recoupment to allow an entity making a substantial investment in another's business to recover its out-of-pocket expenses. For example, in *Cambee's Furniture, Inc. v. Doughboy Recreational, Inc.*,<sup>100</sup> the Eighth Circuit held that a distributor is entitled to a reasonable period of time to recoup its required financial commitment to serve as a manufacturer's representative.<sup>101</sup> Because there was no agreed termination date, the court ruled that the contract could not be terminated by the manufacturer without good cause.<sup>102</sup> The court also observed that after a reasonable time for recoupment had elapsed, "the distributorship agreement [became] terminable at will upon reasonable notice."<sup>103</sup>

The *Cambee's* holding seems to apply only if the parties' contract has no fixed and definite duration.<sup>104</sup> Even if one party invests substantial amounts of money that inures to the other party's benefit, a court may not imply an obligation, contrary to an agreement's express terms, to continue the parties' business relationship for a reasonable time to allow recoupment of a financial investment.<sup>105</sup>

One court held that a franchisor has a common law duty not to arbitrarily sever a franchise relationship having a definite, written duration.<sup>106</sup> To prevent unjust enrichment, the court imposed a duty of good faith and fair dealing on the franchisor in terminating its business relationship with a franchisee.<sup>107</sup> This common law duty arises only when the franchisor's power to terminate is not explicitly de-

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no implied contract for a multiyear extension of a head basketball coach's employment contract); *Gahres v. Phico Ins. Co.*, 672 F. Supp. 249, 253-54 (E.D. Va. 1987) (finding no implied duty to renew medical malpractice insurance). Some courts suggest that a course of dealing may create a legitimate expectation of contract renewal. See, e.g., *Schaal v. Flathead Valley Community College*, 901 P.2d 541, 543 (Mont. 1995) (upholding a lower court's finding of no basis for a reasonable expectation of continued employment on the part of a university professor beyond the term of his second one-year contract and third year of employment); *Barn-Chestnut*, 457 S.E.2d at 506 n.8 (finding no support for the argument that a lessor-franchisor was "equitably estopped from refusing to renew [the plaintiff's] lease and franchise agreement under reasonable terms and conditions").

100. 825 F.2d 167 (8th Cir. 1987).

101. *Id.* at 173.

102. *Id.*

103. *Id.*

104. See *id.* at 172-74.

105. See, e.g., *Prince v. Miller Brewing Co.*, 434 S.W.2d 232, 234 (Tex. Ct. App. 1968) (refusing to allow a terminated distributor a reasonable time to recoup losses because written agreement expressly allowed either party to terminate "at any time without incurring liability to the other").

106. See *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736, 745 (Pa. 1978).

107. See *id.* at 742.

scribed in the parties' written agreement.<sup>108</sup> Several states have enacted statutes effectively imposing a duty of good faith and fair dealing by requiring that a franchisor have good cause to terminate a franchise agreement.<sup>109</sup>

If a lease between a sports franchise and the operator of a publicly owned playing facility has a definite duration without any obligation for renewal, there is no common law precedent or applicable statute requiring a team owner to keep the team in its host city after its playing-facility lease expires.<sup>110</sup> Notwithstanding a government entity's substantial investment of public money in constructing or improving a playing facility for the purpose of retaining or attracting a professional team, a court may not require the team to remain in its host city beyond the termination date of the lease, even if necessary to enable the government to recoup its investment, nor may the court award damages if the team departs.

In 1987, the taxpayers of Harris County, Texas incurred \$67.5 million in bond indebtedness to finance improvements to the Astrodome as a condition of keeping the Houston Oilers in Houston through the 1997 NFL season.<sup>111</sup> Oilers owner Bud Adams intends to move his team to Tennessee after the 1997 football season ends, leaving behind an outstanding bond indebtedness of approximately \$49

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108. See *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 728-29 (10th Cir. 1991) (holding that an implied covenant of good faith and fair dealing would not overcome a bargained-for termination-at-will).

109. See, e.g., ARIZ. REV. STAT. ANN. § 28-4452 (West 1995) (stating that, despite the terms or conditions of an agreement, a franchisor may not cancel a franchise agreement without good cause); ARK. CODE ANN. § 4-72-209 (Michie 1996) (requiring franchisor to repurchase franchise from franchisee, should the franchisor terminate without cause); CAL. BUS. & PROF. CODE § 20020 (West 1996) (prohibiting franchisor from terminating franchise prior to expiration of its terms); CONN. GEN. STAT. ANN. § 42-133f (West 1994 & Supp. 1996) (prohibiting franchisor from actually or constructively terminating franchise without good cause); GA. CODE ANN. § 10-1-651 (1995) (prohibiting franchisor from cancelling any franchise, despite the terms of the agreement, without notice and good cause); HAW. REV. STAT. ANN. § 482E-6 (Michie 1995) (stating that parties shall deal in good faith); IND. CODE ANN. § 23-2-2.7-1(7) (Michie 1995) (making it illegal for a franchisor and franchisee to enter into an agreement that allows for unilateral termination); OHIO REV. CODE ANN. § 4517.54 (Anderson 1995) (stating that, despite the terms of an agreement, a franchisor may not terminate a franchise without a good cause); OR. REV. STAT. § 650.140 (1994) (stating that, notwithstanding the terms of an agreement, no franchisor shall terminate a franchise without showing good cause).

110. Courts have evidenced an unwillingness to imply an obligation in a stadium lease that is contrary to the express terms of the parties' agreement. See, e.g., *City of Cincinnati v. Cincinnati Reds*, 483 N.E.2d 1181, 1185 (Ohio Ct. App. 1984) (refusing to hold club liable for contingency payments based on scheduled games cancelled by players' strike because lease requires payment only if games are actually played).

111. See Letter from Nick Turner, Assistant County Attorney, Harris County, Texas, to Matthew J. Mitten (Dec. 28, 1995) (on file with author).

million for stadium improvements, designed primarily to benefit his franchise; this indebtedness will not be fully paid off by Harris County taxpayers until 2012.<sup>112</sup> Under existing law, it appears that Adams is free to relocate his team, although Houston area fans and taxpayers have provided significant private and public financial support to the Oilers for more than thirty years, thereby enabling the value of Adams's NFL franchise to grow to more than \$100 million.<sup>113</sup> It is estimated that the value of the Oilers franchise will increase significantly and that its annual cash flow will rise by \$20 million<sup>114</sup> because of the substantial public subsidization that the City of Nashville and State of Tennessee are offering to encourage the Oilers to relocate.<sup>115</sup>

The foregoing discussion illustrates judicial reluctance to make aggressive use of the common law to rewrite the express terms of a commercial transaction to prevent unfairness or financial hardship, even when a significant disparity of bargaining power exists between the parties. Courts have demonstrated a tendency not to reallocate the risks of loss by interfering with the parties' contract.<sup>116</sup> Moreover, it is uncertain whether specific performance and injunctive relief will be judicially recognized as remedies for a professional team's breach of a lease with a publicly owned playing facility.<sup>117</sup>

## II. PRIVATE MARKETPLACE COVENANTS FOR PROTECTION OF THE CITY

### A. *Preventive Law—Private Ordering*

Any detailed contractual ordering of the legal relationship between a professional team and its host city<sup>118</sup> derives most of its force

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112. See Telephone Interview with Nick Turner, Assistant County Attorney, Harris County, Texas (Dec. 28, 1995). Similarly, when the NFL's Raiders left Oakland in 1982 to move to Los Angeles, the City of Oakland and Alameda County taxpayers were left with an annual debt service of \$1.5 million through 2006 to repay financing for the Oakland-Alameda County Coliseum, built specifically for the Raiders. See York, *supra* note 32, at 354.

113. See John Williams, *Oilers Take Another Step on the Road to Nashville Riches*, HOUS. CHRON., Feb. 27, 1996, at A15, available in 1996 WL 5583817.

114. See John Williams, *Nashville Sports Authority Gives Approval to Lease for Oilers*, HOUS. CHRON., Feb. 14, 1996, at A20, available in 1996 WL 5581734 [hereinafter Williams, *Sports Authority*]; John Williams, *Oilers' Move Closer to Reality with Contract*, HOUS. CHRON., Oct. 5, 1995, at A25, available in 1995 WL 9407468.

115. See John Helyar, *A Long Bomb: How Nashville Seeks, at High Cost, to Win Oilers from Houston*, WALL ST. J., Nov. 21, 1995, at A1, available in 1995 WL-WSJ 9908758; John Williams, *Nashville Turns on the Tap to Put Cash in Oilers' Pocket*, HOUS. CHRON., Oct. 6, 1995, at A1, available in 1995 WL 9407679.

116. See *supra* notes 105, 108.

117. See *supra* Part I.E.

118. For purposes of this discussion, the term "city" includes a public or private sports facility's commission or other entity authorized to act on behalf of the local governmental unit which owns or controls the sports facility.

from the models of private business law. Although some aspects of the parties' private law relationship resemble a joint venture between the public and private sector, most are reflected in the existence of a landlord-tenant relationship.<sup>119</sup> It is the premise of this section that business law in the private marketplace has already evolved many workable approaches for non-sports relationships that should be examined by cities and sports franchises. The marketplace models are germane because the underlying business relationship between a city and a professional team has many of the same legal characteristics as the relationship between a private owner and its commercial tenants in a large shopping center, office complex, or medical campus, for example. The goal of such private ordering should be two-fold: predictability and flexibility.

In the sophisticated business and legal arrangements made between private owners and commercial tenants, there have been solutions developed that can be applied to most of the seemingly knotty questions which plague a team-city relationship. In the private marketplace, a variety of agreements have evolved with commercially creative provisions crafted to maximize the protection of the parties and to minimize their exposure to unexpected loss. These private arrangements allow for carefully nuanced adaptations suitable to a wide variety of individual circumstances involving professional sports

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119. For examples from Atlanta and Chicago, see Kimarie R. Stratos & Richard B. Horrow, *Facility Development and the Sports Authority*, in 2 *LAW OF PROFESSIONAL AND AMATEUR SPORTS*, at 20-11 n.5 (Gary A. Uberstine ed., 1995). Some models, notably the Green Bay Packers, are *sui generis*. *Id.* at 20-14 to -15. The Green Bay Packers were incorporated in the State of Wisconsin in 1923. *Id.* at 20-15. Purchasers of the original stock had to be season ticket holders. *Id.* In addition, a cap was placed on the maximum amount of shares that an individual could hold. *Id.* Thus, the Packers were "a community project intended to promote community welfare." *Id.* (quoting J. TORINUS, *THE PARKER LEGEND: AN INSIDE LOOK* 18 (1982)). To this day, almost all Packers shareholders are residents of Green Bay, and because there is no profit or dividend, there is no incentive for anyone to sell or purchase control of the franchise in order to generate a relocation. *Id.* Several other sports teams have followed this example. *See id.* at 20-14 to -16. The Packers franchise is structured so that the private shareholders have virtually no possibility of profit motive. *Id.* Each shareholder is also a season ticket holder. *Id.* The Green Bay voting public is also the controlling shareholder of a not-for-profit corporation. *Id.* Thus, the franchise will stay fixed in Green Bay almost as firmly as if the city and the team were parent and subsidiary corporations. The traditional private law model involving relationships akin to joint ventures between teams and cities to develop new stadiums is also frequent. *See supra* notes 44-49 and accompanying text.

Another very frequent model is the commercial landlord-tenant relationship with principles of leasehold law governing the key relationships. *See supra* notes 48-49 and accompanying text. Thus, the models stretch along a continuum from partnerships to bilateral leasing covenants, with each city's synthesis occurring in a variety of formats.

franchises<sup>120</sup>—a preferable alternative to judicial policing of the parties' contract by implying terms upon which the parties never agreed.

A city's true interest lies in sharply defining its goals and performing a cost-benefit analysis that assesses the need to attract or retain a particular franchise.<sup>121</sup> This is the same discipline that any private developer of office buildings, shopping malls, or medical campuses must undertake before committing private resources to a new project.<sup>122</sup> The fiduciary relationship between city officials and the tax-paying electorate should push these officials fully into the private marketplace model as far as analyzing and structuring the city's relationship with a professional sports franchise. Only after a cost-benefit analysis has been performed can the net burden of the relationship be identified to the city, and only then can the ultimate financial risk of the city and its resources be considered clearly.<sup>123</sup> With this in mind, a set of adaptive principles, taken from the law of the private marketplace, may be useful in addressing some of the more persistent problems that arise between the city and team owners.

*B. Approaching the End of the Term: Notification and  
Negotiation Structures*

For the protection of both city and team during the critical final years of any lease arrangement under which the team uses a city-owned facility, it is vital to have crafted a "no surprises" set of notifications that provides a structure for the timing of negotiations. The same type of approach is frequently used when a major occupant of office or commercial space is nearing the end of its lease term and the parties have previously negotiated for covenants of mutual protection.<sup>124</sup>

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120. See *infra* notes 124-129 and accompanying text.

121. See BAIM, *supra* note 27, at 1-2 (summarizing and analyzing the presentation of financial data for 15 stadiums and providing calculations of outlays and revenues).

122. See *id.* at 195 (contrasting public and private stadiums).

123. See EUCHNER, *supra* note 24, at 65-77; Baade & Dye, *supra* note 29, at 270-71; Arthur T. Johnson, *Municipal Administration and the Sports Franchise Relocation Issue*, PUB. ADMIN. REV. 519, 524 (Nov./Dec. 1983); George F. Will, *Modell Sacks Maryland*, NEWSWEEK, Jan. 22, 1996, at 70, available in 1996 WL 9471282. City officials should carefully consider the advisability of constructing a new stadium before obtaining a binding commitment from a major league team to play in it. In 1988, St. Petersburg built a 43,000-seat baseball stadium, but has not yet attracted a major league baseball team. See SHROPSHIRE, *supra* note 3, at 11. To reduce the amount of public subsidies for playing facility construction or improvements, the team owner should be required to provide some of the financing. In addition, other means of private financing, such as the sale of personal seat licenses and stadium naming rights, as well as user fees, like ticket taxes, should be used to the utmost extent.

124. See William B. Johnson, Annotation, *Sufficiency As to Method of Giving Oral or Written Notice Exercising Option to Renew or Extend Lease*, 29 A.L.R. 4th 903-910 (1995).



For example, provisions can easily be devised requiring that the team, as tenant, give notice to the city, as landlord, of the team's desire to renegotiate, terminate, move, or otherwise make a material change in status at the end of the current lease term.<sup>125</sup> These notifications are common when a commercial tenant has committed for a fixed term of years, but wishes to enjoy a series of special renewal or other options that would allow the tenant to continue to enjoy the leasehold site if it is successful.<sup>126</sup> These notifications should be a mandatory covenant at some time in the final five years, perhaps not later than one year before expiration of the current term. Failure to provide notification to the city in a prescribed, written form could trigger an automatic renewal of the term for a fixed period. For example, failure of a team to notify the city of the team's desire to change its status before one year prior to the end of the lease could cause an automatic five-year renewal. The renewal would be governed by the previous terms and conditions and would take place at the city's election when the original term expires. These provisions would tend to "smoke out" problems that a tenant, such as a sports franchise owner, may have with the arrangement; focus both parties' attention on the matter; and provide ample time for seeking a variety of mutually acceptable solutions.

Notification covenants should also include a grant to the city of an exclusive right to negotiate with the team for a fixed period of months. For example, once the team notifies the city of the team's intention to seek another home, the city would have an exclusive right to deal with the team ownership for a period, say six months, from the date of the notification before the team becomes free to negotiate, or make commitments, with a "wannabe" host city. Upon expiration of the six-month period, and without some agreement having been reached, the team would be free to negotiate simultaneously with other cities.

This type of structured approach avoids the risk of the team's making a "midnight evacuation" if the parties have not held genuine negotiations, or if the city has been passive or nonforthcoming during the period leading up to the expiration of the lease term.<sup>127</sup> Forcing

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125. See *id.*

126. See Richard D. Coats, *Negotiating a Commercial Lease Termination Agreement*, 9 THE PRAC. REAL EST. LAW. 13, 16 (1993); William B. Johnson, Annotation, *Circumstances Excusing Lessee's Failure to Give Timely Notice of Exercise of Option to Renew or Extend Lease*, 27 A.L.R. 4th 266 (1994).

127. The litigation spurred by the "midnight move" of the former Baltimore Colts, a Delaware corporation, from Baltimore to Indianapolis, provides a classic illustration of the problems of seeking to accommodate what are essentially commercial business leasing ar-

the issues to be addressed in a timely fashion is obviously a benefit to the host city. Similarly, a team owner benefits from having a level of certainty as to when and how it may negotiate with other cities. Thus, if a team is faced with a rival city's relocation proposal, the team need not risk lawsuits, league-imposed delays, or a political firestorm. The team's ability to predict when, and under what circumstances, it will be free to negotiate with the rival city would be clear at all times.

### C. *Early Departures*

A structure for advance notification and negotiations can be included for *any* proposed departure from the host city, regardless of when this might become an issue in the mind of the team ownership. If team ownership is contemplating the breach of its lease agreement in the fifteenth year of a thirty-year term, it would still be obligated to give notice and to negotiate for a fixed period before any rival negotiations were legally permitted. To enforce this obligation, the parties could craft the notice and negotiation covenants as preconditions to the team's departure and include a covenant offering the host city explicit remedies, such as specific performance for the term of the lease, injunctive relief, or heightened damages, if the team departs at any time without adhering to this structured notification and negotiation provision. The virtues of crafting a structure that provides a high degree of certainty regarding notices, negotiation time, and remedies are apparent.

Other relief the city could seek in response to an early departure might include a "call" by the city upon the team franchise. Subject to obtaining league approval for transfer of franchise ownership, the city could have a right to purchase the team at an appraised value (per-

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rangements through the post hoc use of litigation. See *Indianapolis Colts v. Mayor of Baltimore* (Colts II), 741 F.2d 954 (7th Cir. 1984). In early 1984, the football club had not obtained a satisfactory new lease agreement with Baltimore's Memorial Stadium. *Id.* at 955. Concerned that the Colts would move to the City of Indianapolis, with whom negotiations had already begun, the Maryland legislature enacted a bill empowering the City of Baltimore to exercise eminent domain over the team. See *Indianapolis Colts v. Mayor of Baltimore* (Colts I), 733 F.2d 484, 486 (7th Cir. 1984). Before a condemnation suit could be perfected, the franchise moved itself and its property outside of Maryland, leaving behind real estate held by a subsidiary of the parent corporation which owned the Colts. *Id.* Since the corporation itself and its sports franchise were intangible property beyond the jurisdiction of a Maryland court for eminent domain purposes, the issue to be resolved was whether the mere ownership of land in Maryland by a subsidiary bestowed jurisdiction for purposes of condemning the franchise. *Id.* See generally Ellen Z. Mufson, Note, *Jurisdictional Limitations on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts*, 60 IND. L.J. 389, 391-93 (1985) (discussing the difficulties of defining the jurisdictional limits of a sovereign's condemnation power).

haps through appraisal arbitration or other alternative dispute resolution (ADR) devices) if the team contemplates an early departure. The call provision would obviate legally dubious attempts at achieving the same result through eminent domain after the team has physically departed or has announced its intent to leave.<sup>128</sup> As a bargained-for marketplace structure, rather than the coercive and confiscatory weapon of eminent domain, a call provision would be quicker and more predictable.

#### *D. Rights of First Refusal: Tenant Protections*

Rights of first refusal, which could be crafted to protect either party, can be modeled on traditional commercial tenant protections. This section will first examine the tenant's perspective when a professional team occupies a public facility.

During the life of the lease, a city may decide to privatize the sports facility. In an era of devolving functions from government to private parties, the privatization of a city or county sports facility is certainly conceivable. The city may decide to sell the facility or convey it by long-term ground lease, or otherwise, to a third party. If this should occur, the team could be faced with a potentially undesirable new landlord or be unable to realize the increased projected values from what may have proven to be a very successful facilities site. The team may feel that capturing these values, which its own sports success has helped to create, is a wise business choice.<sup>129</sup>

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128. During the 1980s, an epic court battle between the City of Oakland and the once-and-current Oakland Raiders resulted in a four-year testing of the power of municipal eminent domain over a team's ownership and, eventually, the supremacy of the Commerce Clause. See *City of Oakland v. Oakland Raiders* (Oakland I), 646 P.2d 835, 840 (Cal. 1982) (holding that law authorizes the taking of intangible property); *City of Oakland v. Superior Court* (Oakland II), 197 Cal. Rptr. 729, 733 (Ct. App. 1983) (holding that territorial restrictions of applicable statute were met when team owners failed to rebut prima facie showing that the intangible property was located within the city); *City of Oakland v. Oakland Raiders* (Oakland III), 220 Cal. Rptr. 153, 158 (Ct. App. 1985) (holding that city's action was invalid under Commerce Clause). The City of Baltimore also unsuccessfully attempted to prevent the Baltimore Colts from moving to Indianapolis through the use of eminent domain authority. See *supra* note 127. Some of the better descriptions of the court battles and the principles of eminent domain involved in such disputes can be found in Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986); Mufson, *supra* note 127; Michael Schiano, Note, *Eminent Domain Exercised—Stare Decisis or a Warning: City of Oakland v. Oakland Raiders*, 4 PAGE L. REV. 169 (1983); Lisa J. Tobin-Rubio, Note, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. MIAMI L. REV. 1185 (1985).

129. Case law provides excellent analyses of the types of commercial tenant lease protections sought in many marketplace situations. See, e.g., *Shell Oil Co. v. Trailer & Truck Repair Co.*, 828 F.2d 205, 210 (3d Cir. 1987) (holding that holder of right of first refusal on a portion of land could not obtain specific performance of that option); *Summit Blvd.*

Accordingly, it would be seen by most owners as highly desirable for the team to hold a right of first refusal from the city as part of its agreement. This desire may provide the government with a wedge-issue incentive to get teams to amend existing agreements in order to provide the protective procedures desired by cities as a *quid pro quo* for granting teams a first refusal call on any transfers of interest in the sports facilities they occupy.

The call would operate in the traditional fashion.<sup>130</sup> In the event that the city sought to sell or otherwise transfer all or any part of the sports facility, the team would have a right of first refusal for a specified period.<sup>131</sup> The covenant would require the city to offer to make all transfers to the team on identical terms and conditions as transfers contemplated to a third party.<sup>132</sup> This would allow a team to avoid a potentially hostile lessor in the future. More enticing, the team could capture for itself the economic benefits of any increased values which have accrued to the facility site—values which presumably provided the marketplace incentive for the third party to negotiate with the city.

Because many facilities are occupied by more than one permanent team,<sup>133</sup> it would be necessary to create a pecking order among the teams. For example, the NFL franchise may have bargaining strength sufficient to allow it to have a right of first refusal that is senior to that of the MLB club, or vice versa.<sup>134</sup> Naturally, the dura-

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Animal Clinic v. Lemon Tree Plaza, 641 So. 2d 437, 438 (Fla. Dist. Ct. App. 1994) (holding that burden of proving ability to perform an option contract is on optionee); Hawthorne's Inc. v. Warrenton Realty, Inc., 606 N.E.2d 908, 913 (Mass. 1993) (holding that tenant's interference with bona fide offer for purchase of property precluded remedy of specific performance); Markert v. Williams, 874 S.W.2d 353, 356 (Tex. Ct. App. 1994) (holding that lessee was not entitled to reformation because of mutual mistake). Such cases make it clear that the commercial tenant's key interests in structuring rights of first refusal and purchase options into their large, commercial leasing arrangements are twofold: (1) to protect against the advent of a new landlord who may be more difficult to deal with and (2) to protect the tenant's long-range interests in capturing the values of good will, marketplace identification, and going concern, which become identified with the leased location during the years of operation.

130. See *Shell Oil*, 828 F.2d at 205.

131. Whether this specified period of time should be thirty days, two months, or longer would be a hotly negotiated matter.

132. But see *Shell Oil*, 828 F.2d at 209-10 (holding that holder of a right of first refusal on portion of tract of land could not obtain specific performance of option when owners contracted to sell larger tract).

133. See EUCHNER, *supra* note 24, at 8-9.

134. This prioritizing of property rights by covenant is merely an informal method of accomplishing what recording act priorities in most jurisdictions achieve as a matter of statutory law. See 66 AM. JUR. 2D *Receivers* §§ 54-68 (1973). Pursuant to most recording acts, competing claims to land and buildings are sorted out by means of a date-driven filing

tion of rights of first refusal must be compressed if several permanent occupants share the facility, with each of them being granted a sequential right of first refusal. The rationale for time compression is that no third party would pursue the deal if as many as three or four franchises had a two-month period of first refusal rights that must expire before the property could be transferred to the third party. Third party transferees typically desire a quick "trigger" on such rights, whereas the holder of the call desires a lengthy period of time.

It is vital to resolve the issue, frequently litigated in first refusal cases, of whether the transfer of less than the entire facility site constitutes a "trigger" of the right of first refusal.<sup>135</sup> If less than the entire facility site is sought to be transferred (for example, the parking area), the question arises whether the team should have a right to protect its interest and purchase that limited area.<sup>136</sup> Similarly, if special property rights are created in parts of the facility (for example, elite skyboxes), any portion sought to be transferred would first need to be offered to the team. Also, transfers from the city by leases (for example, parking areas or vending booths) should be addressed.

The parallel questions are whether a transfer in excess of the facility site triggers a right of first refusal and whether a formula exists to segregate the facility site from the balance of the transfer.<sup>137</sup> For example, suppose that a sports facility were located on a site of 500 acres of land on the outskirts of the city. Suppose further that the city proposed to transfer to a third party a total of 1000 acres, including the 500-acre sports facility, together with an additional 500 acres of other city-owned property adjacent to the sports facility, thus raising questions as to the scope of the team's first refusal right. It should be determined in advance, by agreement of the city and team, whether by holding the right of first refusal the team must acquire the entire one thousand acres, acquire nothing, or may acquire the five hundred-acre facility site pursuant to some formula for segregating the cost of that site from the rest of the larger transaction.<sup>138</sup>

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system so that the more senior have prior claims to the more junior interests. When multiple users of a facility are all desirous of protecting their positions, a system of covenant priorities can remove the uncertainties experienced by each. If these covenants are devised over time, then, much like the recording acts, the first franchise to enter into a lease agreement containing rights of first refusal and purchase options would be senior in time to those that might negotiate such positions later.

135. See *supra* note 132.

136. See *Shell Oil*, 828 F.2d at 210.

137. See *id.*

138. See *id.*

The team's ongoing interest in the facility site probably dictates that first refusal rights be continuing, and not terminate, if the team "passes" on its call in the first instance of a transfer of site ownership. Thus, survival language would be helpful. If a team has an existing lease on a facility, there may well be an interest in reopening the agreement to obtain such valuable call rights. This could be the wedge issue for opening those other vital procedural protections pertaining to notice and negotiations.<sup>139</sup>

### *E. Rights of First Refusal: Protections for the City*

Risk for the city comes about in one of two ways. Typically, a city finds itself at risk when a team accepts a proposal from a rival city to relocate the franchise at some future time.<sup>140</sup> However, a second possibility exists that may place a significant public interest at risk: ownership transfers involving the team.<sup>141</sup> This usually arises when the team is not a publicly traded entity, but rather, is closely held.<sup>142</sup> In the event of a sale of all or some of the control group of the team to a third party, the city may have an interest in acquiring that which is being offered for sale.<sup>143</sup>

As in so many other business arrangements, special covenants can be crafted to prevent a proposed change in team ownership or management that the city would view as hostile to its long-range best interests without the city's having had an opportunity to protect its interests in the marketplace.

*1. Protections When the Team Wishes to Move to a Rival City.*—Suppose the present ownership of a team receives an acceptable offer that includes a package of leasing agreements, guarantee of a new facility, and ancillary benefits in return for moving the franchise to the rival city. This is the same dilemma faced by a lessor in a commercial mall context when a rival attempts to lure away a key tenant. Like the mall owner, the city views itself as having a bundle of vital interests in keep-

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139. See *supra* notes 124-127 and accompanying text.

140. See SHROPSHIRE, *supra* note 3, at 11 (discussing effects on cities when teams seek to relocate); EUCHNER, *supra* note 24, at 65-77 (exploring the "feverish competition among North American cities to attract professional sports teams").

141. See EUCHNER, *supra* note 24, at 165.

142. See *id.*

143. For example, a sale of the Houston Astros baseball team to a Virginia-based group of investors was recently contemplated—representing the first step in a sequence that could quickly lead to the team's relocation out of the Lone Star State and into the Old Dominion. See John Williams, *Baseball Stadium Hopes Dim*, HOUS. CHRON., Nov. 1, 1995, at A17, available in 1995 WL 9412256.

ing the tenant. The city could hold a right for a specified period,<sup>144</sup> during which the city may match the terms of the rival's offer. Sometimes, in the realities of the marketplace, the rival's offer simply cannot be matched. For example, if the sports franchise is entitled to keep all local television and radio broadcast revenues generated by its games, rather than sharing them on a pro rata basis with other league teams, the size of the viewing and listening markets becomes a valued commodity; hence, the revenue guarantees for broadcast rights in a larger rival city may be of such economic magnitude as to deter the host city from exercising its right of first refusal and matching the terms of the offer. If so, the team may move, and the result would simply reflect the economic reality of the marketplace.

Allowing a city to decide whether to match the rival offer also has the virtue of forcing the local democracy to assess its priorities. The cost of retaining the franchise becomes starkly defined. Thus, the body politic can work its will within a specified period while focusing on a defined target: the magnitude of the tax and other burdens needed to retain its status as the host city upon expiration of the lease term. This structure diminishes the "bidding war" between host city and rival, as each offer is met with increased demands from the team.<sup>145</sup>

2. *If the Team Wishes to Sell Control of Management.*—A host city may feel uncomfortable if the team occupying the city's facility is to be sold and replaced by new team ownership. The city may be faced with seeking to preserve the team at its current facility while new team management is hostile to that goal.<sup>146</sup> Perhaps the new control group favors moving the franchise to a different city. Accordingly, a city might decide that exercising a right of first refusal would be appropriate to forestall this result. For the city to become the owner of a sports franchise—perhaps only temporarily, because the city may well inspire a group of local investors to become the ultimate new owners—the city will need a right of first refusal.<sup>147</sup> This covenant simply achieves

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144. Here again, whether it should be 15 days or 15 months will be hotly negotiated.

145. See Beisner, *supra* note 31, at 434-35.

146. For a city to become the owner-proprietor of a franchise requires statutory empowerment as well as league approval. See, for example, the arrangements for the Green Bay Packers described *supra* at note 119 and the potential sale of the Houston Astros to Virginia investors described *supra* at note 143.

147. This is by far the most likely scenario any time a team's continuation at a host city is jeopardized. The Minnesota Twins remained in Minneapolis by virtue of the purchase of control of the franchise by a local Minnesota family from the Griffith family interests, which had owned the team in Washington and Minnesota for generations prior. See Lee Schafer, *Banker or Baseball Man? Carl Pohlad Decides His Legacy*, CORP. REP. MINN., NOV. 1,

through private means the result sought by eminent domain actions against teams. A city's acquisition of a franchise through the marketplace and a negotiated covenant of first refusal is preferable to the uncertainties of litigation and turmoil involved in any attempt to condemn a sports franchise against the resistance of ownership. These attempts have uncertain results and will likely take years to resolve.<sup>148</sup>

### F. Liquidated Damages

The "passive landlord," whose only economic interest is collecting rentals, has no claim for breach of lease damages beyond the present value of the future rents.<sup>149</sup> City-team relationships are not this simplistic. If a team moves to a rival city, the most significant risk of incurring major damages would stem from the host city's unpaid indebtedness on the land and buildings that constitute the facility. For example, in 1987, Harris County undertook a major upgrade of the Houston Astrodome.<sup>150</sup> The upgrade was financed through public borrowing and had an amortization period far longer than the duration of the lease renewal that was negotiated at that time with the Houston Oilers.<sup>151</sup> Accordingly, if the Oilers departed for a rival city, Houston would be faced with the prospect of completing the amortization of city indebtedness without the benefit of the team's rents and without any of the ancillary tangible and intangible benefits derived from the presence of the team, such as tourism, prestige, and enhanced tax bases in the vicinity of the facility.

Under these circumstances, the most direct measure of liquidated damages<sup>152</sup> would be the unpaid portion of the public indebtedness.<sup>153</sup> This calculation would be rather simple, and liquidated damages could easily be tied to the team's payment of the present

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1995, at 28, *available in* 1995 WL 7906033. Accordingly, it could be expected that the city would exercise a right of first refusal in many cases merely as a conduit to transfer the club to a local group of investors, thereby preventing acquisition by an outside rival group.

148. See *supra* note 128 (providing a multiyear history of the Oakland Raiders' struggle).

149. See BERNARD H. GOLDSTEIN, *A DOCUMENTARY GUIDE TO COMMERCIAL LEASING* 133 (1985).

150. See *supra* note 111 and accompanying text.

151. See *supra* notes 112-113 and accompanying text.

152. This is the reverse of the situation in which the net rental income would be the basis for computing damages through capitalization. See Howard E. Kane et al., *Defaults*, C410 A.L.I.-A.B.A. 325, 339 (1989) [hereinafter Kane I]; Howard E. Kane et al., *Defaults*, C320 A.L.I.-A.B.A. 413, 434 (1988) [hereinafter Kane II]. Here it would be the out-of-pocket costs of amortization to the lessor, rather than the net income stream to the lessor.

153. The use of various equitable remedies in commercial lease disputes is a topic explored in Glen E. Mercer, *McCrary v. Park South Properties: Entering Dangerous Grounds: The Use of Equitable Remedies in Commercial Lease Disputes*, 51 LA. L. REV. 1123, 1129-39 (1991).



value of the unamortized public bonds.<sup>154</sup> Fine tuning this arrangement with a cap to protect the team, or the absence thereof, would force negotiators for the city and the team to focus *ex ante* upon the direct costs to be borne by each if the team departs before the debt incurred to develop the sports facility is paid.<sup>155</sup>

A measure of liquidated damages, though easily formulized, would also raise the issue of setoff.<sup>156</sup> The formula could include provisions granting the team a setoff against liquidated damages for any monies that may inure to the city from sources which replace the activities of the departing team. For example, the facility may become available for additional events during the season when the departing team would otherwise be in occupancy, or as in the case of the former home of the Minnesota Vikings and Twins near Minneapolis, the stadium site becomes the notable "Mall of the Americas" development. The departure of the team from the site permits the city to realize new revenues, thus reducing the city's direct costs for amortizing its bond indebtedness. In addition—hope beats eternal within the civic breasts of local politicians and business leaders—another team, of equal or greater drawing power, may arrive to use the facility. If, for example, this type of liquidated damages clause had existed in St. Louis when the former Los Angeles Rams moved to the City of St. Louis and occupied the same stadium and game dates as the former St. Louis, now Arizona, Cardinals, an argument for setoff against any amounts owed by the Cardinals would have been in order.<sup>157</sup> Liquidated damages, mitigated by a setoff provision, would be appropriate in these instances.

It has been suggested that attempting to formalize liquidated damages based upon lost tourist revenues, diminished tax bases or business activity, and other speculative amounts would not be fruitful

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154. *See id.*

155. The lease agreement between the Nashville Sports Authority and the Houston Oilers has a performance clause requiring the franchise to pay millions of dollars in penalties if it leaves the city prematurely. *See Williams, Sports Authority*, *supra* note 114; *see also* W & G Seaford Assocs. v. Eastern Shore Mkts., Inc., 714 F. Supp. 1336, 1346-50 (D. Del. 1989) (discussing liquidated damages and penalties in breach of commercial leases); *Travelers Ins. Co. v. General Elec.*, 644 A.2d 346, 347 (Conn. 1994) (discussing damages and penalties in commercial leases).

156. For a generalized discussion of commercial leasing damage computations, *see Wolfen v. Clinical Data, Inc.*, 16 Cal. App. 4th 171, 179-82 (Ct. App. 1993); *Lofchie v. Washington Square Ltd. Partnership*, 580 A.2d 665, 667-68 (D.C. 1990); *Coats*, *supra* note 126, at 21; *Kane I*, *supra* note 152, at 329; *Kane II*, *supra* note 152, at 434; *Johnson*, *supra* note 126, at 266.

157. *See Wolfen*, 16 Cal. App. 4th at 180-82 (discussing permissibility of setoff to diminish liability).

for profitable negotiation.<sup>158</sup> The issue would cry out for vigorous contest, as these speculative numbers can be hyped almost to infinity. Most team owners would balk at the notion of being required to pay speculative amounts as the price of moving to a rival city. One possible solution would be to permit a city to claim speculative damages, or even punitive damages or specific performance, only under limited circumstances. For instance, whenever the city's public indebtedness is unpaid at the time the team vacates the public facility, or where the team has failed to give required notice or to negotiate in good faith, the city would be entitled to protection in the form of a covenant allowing special damages or specific performance. This covenant makes economic sense even when the city is truly a passive landlord.

### G. Variables: Revenue Participations

In a matter closely related to liquidated damages, teams frequently negotiate for a monopoly, or at least a participation, in all facility revenues.<sup>159</sup> Sometimes this takes the form of revenues generated from the sale of refreshments, liquor, or merchandise; parking; catering; or funds accruing from the rental of skyboxes and similar facilities.<sup>160</sup> These participations in favor of the tenant need to be included in calculations or departure covenants, as they may represent a major stream of income from which both the city and tenant have received or plan to receive profits.

These items can be formulized based on revenues from recent operating years or fixed by agreement at the original term of the lease, as is often customary in commercial retail leases. The formula also can be adjusted continually for operating experiences, inflation, and other factors. This formalization, though more difficult than simply looking to the amortization pattern of public bonds, is frequently done in the private marketplace and is certainly well within the knowledge and ability of most commercial lawyers. Finally, ADR devices can be used to resolve any unforeseen variables in application of the damages formula.<sup>161</sup>

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158. See Stratos & Horrow, *supra* note 119, at 20-1, 20-11 n.44, 20-12 to -14. The variety of profit centers in the operation of any sports facility is huge. See *id.* In addition to taxes levied upon each of the activities, there are innumerable sources of profits, such as parking, sale of programs and souvenirs, concession revenues, and special charges for the use of skyboxes or other seating arrangements. See *id.*

159. See GOLDSTEIN, *supra* note 149, at 214-15.

160. See *id.*

161. See, e.g., *Jett v. Hays*, 283 Cal. Rptr. 40, 41 (1991) ("In a contractual arbitration proceeding . . . an arbitrator does not have the power to proceed with a hearing and make an award in the absence of a party unless the arbitration has been ordered by the court or

### H. Periodic Estoppel Certificates

In a commercial leasing relationship, a tenant will frequently supply, periodically or upon request, estoppel certificates for the use and protection of the commercial landlord.<sup>162</sup> Conversely, some tenants can require certificates from landlords regarding certain matters, particularly those involving computations of shared operating costs. Because of the need for assurances regarding exclusive negotiating rights<sup>163</sup> and the possibility of a dynamic formula for liquidated damages,<sup>164</sup> the parties might include a covenant requiring an exchange of annual or periodic estoppel certificates. For example, if the liquidated damages formula calls for a periodic recalculation of interest because public bonds are refunded or annualized determinations of revenue participations by the team and the city from such things as parking or refreshments, then an exchange of annualized estoppel certificates would be appropriate so that at periodic intervals a fixed baseline for such calculations would be available to both parties.

Concerns about the possibility of hidden negotiations for matters that could trigger rights of first refusal, notification, and negotiation could also be covered in the estoppel certificates as a sort of "comfort-giving" element to the parties on an annual or other periodic basis. For instance, the city could certify as to whether it contemplates, or is negotiating for, a sale of all or any portion of the facility. The team could certify its involvement in any sale of control to a rival city. Because some of the items pertaining to the relationship may require

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such power has been conferred by the arbitration agreement."); 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 575 N.E.2d 104, 107 (N.Y. 1991) (holding that lease renewal option providing for arbitration in the event that parties could not agree was definite and enforceable). See generally William M. Burke et al., *Lender Liability*, C422 A.L.I.-A.B.A. 81, 298 (1989) (stating that arbitration clauses are generally enforceable); John W. Daniels, Jr., *Primer Remedies for Landlord Defaults*, C532 A.L.I.-A.B.A. 195, 215 (1990) (discussing ways the landlord can limit his duty to mitigate damages in cases of default by tenants); Marvin Garfinkel, *The Office Leases from Tenants' Point of View*, C410 A.L.I.-A.B.A. 107, 122 (1989) (stating that procedures designed to resolve disputes that may arise with respect to the determination of rentable space should be articulated); John A. Gose & Brian N. Poll, *The Americans with Disabilities Act of 1990: Impacts on Tenants, Landlords, and Lenders*, C908 A.L.I.-A.B.A. 263, 274 (1994) (stating that, because of the vagueness of the law and the failure to allocate responsibility, there are inherent conflicts that could better be resolved by dealing with them prospectively); Steven L. Sloca, *ADR in Landlord-Tenant Cases*, 40 PRAC. LAW. 45, 46 (1994) (discussing the increasing use of alternative dispute resolution (ADR) in landlord-tenant cases); James H. Wallenstein, *A Potpourri of Selected Lease Provisions*, C410 A.L.I.-A.B.A. 517, 543 (1989) (discussing how parties may specify in a continuous occupancy clause agreed-upon liquidated damages).

162. See 8 AM. JUR. 2d (rev.) *Legal Forms* §§ 102.1-14 (1991); 11A AM. JUR. 2d (rev.) *Legal Forms* §§ 161:1143-46 (1991).

163. See *supra* notes 124-127.

164. See *supra* Part II.F.

audited reports from certified public accounting firms (for example, participations in parking and refreshment revenues), estoppel certificates covering the wide range of concerns to both parties should also be issued when annual audit statements are exchanged.

### *I. Confidentiality, Arbitration, and Mediation*

Although local or state "open meeting" statutes and "open records" laws may make confidentiality of negotiations and other items impossible, a municipal government should consider seeking covenants of confidentiality regarding certain matters involving the local team and the sports facility. The parties should, at least, identify those items sensitive enough to remain confidential and not subject to widespread media dissemination. For example, teams will be likely to have a strong desire not to reveal publicly the identities of offerors that have sought to purchase ownership or control of the franchise. The problem of protecting such legitimate requests for confidentiality needs to be addressed.<sup>165</sup>

A city may find it advantageous to remove discussions of rights of first refusal, resolution of disputes about liquidated damages, and resolution of disputes about the structure of notification and negotiation from the public limelight, and possibly from the sensationalism of the courtroom. This can be accomplished by including appropriate mediation and arbitration clauses in the agreements with the team owner.<sup>166</sup> It would be relatively simple to identify the most sensitive issues and to allow them to be addressed, at least in the first instance, by confidential mediation. It might also be possible to structure

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165. The use of documents from which identities of certain parties have been redacted is one promising approach.

166. Pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 2 (1994), if a lease is deemed to be within interstate commerce, then the provisions of the Act would apply. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 841 (1995) (holding that if an arbitration agreement relates to an activity involving interstate commerce, the FAA applies, thereby preempting any conflicting state law); *Mosca v. Doctors Assocs.*, 852 F. Supp. 152, 155 (E.D.N.Y. 1993) (holding that where a contract concerns interstate commerce, claims arising under the contract are subject to arbitration as required by the FAA); *Fairchild & Co., Inc. v. Richmond, Fredericksburg & Potomac R.R. Co.*, 516 F. Supp. 1305, 1316 (D.D.C. 1981) (holding that leasing agreement was a "contract evidencing a transaction 'involving commerce' within the meaning of [the FAA]" and was, therefore, governed by the Act). If the provisions of the Act would not apply, local arbitration provisions would. See *Dobson*, 115 S. Ct. at 841. In either event, the resolution of commercial landlord-tenant disputes arising between a city and a team are handled more quickly and with greater expertise than the posturing and jury trials which may require years of litigation. See *Burke et al.*, *supra* note 161, at 298; *Daniels*, *supra* note 161, at 215; *Garfinkel*, *supra* note 161, at 122; *Gose & Poll*, *supra* note 161, at 263; *Sloca*, *supra* note 161, at 45; *Wallenstein*, *supra* note 161, at 543.

clauses requiring binding arbitration of specific issues in the event that mediation fails. Rules of confidentiality may stand a better chance of being enforced and respected during the arbitration or mediation process than when such questions are resolved before the local or federal courtroom, the chambers of the city council, the legislature, or the media.

### *J. Game Plan for City*

In summary, the practices used in the private economy pertaining to negotiations for long-term arrangements between developers and commercial tenants offer a number of devices that can be creatively adapted to address the issues between a city and a major league franchise occupying its sports facility. Even if the final resolution of some covenants reaches an impasse, and some elements are thus not addressed in the final agreements between the city and the team, forcing the public agenda to focus on these issues should have a significant, healthy effect. Rather than rushing into an agreement for the sake of landing or retaining a major league team, relying on little more than bullish high hopes and civic appetites, a city would be well served to take a hard-headed look at the potential consequences to the community of the departure, perhaps many decades later, of a local sports franchise. The analog to the courtship between the city and its team is not a "prenuptial agreement," but rather, the commercially creative arrangements of the business marketplace. Preventive law through private ordering, like preventive medicine, can frequently ensure maximum health.

## III. MAJOR LEAGUE MONOPOLY POWER CREATES DISPARITY OF BARGAINING POWER

The preceding section assumes that a city will be able to negotiate contract provisions necessary to effectively protect its interests. Although a city often provides millions of dollars in public subsidization to attract or retain a major league professional sports franchise, the team owner may have the upper hand in contract negotiations. A major league's monopoly power provides a franchise owner with superior bargaining leverage, enabling it to resist a city's demands for adequate protection by contract.

### *A. Monopoly Nature of Sports League*

The historical tendency in America favors a single major professional league in baseball, football, basketball, and hockey. Throughout the twentieth century, competition among rival leagues in the

same sport has never existed for any appreciable period. Because monopoly control of each sport has been the norm, it may be unrealistic to expect that the free market model of competition, which produces a wide variety of competing products in most industries, applies equally to the professional sports industry.<sup>167</sup> It is questionable whether a professional sports league is an example of a "natural monopoly" simply because significant economies of scale enable a single league to produce games most efficiently, or because there may be certain conditions, inherent in the sports industry, that predispose toward dominance by a single league.<sup>168</sup>

One persuasive reason for one-league monopoly control of a professional sport is the "hierarchical nature of sports competition" in the United States.<sup>169</sup> Each sport is played at various levels of competition, from sandlot games up to organized major league professional teams.<sup>170</sup> Under this system, fans come to expect one premier level of sports competition and the "crowning of a single champion."<sup>171</sup> Therefore, eventually, fans will prefer the product of one league over that of another, thereby causing the demise of the disfavored league.<sup>172</sup>

It is extremely difficult for more than one major professional league to exist in the same sport for a prolonged period.<sup>173</sup> To be viable, a professional sports league must place teams in several large cities containing the population and economic base to support the franchises;<sup>174</sup> the league must also procure access to adequate playing

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167. See JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 5.11, at 726-27 (1979) (discussing antitrust aspects of the ownership and location of sports league franchises); James Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 *LAW & CONTEMP. PROBS.* 42, 64 (1973) (stating that competitive leagues will not survive in professional sports because the incentives for monopoly control are too strong); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 *UCLA L. REV.* 219, 257 n.134 (1984) (providing a historical overview of how rival professional leagues have failed to survive for more than a few financially disastrous years).

168. See Stephen F. Ross, *Monopoly Sports Leagues*, 73 *MINN. L. REV.* 643, 715-33 (1989) (arguing that sports leagues do not satisfy economic definition of natural monopoly).

169. WEISTART & LOWELL, *supra* note 167, § 5.11, at 728.

170. See *id.*

171. Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 *MARQ. SPORTS L.J.* 323, 342 (1994).

172. See WEISTART & LOWELL, *supra* note 167, § 5.11, at 728.

173. See *id.*

174. See *American Football League v. National Football League*, 205 F. Supp. 60, 76 (D. Md. 1962) (discussing the relevant factors for determining whether a particular city is a suitable location for a professional football franchise), *aff'd*, 323 F.2d 124 (4th Cir. 1963); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Coop-*

facilities,<sup>175</sup> obtain major-league quality players,<sup>176</sup> and secure a national television contract.<sup>177</sup> Even if a league is able to satisfy these minimum requirements, its long-term survival as a profitable, independent entity is not ensured.<sup>178</sup> Upstart leagues often fold after a relatively short period of existence because of financial problems<sup>179</sup> or improper management and poor strategic business decisions.<sup>180</sup>

The evolution of professional sports has seen viable competing leagues, such as the National Football League and the American Football League, merging after receiving congressional antitrust immunity to do so<sup>181</sup> or forming an alliance, as the National and American baseball leagues have done.<sup>182</sup> To prevent violation of the antitrust laws, courts have preliminarily enjoined mergers of rival professional leagues that lack congressional approval.<sup>183</sup> Nevertheless, truces or "peace agreements," enabling the NBA and the NHL to absorb some teams from rival leagues while other franchises in those leagues folded, were successfully used in the 1970s to restore the existence of a single major professional league in both basketball and hockey.<sup>184</sup>

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*eration in the Sports Industry*, 1984 DUKE L.J. 1013, 1029 n.52 (1984) (noting the importance of having teams in cities with a certain minimum population base to sustain the league).

175. See *Fishman v. Wirtz*, 807 F.2d 520, 525 (7th Cir. 1986) (holding that "refusal to lease the Chicago Stadium violated [the Sherman Act] and constituted tortious interference with prospective advantage"); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 985-86 (D.C. Cir. 1977) (discussing whether a restrictive covenant proscribing the leasing of RFK Stadium to any team other than the Redskins is a violation of the Sherman Act).

176. See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 473 (E.D. Pa. 1972) (discussing the importance of obtaining high-quality players to support a rival league).

177. See *United States Football League v. National Football League*, 842 F.2d 1335, 1341-42 (2d Cir. 1988) (examining claims that the NFL, by contracting with the three major league networks and by acting coercively toward them, prevented the United States Football League (USFL) from acquiring a network television contract).

178. See Weistart, *supra* note 174, at 1029.

179. For example, the World Football League discontinued operations because its teams incurred substantial losses. See WEISTART & LOWELL, *supra* note 167, § 5.11, at 727 n.282.

180. See *United States Football League*, 842 F.2d at 1341-42 (upholding jury finding that USFL's financial instability was caused by the league's managerial mistakes).

181. See 15 U.S.C. § 1291 (1995).

182. See *National League of Prof'l Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681, 682 (D.C. Cir. 1920).

183. See, e.g., *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 894 (S.D.N.Y. 1975) (refusing to dissolve injunction because "merger . . . would result in the total elimination of competition in the major league [basketball] market"); *Robertson v. National Basketball Ass'n*, 1970 Trade Cas. (CCH) ¶ 73,282 (S.D.N.Y. 1970) (granting injunction because "should a merger occur and later be found to be illegal under the Sherman Act, the court will be confronted with the unscrambling complexities inherent in divestiture which might well work severe hardship upon innocent parties").

184. See PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: CASES, MATERIALS AND PROBLEMS* 444-45 (1993).

In some cases, an established league has resorted to anticompetitive exclusionary practices to drive a newly formed rival league out of business.<sup>185</sup> Courts have held that attempts to restrict a competing league's access to players or a national television contract are illegal restraints of trade that violate the antitrust laws.<sup>186</sup> Despite winning their respective antitrust cases,<sup>187</sup> neither the World Hockey Association nor the United States Football League (USFL) now exists. This evidence further reflects the inability of a rival professional league to effectively compete coast-to-coast against an established league for a sustained period.

There are presently a combined total of 113 teams in the NFL, NBA, MLB, and NHL,<sup>188</sup> the dominant leagues in their respective sports throughout the twentieth century.<sup>189</sup> Although each of these leagues has expanded since its inception, either by adding existing teams through merger or by creating new franchises,<sup>190</sup> the rate of expansion has not been sufficient to satisfy the current demand of cities for major league professional teams.<sup>191</sup> Because of the development of the interstate highway system, localized broadcast competition, and league revenue sharing, the number of communities capable of supporting a major league sports franchise has expanded to include smaller cities and suburban areas.<sup>192</sup>

A natural business paradox exists between the competing interests of a league as a collective entity and its individual owners. A sports league has an economic incentive to expand its membership up to the number of teams necessary to maximize its franchises' collective profitability and, equally important, to preempt and deter attempts to form successful rival leagues.<sup>193</sup> However, a league's current owners appear to have an even stronger incentive to maintain the number of available franchises below market demand, thereby increasing the value of existing teams, preventing the reduction of their pro rata

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185. See WEISTART & LOWELL, *supra* note 167, § 5.11, at 727 n.284.

186. See *infra* note 370 and accompanying text.

187. See *United States Football League v. National Football League*, 842 F.2d 1335, 1380 (2d Cir. 1988) (affirming district court's jury verdict award of one dollar in damages and denying injunctive relief); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 519 (E.D. Pa. 1972) (holding that NFL committed antitrust violations).

188. See *Brownout*, *supra* note 28.

189. See WEILER & ROBERTS, *supra* note 184, at 444-45.

190. Since the mid-1950s, major league baseball, basketball, football, and hockey have each added between ten and twenty teams. See Noll, *supra* note 1, at § 17.02[1].

191. See EUCHNER, *supra* note 24, at 23.

192. See *id.* at 23, 29-32.

193. See Quirk, *supra* note 167, at 47.



share of league revenues from national broadcast and other sources, and enhancing each owner's bargaining power with stadium authorities by the threat of moving to cities without teams.<sup>194</sup> Moreover, increased capital costs of creating a new league, as well as the history of failed attempts, indicate that the formation of a rival league does not present a viable threat to an established league, thus reducing the pressure on existing leagues to expand to additional cities as a strategic response to potential competition.<sup>195</sup>

### *B. League Monopoly Power and Its Effects*

A major professional league's monopoly power gives it the ability to control the number of major league franchises in its sport.<sup>196</sup> The league grants each franchise an exclusive charter to operate a team in a particular geographical area.<sup>197</sup> An exclusive geographical distribution of franchises is believed necessary to ensure league survival and the economic viability of individual teams.<sup>198</sup> Unless a local market is protected from economic competition by other league teams, a franchise may face potentially ruinous competition that harms league-wide competitive balance and overall league financial stability.<sup>199</sup>

Positing that cities are consumers of professional sports franchises, it follows that a major professional league as a collective entity has monopoly power in its business dealings with communities that seek to host teams. Unlike almost any other form of modern entertainment, from the perspective of a city that desires to acquire or retain a major league team, there are no reasonable substitutes.<sup>200</sup> For example, cities generally do not offer tens or hundreds of millions of dollars in public subsidization to attract teams from other non-major leagues, such as the Canadian Football League, Continental Basketball Association, International Hockey League, or minor league baseball. In this context,<sup>201</sup> the NFL, NBA, NHL, and MLB each con-

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194. See Gray, *supra* note 93, at 155-56; Noll, *supra* note 1, at 17-30.

195. See *supra* note 194.

196. See Morris, *supra* note 39, at 90-91.

197. See *id.*

198. See *id.*

199. See Weistart, *supra* note 174, at 1027-30.

200. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). In determining the existence of monopoly power, the Supreme Court has held that the defendant's product, and any reasonable substitutes for it, should be included in the relevant market. See *id.*

201. See James L. Seal, *Market Definition in Antitrust Litigation in the Sports and the Entertainment Industries*, 61 ANTITRUST L.J. 737, 764 (1993) (noting the importance of focusing on unique characteristics of the sports and entertainment industries and the potential harm to a particular plaintiff in defining relevant market).

trols the supply of franchises in their respective sports and thus exercises monopoly power<sup>202</sup> that gives their individual franchises significant leverage in negotiations with operators of government-financed playing facilities.<sup>203</sup>

While the granting of geographically exclusive franchises benefits a league and its member teams, it places cities that desire to host a team at a significant disadvantage in contract negotiations.<sup>204</sup> There are few regular, long-term uses for a large playing facility, particularly an outdoor stadium that only generates substantial revenues as the venue for a major league sports franchise. Because the aggregate demand for teams exceeds the available supply, and because a city can only negotiate with one team per major league sport at a time, clubs are able to extract public funds from government entities for the team's own private benefit.<sup>205</sup>

The disparity between the number of major league professional sports franchises and the number of cities desiring to host them has spawned some classic monopoly characteristics—opportunistic behavior by teams, bidding wars among communities for a limited supply of teams, and an inability of cities to protect the interests of their taxpayers and fans solely by contract.<sup>206</sup> The threat of relocation gives the owners of professional teams substantial leverage in negotiations with cities seeking to retain or attract a sports franchise.<sup>207</sup> Franchise owners often shop their teams to competing cities in an effort to increase their profits, largely at taxpayer expense.<sup>208</sup> A sports franchise can extract a monopoly price from a community by insisting on millions of dollars of publicly financed subsidies, such as reduced rental fees,

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202. See *Eastman Kodak v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) (stating that a single brand may be the relevant market); Seal, *supra* note 201, at 742-43 (observing that a single product in the sports or entertainment industry may constitute relevant market under particular circumstances). In his exhaustive article, Professor Ross concludes that both MLB and the NFL possess monopoly power that harms taxpayers and fans. See Ross, *supra* note 168, at 646. Ross further observes that the NBA and NHL may also possess monopoly power. See *id.* at 646 n.14.

203. See Noll, *supra* note 1, at 17.03[5].

204. See Wunderli, *supra* note 41, at 83-86.

205. See BAIM, *supra* note 27, at 3.

206. Although Oakland capitulated to owner Al Davis's demands for stadium improvements in an effort to prevent the Raiders from relocating to Los Angeles, Davis refused to enter into a long-term lease to secure bond financing for those improvements. See Ross, *supra* note 168, at 652.

207. See BAIM, *supra* note 27, at 6; EUCHNER, *supra* note 24, at 24-26, 163.

208. See EUCHNER, *supra* note 24, at 79-159 (discussing the influence of threatened relocation on efforts by Los Angeles, Baltimore, and Chicago to acquire or retain a professional sports team).

playing facility or infrastructure improvements, or new arenas or stadiums.

Economists believe that teams which play home games in publicly owned facilities pay below free market rents.<sup>209</sup> Through the effective use of bargaining leverage, a franchise owner is able to appropriate to itself many of a city's economic benefits of hosting a team.<sup>210</sup> Playing facility-related revenues and owner savings due to public financing of subsidies significantly affect a sports franchise's profitability.<sup>211</sup>

Political factors also enhance a team owner's ability to obtain favorable concessions from government officials of cities that want to host sports franchises.<sup>212</sup> Cities compete vigorously among themselves to attract business, enhance their economic development, and expand their tax base.<sup>213</sup> Local politicians are susceptible to pressure to prevent the loss of area businesses to other communities.<sup>214</sup> The pressure to retain a local professional team can be even more intense than in other business contexts because of the significance of professional sports in American society, the community's development of a strong emotional bond with the home team, and the limited supply of other professional teams.<sup>215</sup>

Losing or attracting a sports franchise may have an impact on an elected official's political future.<sup>216</sup> To satisfy prevailing public opinion and to further their political ambitions, elected officials may not fully consider the costs and benefits to the community of providing millions of dollars in public subsidies to a sports franchise.<sup>217</sup> The adverse effects of committing taxpayer funds over a long period, with-

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209. See BAIM, *supra* note 27, at 3; Baade & Dye, *supra* note 29, at 265-66; Noll, *supra* note 1, at 17.03[5]; Quirk, *supra* note 167, at 64-65. When the Baltimore Orioles franchise was sold in 1993, its largest single asset was considered to be its stadium lease. See Andrew Osterland, *Field of Nightmares: Professional Sports Franchises Are Giving Local Taxpayers Sleepless Nights*, FIN. WORLD, Feb. 14, 1995, at 104, available in 1995 WL 8083025.

210. See Wunderli, *supra* note 41, at 94; Allen R. Sanderson, *Games Oilers Play: It's No-Win for Houston in These Childish Antics*, HOUS. CHRON., Aug. 20, 1995, at C1, available in 1995 WL 9399877. Cities with diverse and stable economic bases appear to be in the best position to resist the often exorbitant demands of professional team owners. See EUCHNER, *supra* note 24, at 174.

211. See EUCHNER, *supra* note 24, at 33-34.

212. See *id.* at 176-77.

213. This can be attributed to the fact that local governments bear the primary responsibility for providing certain services to their constituents, such as police and fire protection, as well as sanitation. See *id.* at 166.

214. See *id.* at 176-77.

215. See Dean, *supra* note 2; *supra* notes 78-80 and accompanying text.

216. See Baade & Dye, *supra* note 29, at 266.

217. See EUCHNER, *supra* note 24, at 176-77.

out ensuring that the community's interests are safely protected, may not manifest themselves until after the politician has left office.<sup>218</sup>

"Ironically, sports franchises may exert greater leverage over city government than other interests do because of their overall economic insignificance."<sup>219</sup> The populace of communities of the size necessary to host a professional sports franchise tends to be diverse and difficult to organize in a unified manner.<sup>220</sup> The general citizenry does not have the time, resources, or common purpose to affect local government policy on issues involving playing facilities for professional teams.<sup>221</sup> This makes it more difficult for ordinary citizens and local coalitions to unite and effectively oppose expensive stadium construction projects or to insist that their elected officials act in a manner that best advances the public good.<sup>222</sup> Nevertheless, the tax dollars of the average citizen are appropriated on a major scale to fund publicly owned playing facilities.<sup>223</sup>

Small groups of the wealthy elite, such as banks, construction firms, bond brokers, and real estate developers, having disproportionate political power and the most to gain from facility construction, improvement, or infrastructure changes, have the strongest voice on stadium issues.<sup>224</sup> These special interest groups, often allied with the team owner, derive the most benefits from public subsidization of professional sports.<sup>225</sup> Businesses and affluent individuals can afford the escalating price of tickets to major league sporting events, while the average person in the community cannot.<sup>226</sup>

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218. For example, the \$67.5 million in bond indebtedness incurred in 1987 by Harris County, Texas, to finance stadium improvements necessary to keep the Houston Oilers from relocating to Jacksonville, Florida, will not be paid off when the Oilers move to Nashville, Tennessee, after the 1997 NFL season. See *supra* notes 14-16 and accompanying text.

219. EUCHNER, *supra* note 24, at 14. The typical sports franchise derives lower annual revenues than a large department store and employs a relatively small number of employees. See Noll, *supra* note 1, at 17.02, 17-2.

220. See EUCHNER, *supra* note 24, at 14.

221. See *id.* Voter referendums on tax increases to support stadium construction or improvements appear to be an exception. See Raymond J. Keating, *Pitching Socialism*, NAT'L REV., Apr. 22, 1996, at 38, available in 1996 WL 8382124.

222. See EUCHNER, *supra* note 24, at 14. Other commentators have noted instances of successful taxpayer resistance to the demands of franchise owners and politicians who have yielded to owners' demands. See, e.g., Baade & Dye, *supra* note 29, at 266-67 (noting that mayor of South Bend, Indiana lost his job, in part, due to his efforts to build a stadium for a minor league baseball team and that stadium referendums have failed in Cleveland and Miami).

223. See *supra* notes 3-4 and accompanying text.

224. See EUCHNER, *supra* note 24, at 58-60.

225. See *id.* at 59.

226. See *id.*

C. *Franchise Free Agency and Opportunistic Behavior*

Movement of professional sports teams from one community to another is not a recent phenomenon.<sup>227</sup> One of the first franchise relocations occurred in 1882 when the Troy Haymakers baseball team moved to New York City and was renamed the "Giants."<sup>228</sup> In the first half of the twentieth century, professional basketball and football franchises frequently shifted locations as part of the competition between rival leagues.<sup>229</sup> During this time, gate receipts constituted a major portion of a team's revenues, and franchise relocations usually occurred because of a failure of fan support for the local team.<sup>230</sup>

In the late 1940s, teams began moving because of "economic and business advantages of the new location and not the economic failures of the previous location."<sup>231</sup> Franchises relocated to growing population centers in the southern and western states and from decaying industrial urban cities to affluent suburban areas.<sup>232</sup> The 1958 moves of the Brooklyn Dodgers to Los Angeles and the New York Giants to San Francisco symbolized this shift from the local community's inability to financially support a team to the team owner's desire to maximize profits in a better market as the dominant factor influencing franchise relocations.<sup>233</sup> Although the movement of a cherished and economically viable franchise out of a community often creates emotional distress for local fans, courts have upheld the transfer of teams as a legitimate means of enhancing the franchise's profitability.<sup>234</sup>

Roger Noll, a leading sports economist, has characterized the current, overall financial health of the professional sports industry as "generally very strong" because the sales price of the limited supply of major franchises has increased steadily.<sup>235</sup> The average value of all sports franchises is estimated to have increased at an annual rate of

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227. See *Brounout*, *supra* note 28.

228. See *id.*

229. See Johnson, *supra* note 124, at 519. Because MLB and the NHL did not face competition from rival leagues during this period, the geographical location of their respective franchises was relatively stable. See *id.*; see also Quirk, *supra* note 167, at 48 (noting that there were no franchise relocations in baseball's American or National Leagues from 1903 to 1953).

230. See Wong, *supra* note 37, at 22-24.

231. *Id.* at 25.

232. See *id.* at 25-27; Johnson, *supra* note 124, at 520-22.

233. See EUCHNER, *supra* note 24, at 16-20.

234. See, e.g., *November v. National Exhibition Co.*, 173 N.Y.S.2d 490, 499 (Sup. Ct. 1958) (dismissing suit by New York Giants shareholder who challenged board of directors' vote to move team to San Francisco).

235. Noll, *supra* note 1, at 17-14.

twenty percent during the late 1980s.<sup>236</sup> Major league professional sports teams generally share revenues equally from national television contracts and trademark licensing royalties.<sup>237</sup> Moreover, NFL and MLB franchises divide gate receipts from live attendance in an established percentage between the home and visiting teams.<sup>238</sup> However, franchises are not required to share revenues with other league teams from local television or radio contracts, concession and parking receipts, personal seat license sales, or luxury box rentals.<sup>239</sup> This causes significant disparities in the annual revenues and franchise values of teams within the same league and may affect a franchise's ability to field a competitive team.<sup>240</sup>

The best way for a franchise to increase its profitability is to expand its local revenues or to reduce its costs.<sup>241</sup> One way for a franchise owner to accomplish this objective is to obtain a lucrative arena or stadium lease with the host city that either increases the owner's share of revenues from the sale of concessions, souvenirs, parking, luxury boxes, and personal seat licenses or reduces the owner's facility usage costs, or both. Because the supply of major league sports franchises is far less than the cities' demand, team owners have a strong incentive to engage in franchise free agency and to shop among cities for the best possible terms of a playing facility arrangement.<sup>242</sup>

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236. See Martens, *supra* note 171, at 12.

237. See SHROPSHIRE, *supra* note 3, at 10.

238. See *id.* at 10-11 (discussing similarities and differences of league revenue-sharing practices).

239. See *id.* at 10.

240. Due to significant differences in stadium revenues, there are extreme disparities in gross revenues among NFL teams. See King, *supra* note 14, at 28; Michael Ozanian, *Suite Deals: Why New Stadiums Are Shaking up the Pecking Order of Sports Franchises*, FIN. WORLD, May 9, 1995, at 42, available in 1995 WL 8083117. The NFL's 1993 collective bargaining agreement permits cash bonuses to be prorated over the duration of a player's contract. See *id.* Dallas Cowboys owner Jerry Jones, whose stadium-related revenues are the league's highest, uses this cash flow to attract star players by offering large bonuses. See *id.* This has encouraged other NFL owners to increase their annual cash flow by seeking more favorable stadium deals through franchise free agency. See *id.*

241. Because player salaries are the largest costs incurred by a franchise, team owners seek to minimize these costs by limiting competition among teams for player services and by establishing a maximum, annual aggregate amount that each team pays its players. See Noll, *supra* note 1, at 17.03[4].

242. Teams in all four major professional leagues appear willing to play "musical chairs" with cities and are threatening to relocate if their demands are not met. Several MLB and NFL teams are now seeking better stadium deals. See King, *supra* note 14, at 28; Murray Chass, *A New Field of Dreams or Just a Dream?*, N.Y. TIMES, Sept. 19, 1995, at B10 (discussing the construction or renovation of stadiums to attract relocating baseball teams). The 1995 Stanley Cup champion New Jersey Devils threatened to move to Nashville until its demands were met. See Michael Farber, *Suept Away*, SPORTS ILLUS., July 3, 1995, at 18, available in

Because the host city's local population base significantly affects attendance-related revenues, one would not expect an owner to move its team to a smaller metropolitan area in search of a better stadium deal.<sup>243</sup> However, league-wide revenue sharing of live gate receipts spreads the adverse financial effects of reduced attendance among all teams and forces a relocating team to internalize only a portion of these lost revenues.<sup>244</sup> Moreover, a smaller city, seeking to achieve "big league status," may be willing to offer a more lucrative deal that compensates for the negative effects of leaving a larger city.<sup>245</sup> Thus, the smaller city's taxpayers end up compensating for marketplace differentials in live attendance, sales of team-related merchandise, and local revenues from radio and television broadcasts.

Even if moving a franchise from a large to a small market harms the league's national television contract or other interests, the franchise bears only its pro rata share of these losses, while individually reaping the economic benefits of relocation.<sup>246</sup> Because all stadium-related revenues are not required to be shared with other league members, an owner has an economic incentive to relocate the franchise if the move can increase revenues. Playing in a new publicly subsidized stadium may have the desirable effect of allowing small-market teams to reduce the disparity in profits and values and to enhance their competitiveness;<sup>247</sup> it is, however, the product of a bidding war among cities for a limited supply of sports franchises and reflects the substantial bargaining leverage created by the monopoly power of major professional sports leagues.

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1995 WL 12558342. The former two-time defending NBA champion Houston Rockets has complained that its arena is inadequate and the team owner is considering moving the franchise. See Julie Mason, *Mayor Says Data Back Downtown Basketball Site*, HOUS. CHRON., Aug. 8, 1996, at 33, available in 1996 WL 11557910.

243. See Wunderli, *supra* note 41, at 87-88. Most fans who attend professional games live within 20 miles of the playing facility. See Noll, *supra* note 1, at 17-16. The "team's winning percentage" is another important factor influencing its local revenues. Wunderli, *supra* note 41, at 87.

244. See Wunderli, *supra* note 41, at 88.

245. See *id.* at 89. Historically, teams tended to move from smaller markets to larger cities because of economic projections that moving to larger markets would generate higher revenues for the teams. See James Quirk & Mohamed El Hodiri, *The Economic Theory of a Professional Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS 45-52 (Roger G. Noll ed., 1974). However, recent moves, such as the Los Angeles Rams to St. Louis and the Houston Oilers to Nashville, support the hypothesis that movement from larger to smaller cities is more profitable for some teams, depending on the amount of public subsidization offered by the new host city. See Wunderli, *supra* note 41, at 88-90.

246. See *supra* notes 237-239 and accompanying text.

247. See Ozanian, *supra* note 240, at 42.

*D. League Response to Franchise Relocations*

A sports league has a strong interest in franchise stability and is collectively harmed by its member teams' exercise of opportunistic behavior and franchise free agency. This conduct breaks down the symbiotic relationship between teams and their host communities. Eventually, city taxpayers may be unwilling to provide publicly owned and subsidized playing facilities for teams that can casually relocate despite a history of fan support that has enabled the franchise to be profitable.<sup>248</sup> Without taxpayer subsidies, leagues may be unable to field competitive teams in optimal geographical locations.<sup>249</sup>

Opportunistic relocation also hurts a league's good will and fan loyalty, especially if it disrupts geographical balance and causes the elimination of traditional rivalries among teams. Game attendance may decline and reduce the league's overall gate revenues and prestige, particularly if a team has committed to relocate to another city in the future.<sup>250</sup> Franchise relocations may also adversely affect league media exposure. Television networks will offer less money for rights to an unstable product, particularly if franchises transfer out of major market areas, cumulatively reducing the nationwide viewing audience.<sup>251</sup>

Leagues and individual team owners have a series of economic contradictions at work within their relationships. Because of the importance of maintaining stable franchises and preventing unwarranted team movements, leagues require super-majority *de jure* approval before a franchise is permitted to relocate;<sup>252</sup> however, this is often a meaningless requirement *de facto*.<sup>253</sup> Individual franchise owners often lack a significant economic incentive to protect a host city's interests. Because owners share gate receipts and national television revenues, it is in their collective interest to keep franchises in, or allow franchises to move to, communities offering the highest potential sources of shared revenues.<sup>254</sup> Moreover, freely permitting franchise movement enables all member teams to use the threat of future relocation to enhance their bargaining power in stadium negotiations

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248. See Jeffrey Glick, *Professional Sports Franchise Movements and the Sherman Act: When and Where Teams Should Be Able to Move*, 23 SANTA CLARA L. REV. 55, 84 (1983); Gray, *supra* note 93, at 131.

249. See Glick, *supra* note 248, at 84.

250. See *id.*

251. See *id.* at 86-87; Ross, *supra* note 168, at 653-54.

252. See Beisner, *supra* note 31, at 436 n.39.

253. See *id.* at 436.

254. See *id.*



with their host cities.<sup>255</sup> An owner must also consider the possibility that voting against a fellow owner's relocation may cause the fellow owner to disapprove of future efforts to move another team.<sup>256</sup>

Professional leagues historically have not made vigorous efforts to prevent franchise movements.<sup>257</sup> One commentator has observed: "There is no reason to expect that franchise owners routinely will interfere with their joint-venturers' efforts to make more money at the taxpayers' expense."<sup>258</sup> From 1950 through 1982, seventy-eight franchise movements occurred in the four major league professional sports.<sup>259</sup> Most league attempts to block franchise relocations were directed at owners, such as Charlie Finley, Bill Veeck, and Al Davis, who were perceived as mavericks.<sup>260</sup> Apparently, "personal animosity" and other factors motivated these actions, rather than an honest desire to protect a host city's interests.<sup>261</sup>

Since 1982, when the NFL and its members were found to have violated the antitrust laws by voting against the proposed move of the Oakland Raiders to Los Angeles,<sup>262</sup> leagues have been forced to consider potential legal liability for attempting to prevent franchise relocation.<sup>263</sup> In 1983, the NHL was sued for rejecting the sale of the St. Louis Blues to a group that planned to move it to Saskatoon, Saskatchewan.<sup>264</sup> The Ralston Purina Company, which owned the Blues at the time, sought \$60 million in antitrust damages from the league.<sup>265</sup> The NHL subsequently approved the sale of the Blues to a local consor-

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255. A popular league strategy is telling host city officials that they should cave in to the demands of franchise owners to avoid the loss of a team by relocation. For example, NFL Commissioner Paul Tagliabue stated that Houston's best chance of continuing to host an NFL team would be to satisfy Oilers owner Bud Adams's demand for a new stadium. See John McClain, *Tagliabue: City Won't Get Guarantee*, HOUS. CHRON. Jan. 17, 1996, at C1, available in 1996 WL 5577348. Tagliabue observed: "'If the Oilers' situation doesn't work down there, I don't see any circumstances in which we're going to guarantee a team, especially when one team's already found it unsatisfactory.'" *Id.*

256. See Beisner, *supra* note 31, at 436 n.39.

257. Quirk, *supra* note 167, at 48-52.

258. Ross, *supra* note 168, at 654.

259. See Wunderli, *supra* note 41, at 90.

260. See *id.*

261. See Ross, *supra* note 168, at 653 n.41.

262. See *infra* notes 316-324 and accompanying text.

263. Despite the jury verdict for the Raiders, the NFL filed a 1984 suit seeking to prevent the Philadelphia Eagles from relocating, on the basis that "[s]uch a move would abandon a community that has supported a team superbly for more than half a century." Wong, *supra* note 37, at 34 n.108 (quoting *NFL Asks Court to Block Eagle Move*, N.Y. TIMES, Dec. 15, 1984, at 43). That suit became moot when Eagles owner Leonard Tose decided to keep the team in Philadelphia. See *id.* at 34-35.

264. See *id.* at 66.

265. See *id.*

tium that kept the team in St. Louis, and the antitrust suit was ultimately settled.<sup>266</sup> The operator of the stadium that houses the St. Louis Rams recently filed an antitrust suit against the NFL, alleging that conditioning league approval of the team's move from Los Angeles on the payment of a \$29 million relocation fee harmed the stadium operator's economic interests.<sup>267</sup> The now Oakland Raiders sued the NFL on antitrust grounds for alleged unlawful interference with the team's 1995 move from Los Angeles back to Oakland.<sup>268</sup>

#### IV. ANTITRUST CLAIMS BY CITIES

The relocation of a major league professional sports team causes psychological distress and a sense of loss to the fans of the former host city.<sup>269</sup> The government entity that owns the playing facility may be left with a significant amount of debt incurred to attract or retain the franchise.<sup>270</sup> Taxpayer dollars are used to pay outstanding facility-related debt, while the franchise, which derived the benefits of taxpayer subsidization, has no legal obligation to remain or pay damages, absent an agreement to do so.<sup>271</sup>

A city's inability to protect its taxpayers' financial investment and prevent fan exploitation by a team owner's opportunistic behavior is the product of a major professional sports league's monopoly power. As previously discussed, both the undersupply of major league franchises and the excess demand by cities give each team owner strong leverage in playing facility lease negotiations.<sup>272</sup> The threat of relocation is an incentive to obtain favorable terms and concessions at taxpayer expense.<sup>273</sup>

Cities, as owners of stadiums, and states, in their sovereign capacity, have sought relief under the antitrust laws for harm caused by franchise relocation. This section of the Article discusses the inappropriateness of using the antitrust laws to regulate a professional

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266. *See id.* at 66-67.

267. *See St. Louis Convention & Visitors Comm'n v. National Football League*, No. 4:95CV02443TIA (E.D. Mo., filed Dec. 18, 1995).

268. *See Oakland Raiders v. National Football League*, No. C-95-03547-SBA (N.D. Cal., filed Oct. 5, 1995).

269. *See supra* note 34 and accompanying text.

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

271. *See supra* notes 113-117 and accompanying text.

272. *See supra* notes 188-192, 206-211 and accompanying text.

273. *See supra* notes 206-211 and accompanying text.

league's determination of the total number and geographical location of franchises.<sup>274</sup>

*A. Loss of Team by Franchise Relocation*

1. *Standing and Antitrust Injury Requirements.*—The objective of the antitrust laws is to prevent, or to allow recovery for, economic losses caused by anticompetitive commercial activity. An antitrust plaintiff must prove actual or threatened harm to its economic interests as a result of the defendant's antitrust violation.<sup>275</sup> A city must show that the anticompetitive conduct of a professional sports league and its member franchises has harmed the city's proprietary interests.<sup>276</sup> For example, lease revenues and revenues associated with the operation of a publicly owned stadium that are lost as a result of the relocation of a professional sports franchise satisfy the economic damages requirement.<sup>277</sup> A government body cannot recover damages for injury to its general economy that has been caused by the movement of a sports franchise out of its jurisdiction.<sup>278</sup>

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274. This Article will not provide an extensive discussion of the viability of an antitrust claim by a city against a single professional team owner for choosing to relocate the franchise to another city. This type of claim, however, is not likely to be successful. This unilateral act is outside the coverage of section 1 of the Sherman Act. 15 U.S.C. § 1 (1994) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."). In a suit under section 2 of the Act, arising out of the team's move elsewhere, it would be difficult to prove that a single professional sports franchise has monopoly power. 15 U.S.C. § 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 . . . shall be deemed guilty of a felony . . ."). This is because other league teams, which a jilted city could seek to host as a replacement for the departing franchise, would be reasonable substitutes. See, e.g., *Henderson Broad. Corp. v. Houston Sports Ass'n*, 659 F. Supp. 109, 110-11 (S.D. Tex. 1987) (mem.) (refusing to find that radio broadcasts of Houston Astros games were the relevant product market because reasonable substitutes—other radio formats—existed to satisfy the plaintiff radio station's needs). Moreover, a businessperson generally has the unilateral right to select the customers and parties with whom she conducts business. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (holding that the Sherman Act does not prohibit a private manufacturer from announcing in advance the conditions under which he will sell).

275. Section 4 of the Clayton Act requires that a plaintiff "be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a) (1988). See generally *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-45 (1979) (holding that loss of money satisfies the injury requirement to "business or property").

276. See *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 395-99 (1906) (holding that the wrongfully induced payment of money is an injury to property); *WEISTART & LOWELL*, *supra* note 167, § 5.11, at 752-53.

277. See *Los Angeles Mem'l Coliseum Comm'n v. National Football League (Raiders II)*, 791 F.2d 1356 (9th Cir. 1986).

278. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263-65 (1972) (holding that section 4 of the Clayton Act does not allow a state to bring a suit for injury to its economy as a result

The antitrust laws do not permit recovery of damages for personal injury.<sup>279</sup> Disappointed local fans cannot recover for any emotional distress resulting from the home team's movement to another city. In *McCormack v. National Collegiate Athletic Ass'n*,<sup>280</sup> a group of Southern Methodist University (SMU) alumni, football players, and cheerleaders alleged that the NCAA's one-year suspension of the university's football program for making improper payments to players violated the antitrust laws.<sup>281</sup> The Fifth Circuit dismissed the claims of SMU alumni for "loss of the opportunity to see football games,"<sup>282</sup> as well as the cheerleaders' claim for "considerable emotional anguish and distress" resulting from the lost opportunity to lead cheers at games.<sup>283</sup> The court reasoned that this type of harm does not constitute economic loss.<sup>284</sup> The court also held that the alleged devaluation of an SMU degree because of the suspension of the school's football team was too speculative to be compensable in antitrust damages.<sup>285</sup>

Although the Clayton Act expressly permits "any person" who has suffered economic loss from an antitrust violation to bring suit,<sup>286</sup> the Supreme Court has held that the plaintiff must be either a consumer

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of the antitrust violation). Although section 4C of the Clayton Act, 15 U.S.C. § 15(a)(1) (1988), enacted after *Standard Oil*, permits a state to bring a *parens patriae* action to recover damages to the property of natural persons within the state caused by an antitrust violation, it does not authorize a damages action for harm to the state's general economy. See *In re Montgomery County Real Estate Antitrust Litig.*, 452 F. Supp. 54, 56-60 (D. Md. 1978) (mem.) (holding that the State of Maryland can sue on behalf of its consumers, regardless of whether its general economy has been injured); Irving Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679, 713 n.195 (1977). A government body, however, has *parens patriae* standing to sue for injunctive relief to prevent continuing injury to its general economy. See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 447 (1945) (holding that the State of Georgia can sue a railroad company for an injury that resulted from a violation of the Clayton Act).

279. See *Reiter*, 442 U.S. at 343-44.

280. 845 F.2d 1338 (5th Cir. 1988).

281. *Id.* at 1340.

282. *Id.* at 1342.

283. *Id.* at 1340. Although the SMU players suffered an economic injury because the challenged NCAA rules prevented them from selling their services to the highest bidder, the court held that the players did not have standing to recover treble damages, but could seek injunctive relief. *Id.* at 1342-43.

284. *Id.* at 1340.

285. *Id.* at 1342. Courts have also rejected a city's claim that the loss of a professional sports franchise defames its reputation. See, e.g., *HMC Management Corp. v. New Orleans Basketball Club*, 375 So. 2d 700, 710 (La. Ct. App. 1979) (denying a preliminary injunction to keep a professional basketball team in a stadium lease).

286. 15 U.S.C. § 15.

or a competitor in the restrained market.<sup>287</sup> This standing requirement has the practical effect of precluding parties only "tangentially affected by an antitrust violation" from bringing a claim for harm caused by anticompetitive activity.<sup>288</sup> In the context of antitrust litigation surrounding the relocation of sports franchises, federal courts have held that a stadium owner or operator has standing to claim that a professional league's rules or conduct restrain its ability to compete with rival stadiums to house a league team.

In *Los Angeles Memorial Coliseum Commission v. National Football League (Raiders II)*,<sup>289</sup> the Ninth Circuit upheld a trebled \$14.5 million antitrust damages award in favor of a football stadium.<sup>290</sup> The stadium suffered economic loss from the NFL's efforts to prevent the Oakland Raiders from honoring its contract to relocate to Los Angeles and play its home games in the plaintiff's stadium.<sup>291</sup> Rejecting the league's contention that the plaintiff had no standing because its injury was too remote from the antitrust violation, the court observed: "Football stadia constitute a special market distinguished from those comprised by, say, hotels, laundering establishments, or limousine services, by their indispensable and intimate connection with professional football and football teams."<sup>292</sup>

*Raiders II* limited the class of potential plaintiffs that may recover antitrust damages for economic loss caused by the relocation of a professional sports franchise.<sup>293</sup> A city must have a direct economic stake in hosting a sports franchise, such as the ability to earn rent from the lease of a publicly owned playing facility.<sup>294</sup> The court's distinction between a stadium and local businesses that only indirectly derive a financial benefit from the presence of a professional team suggests that any other economic loss that a city and its inhabitants suffer from

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287. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545-46 (1983) (holding that a union is not a person injured within the meaning of the antitrust laws); *Blue Shield v. McCreedy*, 457 U.S. 465, 485 (1982) (holding that a consumer has standing to assert an antitrust claim).

288. *McCreedy*, 457 U.S. at 477.

289. 791 F.2d 1356 (9th Cir. 1986).

290. *Id.* at 1364-65. But see *Sullivan v. Tagliabue*, 25 F.3d 43, 52 (1st Cir. 1994) (holding that a stadium owner has no standing to recover antitrust damages for lost value of stadium improvements that would have been financed by public offering of minority interest in a team that was disapproved by the league).

291. *Raiders II*, 791 F.2d at 1364-65.

292. *Id.* at 1365.

293. *Id.* at 1363.

294. *Id.*

the relocation of a professional sports franchise, such as a reduced tax base, is not compensable under the antitrust laws.<sup>295</sup>

More important, even if a city satisfies the economic injury and standing requirements, it can obtain an injunction or recover damages under the antitrust laws only if its harm is caused by an anticompetitive effect in a properly defined market as a result of a professional team's relocation.<sup>296</sup> This is known as the "antitrust injury" requirement.<sup>297</sup> *Raiders II* implicitly recognizes that cities compete to host professional sports franchises and to house them in publicly owned stadiums and that the antitrust laws encourage such free market competition.<sup>298</sup> Thus, it appears virtually impossible for a city to prove that it has suffered an antitrust injury after it has lost a professional team because the franchise owner accepted a better stadium deal from another city. That type of harm flows from *increased* competition, rather than decreased competition, for which the federal antitrust laws do not provide a remedy.<sup>299</sup>

The antitrust laws are intended to promote consumer welfare by preserving the competitive process.<sup>300</sup> If a team leaves one city and moves to another, the people in the former host city have suffered a loss, whereas the citizens of the new host city have simultaneously received a benefit. Hence, it is probably impossible to accurately measure the net effect of a sports franchise relocation on consumer welfare. Even if this measurement can be made, an antitrust suit by a jilted city against a league and its member teams does not provide an appropriate means of compensating for the loss. The underlying economic assumption of the federal antitrust laws is that free market competition among cities is the best means of allocating scarce resources, such as the geographical location of major league profes-

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295. However, some courts have recognized that a city may suffer irreparable harm from lost intangible benefits caused by the premature departure of a professional sports team that may justify injunctive relief under a breach of contract theory. See *supra* notes 74-81 and accompanying text.

296. Cf. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109 (1986) (holding that a plaintiff seeking injunctive relief under section 16 of the Clayton Act must show loss resulting from increased competition); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

297. See 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 103, at 7-8 (1978).

298. *Raiders II*, 791 F.2d at 1364.

299. In *Brunswick Corp.*, 429 U.S. at 489, the Court rejected the plaintiff's antitrust claim because the plaintiff's economic loss resulted from a procompetitive effect of the defendant's challenged conduct. See *id.* at 489-91.

300. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979) ("The essence of the antitrust laws is to ensure fair price competition in an open market.").

sional sports franchises throughout the United States, to maximize the consumer welfare of all Americans.

In an eminent domain proceeding, one court has held that permitting the city to take a professional sports franchise through condemnation proceedings unduly interfered with a professional sports league's national geographical dispersal of its teams.<sup>301</sup> In *City of Oakland v. Oakland Raiders (Oakland III)*,<sup>302</sup> the California Court of Appeals ruled that the City of Oakland's use of state eminent domain laws to prevent the Raiders from moving to Los Angeles violated the Commerce Clause.<sup>303</sup> Because the NFL's member teams provide nationwide entertainment and are financially interdependent, the court recognized the league's legitimate need to determine the location of its teams.<sup>304</sup> Observing that "[a]n involuntarily acquired franchise could, at the local government's pleasure, be permanently indentured to the local entity," the court concluded that "[t]his is the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit."<sup>305</sup> Although not an antitrust case, *Oakland III* implicitly recognized that market competition among cities should be left free of local interference that would determine the geographical location of professional sports franchises.<sup>306</sup> Moreover, the case buttressed the principle of using private ordering, not eminent domain, to achieve this result through a "call mechanism."<sup>307</sup>

2. *Merits of Claim.*—Holding that matters of internal league governance are outside the scope of section 1 of the Sherman Act,<sup>308</sup> courts initially provided professional sports leagues with broad authority to regulate franchise relocation. In *San Francisco Seals, Ltd. v. National Hockey League*,<sup>309</sup> a 1974 case, a federal district court dismissed a team's antitrust claim against other league members for prohibiting the team's relocation to Vancouver.<sup>310</sup> The court found that league

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301. See *City of Oakland v. Oakland Raiders (Oakland III)*, 220 Cal. Rptr. 153, 158 (Ct. App. 1985).

302. *Id.*

303. *Id.* at 154. The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3.

304. *Oakland III*, 220 Cal. Rptr. at 158.

305. *Id.* at 157. Ironically, the court reached this conclusion even though this was a franchise relocation within California that was opposed by the NFL. *Id.* at 158.

306. *Id.* at 157.

307. See *supra* notes 146-148 and accompanying text.

308. 15 U.S.C. § 1 (1994).

309. 379 F. Supp. 966 (C.D. Cal. 1974).

310. *Id.* at 972.

teams "are not competitors in the economic sense," but rather are "all members of a single unit competing as such with other similar professional leagues."<sup>311</sup> Because a sports league cannot exist without cooperation on matters such as the geographical location of franchises, the court found that the requisite conspiracy among independent economic competitors did not exist as a matter of law.<sup>312</sup>

Although the Supreme Court has not resolved this issue,<sup>313</sup> the prevailing judicial view among circuit courts is that the member teams of a professional sports league are separate and independent economic entities whose collective action is subject to section 1 scrutiny.<sup>314</sup> It is reasoned that each team acts to further its individual

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311. *Id.* at 969-70.

312. *Id.* at 971.

313. On one occasion, the Supreme Court refused to review the Second Circuit's holding that "the characterization of NFL as a single economic entity does not exempt from the Sherman Act an agreement between its members to restrain competition." *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1257 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). Justice Rehnquist dissented from the denial of certiorari and suggested that a professional sports league is a single entity outside the scope of section 1 of the Sherman Act:

The NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the marketplace. The NFL negotiates its television contracts, for example, in a single block. The revenues from broadcast rights are pooled. Indeed, the only interteam competition occurs when two teams are located in one major city, such as New York or Los Angeles. These teams compete with one another for home game attendance and local broadcast revenues. In all other respects, the league competes as a unit against other forms of entertainment.

*National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting), *denying cert. to* 670 F.2d 1249 (2d Cir.).

314. *See, e.g., Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (reviewing a professional team owner's allegation that the league violated antitrust laws by prohibiting owners from selling team shares to the public), *cert. denied*, 115 S. Ct. 1252 (1995) (mem.); *Los Angeles Mem'l Coliseum Comm'n v. National Football League (Raiders I)*, 726 F.2d 1381, 1387-90 (9th Cir. 1984) (holding that the NFL is not a single entity for antitrust purposes); *North Am. Soccer League*, 670 F.2d at 1256-58 (holding that it is a Sherman Act violation for a league to ban ownership by team members in other leagues). *But see Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 599 (7th Cir. 1996) (stating that the NBA "looks more or less like a firm depending on which facet of the business one examines.").

Commentators disagree on whether issues of internal league governance should be subject to antitrust review under section 1 of the Sherman Act. Their dispute primarily reflects differing views of the nature of a professional sports league and conflicting interpretations of the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984), which stated that a parent corporation is legally incapable of conspiring with a wholly owned subsidiary under section 1. *See id.* Some authorities argue that league decisionmaking is conduct of a single entity because (1) no individual team can produce the league's entertainment product—on-field competition; (2) cooperation



economic interests rather than the league's common interests; therefore, teams are capable of conspiring among themselves. As the First Circuit recently observed: "NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1."<sup>315</sup> This line of authority allows a team owner to challenge, on antitrust grounds, a collective decision by other league teams not to allow the owner's franchise to relocate.

In *Los Angeles Memorial Coliseum v. National Football League (Raiders I)*,<sup>316</sup> the Ninth Circuit upheld a jury finding that the collective refusal of league member teams to approve the 1980 proposed move of the Oakland Raiders to Los Angeles violated the antitrust laws.<sup>317</sup> The court initially concluded that the defendants were "an association of teams sufficiently independent and competitive with one another" to be covered by section 1 of the Sherman Act.<sup>318</sup> An NFL rule required the approval of three-quarters of the league's teams before a franchise was permitted to relocate into another team's designated home territory.<sup>319</sup> With five abstentions, NFL owners voted 22-0 against the proposed relocation of the Raiders into the territory of the Los Angeles Rams.<sup>320</sup>

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and consideration of the league's best interests are essential to produce this product and compete effectively against other forms of entertainment; and (3) league teams share revenues and are financially interdependent. See, e.g., Myron C. Grauer, *Recognition of the National Football League As a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 23-35 (1983) (arguing that the NFL is a single entity for antitrust purposes); Roberts, *supra* note 167, at 260-62 (arguing that the Sherman Act does not require individual clubs to act as natural competitors); Weistart, *supra* note 174, at 1048-49 (analyzing the majority opinion in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984)).

Other analysts contend that league decisionmaking is concerted action because (1) teams are separately owned businesses; (2) they do not share all revenues and losses; and (3) they do not have a complete unity of economic interest and may consider their individual best interests in participation in league governance. See, e.g., Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 789-90 (1989) (discussing whether section 1 of the Sherman Act should be applied to sports leagues); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 30-46 (1991) (arguing against single-entity status for professional sports leagues); Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 169 (1988) (discussing the antitrust questions raised by the sports franchise relocation restraint).

315. *Sullivan*, 34 F.3d at 1099.

316. 726 F.2d 1381 (9th Cir. 1984).

317. *Id.* at 1401.

318. *Id.* at 1389.

319. *Id.* at 1385.

320. *Id.*

The challenged NFL rule was found to be a means of establishing exclusive geographical territories among economic competitors, thus interfering with a team owner's right to do business where it pleased.<sup>321</sup> Although team owners have a legitimate collective interest in protecting the league's integrity and attractiveness as an entertainment product by controlling the geographical placement of franchises, the court held that a standardless relocation approval requirement would not necessarily accomplish these objectives.<sup>322</sup> The owners' refusal to allow the Raiders to relocate restrained economic competition unreasonably between league teams.<sup>323</sup> The Ninth Circuit suggested that in order to withstand an antitrust challenge by a franchise owner or stadium authority, a league must have objective franchise relocation standards that are no more restrictive than necessary to protect its legitimate interests.<sup>324</sup>

Allowing a former host city to bring an antitrust claim against a league and its members for merely permitting a franchise to relocate to another city creates conflicting legal obligations.<sup>325</sup> *Raiders I* limits a league's authority to govern franchise relocation and creates poten-

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321. *Id.* at 1391. Certain rulings by the Ninth Circuit in the Raiders antitrust litigation appear internally inconsistent. In *Raiders II*, the Ninth Circuit affirmed the jury's finding that the Raiders lost profits in an amount exceeding \$11.5 million because of a two-year delay in moving to Los Angeles caused by other league teams' vote against this relocation, which was found to be an unreasonable restraint of trade. *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1365-66 (9th Cir. 1986). The panel also found that the opportunity to expand the league belonged to the league as a whole and that by moving to Los Angeles, the Raiders appropriated for itself the league's expansion opportunity for a new NFL franchise in this area. *Id.* at 1371. A league lawfully charges the owner of a new franchise a multi-million dollar expansion fee that is distributed to all existing franchises on a pro rata basis. *Id.* Therefore, to prevent the Raiders from gaining a windfall at the expense of other league teams, the Ninth Circuit found it necessary to subtract from the value of the league's lost expansion opportunity in Los Angeles, the value of the Oakland expansion opportunity returned to the league by the Raiders relocation; the court then offset this sum from the antitrust damages award to the Raiders before trebling. *Id.* at 1371-74. The court remanded the case for resolution of this issue. *Id.* at 1376.

322. *Raiders I*, 726 F.2d at 1395-98. The court observed that a professional sports league has a legitimate procompetitive interest in (1) encouraging and protecting each franchise's financial investment; (2) establishing geographical scope, regional balance, and coverage of major and minor markets; and (3) preventing franchise relocations before local governments can recover their investments in the team's playing facility, thereby preventing erosion of local confidence and interest in the league. *Id.* at 1396.

323. *Id.*

324. *Id.* at 1396-97.

325. The Oakland-Alameda County Coliseum was prepared to file an antitrust suit if the NFL and its member teams had voted to permit the Oakland Raiders to move to Los Angeles in 1980. See WEILER & ROBERTS, *supra* note 184, at 382 n.6. The theory of the proposed suit was that the relocation of the Raiders would reduce economic competition among NFL teams in the San Francisco Bay area. See *id.*

tial exposure to antitrust treble damages for disapproving a team's move to another city.<sup>326</sup> Therefore, it is inconsistent with *Raiders I* to permit a jilted city to use antitrust law as a sword against a league for failing to prevent a franchise from relocating.

*Raiders I* not only appears to preclude a city that has lost a professional sports team from prevailing in an antitrust action; it also gives the "green light" to franchise free agency and encourages opportunistic behavior by team owners.<sup>327</sup> *Raiders I* creates uncertainty regarding a league's legal ability to prevent franchise relocation and increases the likelihood that a franchise owner will move the team to another city if the host city does not satisfy the owner's demands. Thus, *Raiders I* reinforces, rather than ameliorates, the disparity of bargaining power between franchise owner and host city.

In the context of franchise relocation, a professional league should be viewed as an economically interdependent entity whose decisions are outside of the scope of section 1 of the Sherman Act.<sup>328</sup> The success of a league depends upon exciting on-field competition between evenly matched teams that are financially viable.<sup>329</sup> An exclusive geographical territory for each league team appears necessary to ensure the league's economic stability.<sup>330</sup> Moreover, it is unlikely that league teams in the same metropolitan area engage in any significant economic competition for fan support.<sup>331</sup> A team owner's decision to relocate its franchise in pursuit of individual economic gain may harm the league's collective interests.<sup>332</sup> League franchise relocation restrictions are necessary internal regulations to protect host cities' interests, to preserve the good will of the fans, and to secure the league's

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326. *Raiders I*, 726 F.2d at 1381.

327. Ironically, one court expressed its concern that allowing a city to take a sports franchise by eminent domain "would seriously disrupt the balance of economic bargaining on stadium leases [presumably in favor of cities] throughout the nation." *City of Oakland v. Oakland Raiders* (Oakland III), 220 Cal. Rptr. 153, 157 (Ct. App. 1985).

328. See *Weistart & Lowell*, *supra* note 167, at § 5.11, 734-36; Gray, *supra* note 93, at 134-39.

329. See *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1251-53 (2d Cir. 1982); *Weistart*, *supra* note 174, at 1018 n.17.

330. See *Raiders I*, 726 F.2d at 1396 (agreeing that the nature of professional football requires some territorial restrictions).

331. See *Weistart*, *supra* note 174, at 1030-31.

332. See *id.* at 1028. Some courts have held that a team owner has a fiduciary duty not to act in its own self-interest if doing so will harm the league's collective interests. See, e.g., *Professional Hockey Corp. v. World Hockey Ass'n*, 191 Cal. Rptr. 773, 777 (Ct. App. 1983) (holding that owners comprising a league's governing body have a fiduciary duty requiring them to make decisions for the benefit of the league as a whole). See generally *Shropshire*, *supra* note 43, at 589-97 (arguing for the existence of a fiduciary duty in the context of franchise relocation).

geographic stability.<sup>333</sup> These underlying purposes require that the league not be subject to antitrust challenges, as asserted in *Raiders I*, by teams seeking to engage in opportunistic behavior.<sup>334</sup>

*B. No Right to Obtain Replacement Team*

Cities that formerly lost an NFL sports franchise have, ironically, filed antitrust suits claiming that NFL efforts to interfere with an existing team's agreement to relocate to one of these communities unreasonably restrains trade. The operator of a new stadium housing the St. Louis Rams has sued the NFL and its member teams for conditioning the move of the Rams from Los Angeles on the payment of a \$29 million relocation fee, which the plaintiff claims deprived it of substantial economic benefits under its lease with the Rams.<sup>335</sup> The City of Baltimore also filed an antitrust suit against the NFL in an effort to force the league to approve an agreement with the owner of the Cleveland Browns to move his team to Baltimore.<sup>336</sup> Thus, the paradox: cities like St. Louis and Baltimore are suing to preserve the very system that allowed them to be jilted by opportunistic owner behavior in the first place, and that may jilt them again in the future.

These lawsuits are patterned after the successful Raiders antitrust litigation,<sup>337</sup> and they contend that league efforts to prevent or hinder franchise relocation represent a concerted, illegal refusal to deal with a city that has reached an agreement to host a league team.<sup>338</sup> Judicial recognition of these types of claims will preserve unbridled, free market competition among cities for professional sports franchises, but will also have the adverse effect of encouraging franchise free agency, to the detriment of host cities.<sup>339</sup> In addition, such recognition would preclude a league from preventing franchise moves that are contrary to the collective best interests of its member teams.<sup>340</sup>

*1. Antitrust Injury Requirement.*—Although an antitrust claim arising out of a league's refusal to permit an existing team to relocate is

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333. See *Raiders I*, 726 F.2d at 1396 (agreeing that exclusive territories aid new franchises in achieving financial stability and in fostering fan loyalty).

334. See Roberts, *supra* note 167, at 590; Weistart, *supra* note 174, at 1023, 1035-40.

335. See *St. Louis Convention & Visitors Comm'n v. National Football League*, No. 4:95CV02443TIA (E.D. Mo., filed Dec. 18, 1995).

336. See *Maryland v. National Football League*, No. L 96-155 (D. Md., filed Jan. 18, 1996).

337. See *supra* notes 289-299, 316-327 and accompanying text.

338. See *supra* notes 335-336 and accompanying text.

339. See *supra* note 242 and accompanying text.

340. See *supra* note 326 and accompanying text.

viable under current law, a city probably could not successfully assert that a league's failure to provide a replacement team for a lost franchise violates antitrust laws. In two cases, federal courts have held that a league's denial of an application for an expansion franchise is not an antitrust violation. Although these cases involve efforts by an existing sports franchise to gain admission to a major professional league, they seem to apply equally to a city seeking to host a team.

In *Mid-South Grizzlies v. National Football League*,<sup>341</sup> the Third Circuit rejected a former World Football League team's claim that the NFL's denial of the Grizzlies' application for an expansion franchise in Memphis violated section 1 of the Sherman Act.<sup>342</sup> While conceding that NFL member teams could legitimately refuse to deal with a team seeking admission to the league by "applying objective, rational and fair decisional criteria,"<sup>343</sup> the plaintiff asserted that there was no valid basis for rejecting its application, as it had satisfied the league's criteria.<sup>344</sup> The court initially ruled that the 1966 congressional approval of the merger between the NFL and the AFL<sup>345</sup> did not require the league to share its dominant market power with all applicants.<sup>346</sup> The court also held that denial of the plaintiff's application for an NFL franchise would not cause any actual or potential injury to economic competition among league teams, as none of them was in the same market area as the proposed Memphis franchise.<sup>347</sup> Observing that the plaintiff's exclusion from the NFL left Memphis available as the site of a franchise for a rival league, the court stated that the NFL's conduct was "patently pro-competitive."<sup>348</sup>

In *Mid-South Grizzlies*, the Third Circuit properly concluded that a league's refusal to admit new member teams does not reduce economic competition among NFL teams or in the broader professional football market.<sup>349</sup> This ruling is consistent with the correct position that collective league member decisions on franchise location issues

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341. 720 F.2d 772 (3d Cir. 1983).

342. *Id.* at 787.

343. *Id.* at 777-78.

344. *Id.* at 778.

345. See *infra* note 356 and accompanying text.

346. *Mid-South Grizzlies*, 720 F.2d at 784-85.

347. *Id.* at 785-87.

348. *Id.* at 786.

349. *Id.* at 787. The court, however, suggested that denial of a franchise application in a geographical area where league members compete for fan support and local revenues "might require a different antitrust analysis." *Id.* See generally Christian M. McBurney, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925 (1985) (arguing that league's denial of franchise application may violate section 1 of the Sherman Act).

should not be subject to section 1 of the Sherman Act.<sup>350</sup> Because it would hamper a league's ability to protect its interests in a manner that enhances the image and attractiveness of its product to consumers, allowing a section 1 claim by a disappointed applicant or city would not further the antitrust law's paramount objective of preserving interbrand competition among competing forms of entertainment.<sup>351</sup>

2. *Legal vs. Illegal Use of Monopoly Power.*—Although it is appropriate to view a league as a single entity in making franchise location and expansion decisions, the mere fact that a league has monopoly power does not violate section 2 of the Sherman Act. Monopoly power has been judicially defined as the ability to affect the product price charged to consumers or to exclude competitors from the market.<sup>352</sup> A violation of section 2 occurs only if a monopolist abuses its power by illegally acquiring or maintaining its market dominance.<sup>353</sup>

Despite disagreement over whether a sports league is a natural monopolist,<sup>354</sup> lawfully acquired or maintained aspects of the league's monopoly position are not subject to antitrust challenge.<sup>355</sup> For example, Congress approved the 1966 merger between the NFL and AFL.<sup>356</sup> MLB has a judicially created antitrust exemption that effectively immunizes its monopoly status.<sup>357</sup>

The federal antitrust laws do not affirmatively require a monopolist professional sports league or its member teams to deal fairly with a current or prospective host city. A sports franchise's demand that a

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350. See *supra* notes 328-334 and accompanying text.

351. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law.").

352. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (defining monopoly power as "the power to control prices or exclude competition").

353. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (stating that section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

354. See *supra* note 314.

355. See *supra* note 353 and accompanying text.

356. 15 U.S.C. § 1291 (1994) (exempting from antitrust laws agreements combining two professional football leagues).

357. See *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972); *Toolson v. New York Yankees*, 346 U.S. 356, 356-57 (1953) (per curiam); *Federal Baseball Club v. National League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09 (1922). Some courts, however, have recently held that baseball's antitrust exemption encompasses only the reserve clause system regarding a team's rights to a player's services. See, e.g., *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D. Pa. 1993); *Butterworth v. National League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994).

city pay a monopoly price in the form of multi-million dollar public subsidization of a playing facility does not violate the antitrust laws.<sup>358</sup> A city's loss of, or inability to attract, a sports franchise is often the direct result of the city's failure to make the best offer to the team's owner.<sup>359</sup> Notwithstanding the league's limitation on the supply of franchises in the supply-demand equation, any economic harm to a city caused by competition among communities to attract a team is not compensable under the antitrust laws.<sup>360</sup>

Even a monopolist has the right to unilaterally select its customers.<sup>361</sup> A refusal to deal with an existing or potential customer is lawful unless a monopolist is seeking to establish or maintain its market dominance by excluding a rival from the market.<sup>362</sup> It is unlikely that a professional sports league's mere unwillingness to locate a franchise in a city is an abuse of the league's monopoly power, actionable under the antitrust laws. In fact, a dominant league's refusal to award a franchise to a city or group of cities with the necessary population base and playing facilities to support a team arguably creates an opportunity for a rival league to form, although the history of successful rival leagues is not encouraging.<sup>363</sup>

In *Seattle Totems Hockey Club, Inc. v. National Hockey League*,<sup>364</sup> the Ninth Circuit held that a league's denial of an application for an expansion franchise did not violate section 2 of the Sherman Act's prohibition against monopolization.<sup>365</sup> The court found no antitrust injury because there was no showing that the plaintiff's exclusion from

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358. See, e.g., *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("A high price is not itself a violation of the Sherman Act."); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979) (holding that a monopoly will not have to pay damages because its prices are excessive, unless it can be shown that the monopoly increased its power by wrongful actions). See generally HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 6.1, at 243 (1994) (stating that "the monopolist's sale of its product at a monopolistic price is not an 'exclusionary' practice" that violates section 2 of the Sherman Act).

359. See *supra* text accompanying note 10.

360. See *supra* notes 295-296 and accompanying text.

361. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (stating that the Sherman Act was not intended to restrict a private enterprise's right to choose with whom it will do business).

362. See *id.*; see also *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (holding that a newspaper publisher's refusal to deal with advertisers unless they agreed not to advertise with competing radio station was a violation of the Sherman Act).

363. For a discussion of the historical failure of most rival leagues, see *supra* notes 167-180 and accompanying text.

364. 783 F.2d 1347 (9th Cir. 1986).

365. *Id.* at 1350.

the league reduced competition among existing league teams.<sup>366</sup> The court ruled that the league's challenged conduct was not an effort to monopolize professional hockey in North America, because the plaintiff was "not competing with the NHL; [it was] seeking to join it."<sup>367</sup>

This is consistent with the classic judicial interpretations of section 2 of the Sherman Act as prohibiting the abuse of monopoly power by unfair exclusionary practices that harm a monopolist's competitors.<sup>368</sup> Aggressive competition on the merits resulting from the production of an attractive product for which there is strong public demand is legal even if it creates reduced market opportunities for a monopolist's rivals.<sup>369</sup> Most antitrust suits asserting section 2 claims against a dominant professional sports league have been brought by a competing league complaining about exclusion from the market, rather than by a city that has been unable to retain or attract a major league team in a particular sport.<sup>370</sup>

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366. *Id.* This finding was consistent with the Third Circuit's findings in *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983), discussed *supra* at notes 341-349 and accompanying text.

367. *Totems*, 783 F.2d at 1350.

368. See HOVENKAMP, *supra* note 358, §§ 6.1, 6.3, at 243, 247.

369. See *id.* at 246.

370. See, e.g., *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). In this case, an upstart football league alleged that the NFL's expansion practices were an illegal attempt to retain its monopoly power in the major league professional football market. *Id.* at 62. Soon after the formation of the AFL, the NFL established expansion franchises to be placed in Dallas and Minneapolis, cities in which the AFL had tentative plans to locate two of its eight franchises. *Id.* at 69-74. Because most cities do not have the population base and playing facilities necessary to host competing professional football teams, the AFL contended that the NFL's action was an effort to destroy a potential competitor in violation of section 2. *Id.* at 76-77.

The district court found that the NFL did not have the power to exclude the AFL from major league professional football because the NFL did not have the capability to (1) expand into all the cities that could support football teams; (2) prevent the AFL from signing an adequate number of quality players; or (3) prevent the AFL from obtaining a national television contract. *Id.* at 77. The Fourth Circuit affirmed on the ground that the NFL did not have the power to prevent the formation of the AFL merely because it was the first competitor in the professional football market and already occupied the most desirable franchise locations. 323 F.2d at 131. Some commentators have suggested that the NFL's expansion plan was "unfair" because of its timing and its focus on two cities in which the AFL intended to place teams. See, e.g., WEISTART & LOWELL, *supra* note 167, § 5.11, at 720-21. However, an aggressive expansion of output, consistent with growing consumer demand for a monopolist's product, appears to be more appropriately characterized as legitimate competition on the merits. See HOVENKAMP, *supra* note 358, § 7.3, at 261-62.

In two instances, courts have found that a professional sports league violated section 2 by engaging in exclusionary practices designed to inhibit competition from a rival league. In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), a federal court granted a preliminary injunction against the NHL's reserve clause, which prevented players signing a standard NHL player contract from ever playing



There has been one federal antitrust action brought by a city threatened with the loss of a professional sports team. In *Buffalo v. Atlanta Hawks Basketball, Inc.*,<sup>371</sup> the City of Buffalo, which owned the arena leased by the NBA Buffalo Braves, asserted a section 2 claim against the NBA and its member teams after the Braves announced its intention to relocate to North Hollywood, Florida.<sup>372</sup> The complaint alleged that the NBA was monopolizing major league professional basketball by (1) restraining the market for player services through its draft procedure, uniform player contracts, and player boycotts; (2) impeding the development of a rival league by negotiating a merger with the American Basketball Association (ABA); and (3) placing NBA franchises in each major advertising market, even if some locations were unprofitable.<sup>373</sup> The case was settled before resolution of its merits, after the Braves chose to remain in Buffalo.<sup>374</sup>

The *Atlanta Hawks Basketball* suit appeared to challenge indirectly the proposed dissolution of the ABA and the entry of some of its member teams into the NBA. The City of Buffalo's primary contention was that the elimination of competition between the NBA and ABA harmed the city's ability to retain or attract a major league professional basketball franchise.<sup>375</sup> It thus appears that the City of Buffalo was not claiming a legal right to host an NBA franchise, nor was it claiming that the NBA's refusal to provide a replacement team, if the

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for teams in a rival league. *Id.* at 519. The court found that this practice, combined with the NHL's aggressive expansion into new cities during the World Hockey Association's formation, was an illegal effort to maintain the NHL's monopoly "position as the only major professional hockey league in the United States and Canada." *Id.* at 512.

In *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988), the Second Circuit upheld a jury finding that the NFL had violated section 2 by attempting to prevent the USFL from competing in the market for major league professional football. *Id.* at 1380. The jury found the following conduct by the NFL to be improper exclusionary conduct: (1) trying to co-opt certain USFL owners and franchise locations for the NFL; (2) increasing NFL player rosters from 45 to 49 players; and (3) holding a supplemental draft of USFL players. *Id.* at 1353. The court, however, affirmed the trial court's jury instructions, which were the basis of a jury finding that the NFL did not have the power to prevent the USFL from obtaining a network television contract, as well as a jury verdict of \$1 in damages. *Id.* at 1356-57, 1377.

371. Civil No. 76-0261 (W.D.N.Y., filed June 15, 1976) discussed in WEISTART & LOWELL, *supra* note 167, at § 5.11, 716-19.

372. See WEISTART & LOWELL, *supra* note 167, at § 5.11, 716.

373. See *id.* at 717.

374. See *id.* at 716. As a "consumer" of a professional sports franchise, rather than as an actual or potential competitor of a league, it is unclear whether a host city would have standing to challenge a dominant league's exclusionary practices that harm a rival league; similarly unclear is the appropriate relief to remedy harm to a city from a section 2 violation. See *id.* at § 5.11, 747-50; see also *supra* notes 274-288 and accompanying text.

375. See WEISTART & LOWELL, *supra* note 167, at § 5.11, 716-17.

Braves relocated, violated the antitrust laws.<sup>376</sup> Buffalo's complaint clearly identifies the underlying cause of franchise free agency and opportunistic behavior by team owners as being an undersupply of major league professional teams in comparison to the demand by cities to host such teams, and it asserts that antitrust law is the solution to this market imbalance.<sup>377</sup> This central issue was not resolved when the case was settled.

3. *Preserving Competition vs. Requiring Fairness.*—Apart from seeking damages for its economic harm, a city that has lost a popular and well-supported sports franchise as a result of its relocation generally desires to obtain another league team as a replacement. In *State v. Milwaukee Braves, Inc.*,<sup>378</sup> the State of Wisconsin alleged that the National League and its member baseball clubs violated state antitrust law by allowing the Milwaukee Braves to move to Atlanta and by refusing to provide a replacement team in Milwaukee.<sup>379</sup> The trial court issued an injunction barring the Braves from relocating unless the league granted a franchise to a group that sought to operate a major league baseball team in Milwaukee.<sup>380</sup>

The trial court made several material findings of fact, including (1) the National League and the American League and their respective member teams collectively have monopoly power over major league professional baseball, thereby giving them "unlimited power and discretion to determine the location of" franchises;<sup>381</sup> (2) expansion by the National League was feasible; (3) the Braves franchise had been profitable in Milwaukee; (4) Milwaukee had the economic and population bases needed to support a major league baseball team;<sup>382</sup> (5) the National League had no objective standards for evaluating the propriety of franchise relocations or any procedure to enable cities faced with the loss of a team an opportunity to be heard;<sup>383</sup> and (6) the move of the Braves to Atlanta would cause a substantial economic loss to Milwaukee's metropolitan area.<sup>384</sup>

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376. *See id.*

377. *See id.*

378. 1966 Trade Cas. (CCH) ¶ 71,738 (Wis. Cir. Ct.), *rev'd on other grounds*, 144 N.W.2d 1 (Wis. 1966).

379. *Id.* at 82,363.

380. *Id.* at 82,411-12.

381. *Id.* at 82,410.

382. *Id.* at 82,410-11.

383. *Id.* at 82,410.

384. *Id.* at 82,409-10.

The trial court heard testimony that MLB "is an operation in a sense quasi public in nature,"<sup>385</sup> and the court cited the league's "persistent refusal to expand."<sup>386</sup> The court also heard testimony that, from the perspective of a host community, the loss of a baseball franchise "would be a detriment where there was a benefit before."<sup>387</sup> The court held that the defendants unreasonably exercised monopolistic control over major league baseball and engaged in a concerted refusal to deal with a consumer in violation of state antitrust law.<sup>388</sup>

In deciding not to restore competitive conditions in the baseball industry, the court noted that the common law declared certain businesses, "because they were monopolies, to be 'effected with the public interest' and therefore subject to judicially imposed rules of reasonable behavior."<sup>389</sup> As an alternative to facilitating competition by dissolving the league, the trial court permitted the league to continue its monopoly status, but required the league "to respond in a responsible and reasonable manner in matters pertaining to the transfer and allocation of franchises."<sup>390</sup> The court awarded the plaintiff \$5000 in damages and ordered the National League to place a baseball franchise in Milwaukee.<sup>391</sup>

On appeal, the Wisconsin Supreme Court reversed the trial court's judgment.<sup>392</sup> Assuming that the defendants' conduct violated the Wisconsin antitrust laws,<sup>393</sup> the appellate court properly held that the use of state law to require the National League to expand the number of its franchises conflicts with the Supremacy<sup>394</sup> and Commerce Clauses<sup>395</sup> of the United States Constitution.<sup>396</sup> Because MLB has a common law exemption from the federal antitrust laws,<sup>397</sup> the court ruled that application of state antitrust law to league decisions regarding franchise location and league membership would conflict

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385. *Id.* at 82,373.

386. *Id.* at 82,391 (citation omitted).

387. *Id.* at 82,376.

388. *Id.* at 82,411. The court's opinion states that the American League's failure to grant Milwaukee an expansion franchise was part of this conspiracy, but neither the league nor its member teams were named as defendants in the suit. *Id.*

389. *Id.* at 82,402.

390. *Id.* at 82,406.

391. *Id.* at 82,411-12.

392. *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966).

393. *Id.* at 11.

394. The Supremacy Clause declares that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST., art. VI, § 2.

395. *See supra* note 303.

396. *Milwaukee Braves*, 144 N.W.2d at 12-18.

397. *See supra* note 357 and accompanying text.

with national policy and violate the Supremacy Clause.<sup>398</sup> Observing that government regulation of a professional sports league requires uniformity, the court also concluded that applying Wisconsin law to prevent the National League from allowing the Braves to relocate and refusing an application for a Milwaukee franchise would violate the Commerce Clause.<sup>399</sup>

The *Milwaukee Braves* trial court improperly used state antitrust law to accomplish a laudable, but nonantitrust law objective, namely, imposing a fairness requirement on a professional sports league in making franchise relocation and expansion decisions as a means of protecting a host city's interests.<sup>400</sup> Assuming the appropriateness of characterizing a league as a single entity regarding matters of internal governance,<sup>401</sup> the move of the Braves to Atlanta and the National League's refusal to grant Milwaukee an expansion franchise were not the products of anticompetitive conduct.<sup>402</sup> There was no allegation or finding that the defendants impeded the formation of a rival league or prevented the American League from placing a team in Mil-

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398. *Milwaukee Braves*, 144 N.W.2d at 12-18. This holding is consistent with the Supreme Court's subsequent ruling that state antitrust law cannot be used to regulate the business of baseball. See *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972).

399. *Milwaukee Braves*, 144 N.W.2d at 15-18. Courts have been reluctant to permit state law to govern the internal affairs of national sports leagues or associations because of the need for uniform regulation and the desire to avoid burdening interstate commerce if conflicting state legislation is enacted. See, e.g., *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633 (9th Cir. 1993) (holding that application of a Nevada statute to the NCAA is a violation of the Commerce Clause); *Partee v. San Diego Chargers Football Co.*, 194 Cal. Rptr. 367, 372 (1983) (en banc) (holding that application of state antitrust law to football league would burden interstate commerce and undercut the need for uniform national regulation). But see *HMC Management Corp. v. New Orleans Basketball Club*, 375 So. 2d 700, 705-07 (La. Ct. App. 1979) (holding that a professional basketball team's breach of a stadium lease may be an actionable violation under Louisiana antitrust law).

400. Other local legislative attempts at attracting or retaining professional teams may include creating municipal sports authorities, granting teams the power to condemn and develop land or facilities, levying taxes, issuing municipal bonds, and operating and managing facilities and parking areas, as well as ancillary matters such as lodging and restaurants. *Stratos & Horrow*, *supra* note 119, at 20-1 to -26 (discussing the usual actions taken by a city to attract and retain a professional sports franchise). As more fully discussed *supra* at note 119, the City of Green Bay, unique among major league sports franchises, has created a municipal corporation for the actual ownership and operation of the Green Bay Packers football team.

401. See *supra* notes 328-334 and accompanying text. Even if the National League's failure to provide Milwaukee with a replacement franchise was viewed as a concerted refusal to deal with a consumer, a judicial order requiring the league to admit a new team would be improper, as the league has no affirmative legal duty to do so. See *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 785 (3d Cir. 1983) (holding that legislation permitting the merger of two competing leagues did not obligate the league to permit entry by any particular applicant to its shared market power).

402. See *Milwaukee Braves*, 144 N.W.2d at 1.

waukee.<sup>403</sup> Rather, the State of Wisconsin merely contended that the National League chose to no longer have a team in Milwaukee.<sup>404</sup>

The primary focus of antitrust law is to enhance consumer welfare by prohibiting anticompetitive conduct.<sup>405</sup> It is important to consider the welfare of all consumers who are affected by the relocation of a sports franchise.<sup>406</sup> Although the fans of a city losing a sports franchise are harmed, the fans of a city gaining a franchise are benefitted.<sup>407</sup> Accordingly, it is extremely difficult, if not impossible, for a court to measure accurately the net consumer welfare effects of a sports franchise relocation.<sup>408</sup> *Milwaukee Braves* illustrates an unwarranted intrusion, in the form of an antitrust claim, by local politics and emotion into a dispute involving conflicting claims to the same team by different communities.

Antitrust law is concerned with prohibiting anticompetitive acts that impair the operation of a free market.<sup>409</sup> It is not designed to enable activist judicial regulation of private business and the second-guessing of business judgment, particularly parochial second-guessing in a charged atmosphere of disappointed fans and cities. Neither is antitrust law grounded in appeals to "fairness," which are not at the core of antitrust policy. The limited focus of antitrust law in a judicial proceeding does not consider harm caused by "unfairness," unless it flows from anticompetitive conduct.<sup>410</sup> Whether it is fair for a sports franchise to move out of a city or how a city should be compensated for noneconomic harm caused by a team's relocation are important issues, but they should not be resolved by courts in antitrust suits.

The *Milwaukee Braves* trial court's finding that MLB is "quasi public in nature"<sup>411</sup> demonstrated an erroneous mix of common law doctrine—subjecting a public utility to judicial control—with antitrust

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403. See *State v. Milwaukee Braves, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,738 (Wis. Cir. Ct.), *rev'd on other grounds*, 144 N.W.2d 1 (Wis. 1966).

404. *Id.* at 82,363.

405. See *supra* note 300.

406. See Gray, *supra* note 93, at 140; Lazaroff, *supra* note 314, at 214-15.

407. See Lazaroff, *supra* note 314, at 214-15.

408. See *id.*

409. See *supra* note 300.

410. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (stating that under section 2, it is "relevant to consider [challenged conduct's] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way"); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978) (stating that under section 1, "inquiry is confined to a consideration of impact on competitive conditions"); see also 1 AREEDA & TURNER, *supra* note 297, ¶ 109, at 21-22 (observing that mere general concern for fairness is not a legitimate part of antitrust analysis).

411. *State v. Milwaukee Braves, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,738, at 82,373 (Wis. Cir. Ct.), *rev'd on other grounds*, 144 N.W.2d 1 (Wis. 1966).

principles. The court attempted to engage in affirmative regulation of a private monopolist's conduct, regulation that is normally undertaken, pursuant to legislative authority, by a specialized administrative body.<sup>412</sup> Private businesses subject to this form of regulation are typically monopolists whose activities are vital to basic public welfare.<sup>413</sup> Although the presence of a major league team may provide significant economic and psychological benefits to its host community, a professional sports franchise is not vital to the public welfare as is the provision of energy, transportation, telephone service, food, shelter, or sanitation.<sup>414</sup> Neither Congress nor state legislatures have established a regulatory framework governing professional sports leagues.<sup>415</sup> It is, therefore, inappropriate for a court to affirmatively regulate a private business enterprise such as a professional sports league, which does not provide a public utility service.<sup>416</sup> Those constraints are most appropriately the province of private ordering between the city and the team.

4. *Remedies for Anti-Competitive League Conduct.*—The *Milwaukee Braves* trial court's affirmative remedy of forced league expansion was improper because expansion did not establish or restore a competitive market for major league professional baseball franchises harmed by an antitrust violation. At best, this relief is a step toward equalizing the available supply of major league franchises in a given sports league with the collective demand of cities for teams.

Artificially interfering with the output decisions of private business by judicial fiat is not appropriate under antitrust principles.<sup>417</sup>

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412. In 1876, the Supreme Court upheld the general authority of state legislatures to regulate private businesses having an impact on the local public interest. See *Munn v. Illinois*, 94 U.S. 113, 133 (1876). Congress has the power to regulate businesses that affect the national public interest. See *Stafford v. Wallace*, 258 U.S. 495, 521 (1922).

413. See WEISTART & LOWELL, *supra* note 167, § 5.11, at 741-42.

414. See *id.* at 742-43.

415. See *id.* at 743.

416. See *id.* at 743-44.

417. As a practical matter, it would be difficult for a court to formulate a workable standard to govern a league's expansion decisions. It is not feasible to require a league to provide a team for each city that wants one, irrespective of the franchise's profitability or the effect of expansion on the quality of league competition. See WEISTART & LOWELL, *supra* note 167, § 5.11, at 736-37. Requiring a league to grant or continue a franchise in a city if the team would be reasonably profitable would create an issue that may be incapable of objective verification. See *id.* at 738-39. A court may find it necessary to determine the "reasonable" terms and conditions of the contractual arrangement between a host city and a league franchise and to supervise the parties' agreement on a long term basis. See *id.* at 739-40. Given the limited availability of league franchises, a court could be faced with evaluating the merits of competing proposals by cities to host the same team. See *id.* at 739. Courts are not well suited to resolve these issues that are "essentially business judgments"

This interference runs contrary to antitrust law's objective of preserving a free market that determines supply and demand for products.<sup>418</sup> Requiring a league to expand may have the anticompetitive effect of inhibiting the formation of a rival league by foreclosing potential franchise locations.<sup>419</sup>

The normal equitable remedy to correct conduct that restrains trade is an injunction prohibiting the continuation of the activity.<sup>420</sup> Courts generally grant affirmative injunctive relief requiring an anti-trust violator to do business with another party only if necessary to correct harm to the competitive market system caused by the violation.<sup>421</sup>

A single-league monopoly at the major league level for baseball, basketball, football, and hockey has been the historical norm.<sup>422</sup> Although new rival leagues periodically have been established, they have not provided viable competition to a dominant league or remained in existence for any sustained period.<sup>423</sup> This exacerbates the problem of franchise free agency and opportunistic behavior.

Because of this phenomenon, Professor Ross advocates breaking up a monopoly professional sports league, such as the NFL or MLB, into three or four independent competing leagues.<sup>424</sup> Thereafter, marketplace competition from rival leagues will provide a disincentive

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best made by the involved parties. *See id.* at 740; *see also* Ross, *supra* note 168, at 702-11 (arguing that a marketplace approach to sports franchise allocation decisions is preferable to judicial regulation).

418. *See* 1 AREEDA & TURNER, *supra* note 297, ¶ 103, at 7-8.

419. *See* Seattle Totems Hockey Club v. National Hockey League, 783 F.2d 1347, 1350 (9th Cir. 1986); Mid-South Grizzlies v. National Football League, 720 F.2d 772, 786 (3d Cir. 1983). Commentators also agree that judicially mandated expansion of a dominant league would deter the future entry of a new league. *See, e.g.,* Ross, *supra* note 168, at 706-07; Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 427-28 (1967) [hereinafter *The Super Bowl and the Sherman Act*]; WEIS-TART & LOWELL, *supra* note 167, § 5.11, at 751.

420. *See* 15 U.S.C. § 26 (1994) (providing the opportunity to sue for injunctive relief to avoid threatened loss or damage caused by a violation of federal antitrust laws); E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY & PROCEDURE: CASES, MATERIALS, PROBLEMS 170 (3d ed. 1994) ("Conduct-oriented injunctions are most generally in the form of 'cease and desist' orders.").

421. *See, e.g.,* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-05 (1985) (upholding jury's treble damages award for defendant monopolist's decision to withdraw from a successful joint venture in the absence of a valid business justification); *cf.* Lorain Journal Co. v. United States, 342 U.S. 143, 153-55 (1951) (holding that an injunction ordering newspaper publisher to accept advertising from advertisers who also placed advertisements with the newspaper's competitors was the appropriate remedy for the anti-trust violation).

422. *See* Quirk, *supra* note 167, at 64; *see also supra* notes 167-172 and accompanying text.

423. *See supra* notes 167-195 and accompanying text.

424. *See* Ross, *supra* note 168, at 734.

for each individual league to develop policies or to act in a manner inconsistent with consumers' best interests.<sup>425</sup> Under this marketplace competition model, competing leagues are likely to place teams in virtually all cities with the population and economic base to support them.<sup>426</sup> An equilibrium in the supply of, and demand for, major league professional sports franchises could effectively eliminate the current disparity of bargaining power between team owners and cities seeking to host a franchise.<sup>427</sup> This, in turn, could eliminate franchise free agency and the incentive to engage in opportunistic behavior.<sup>428</sup>

Professor Ross correctly asserts that congressional action is the best means of preserving the desirable aspects of a particular sport, implementing divestiture, and avoiding the need to reconsider or reverse applicable judicial precedents.<sup>429</sup> He acknowledges, however, that sports franchise owners may have the political power to defeat this type of legislation.<sup>430</sup> Congress has not seriously considered Ross's proposal thus far. As an alternative, Professor Ross suggests that judicially ordered divestiture would be an appropriate remedy for correcting unlawful monopolization by a professional sports league; he again admits, however, that a court is unlikely to order that kind of relief.<sup>431</sup>

Although implementing the Ross proposal could stimulate competition among rival leagues to place franchises in all cities capable of supporting them, the idea appears unlikely to become reality. A single major professional league may be a "better quality entertainment product" that optimally satisfies consumer demand.<sup>432</sup> Breaking up any major league professional sport found to have illegally acquired or maintained monopoly power is a drastic, broad-gauge remedy that may have the net effect of harming, rather than benefiting, consumers

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425. See *id.* at 734-39.

426. See *id.*

427. See *id.*

428. See *id.* A marketplace of economically viable competing leagues would enhance each league's legal ability to more effectively restrict teams from relocating. See *id.* A franchise owner that challenges league denial of approval to relocate on antitrust grounds would have difficulty proving antitrust injury, a necessary prerequisite to a successful claim. See *id.*

429. See *id.* at 748-52.

430. See *id.* at 748.

431. See *id.* at 752-54.

432. Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 772 (1987). Historically, rival major leagues in the same professional sport have not co-existed for any significant period of time. See *supra* notes 167-195 and accompanying text. The weaker league has either not been financially viable or has merged, in whole or part, with the dominant league. See Ross, *supra* note 168, at 717-23.



by diluting product quality.<sup>433</sup> It would be more appropriate to use a rifle, not a shotgun. Effective remedies would include prohibiting specific anticompetitive practices or enacting federal legislation to correct market imbalances and externalities in a manner least intrusive to the existing structure of professional sports leagues.

#### V. PROPOSALS TO LEVEL THE PLAYING FIELD

The principal goals of any proposal to remedy the harm to taxpayers and fans caused by franchise free agency and opportunistic behavior by team owners should include (1) preserving marketplace competition as the optimal method of allocating a limited number of professional sports franchises; (2) strengthening league authority to protect its members' collective interests and host cities' investments in their local teams; and (3) requiring fairness to prevent exploitation of taxpayers and fans. These proposals appropriately balance the interests of all concerned parties and provide a solution that furthers national policy objectives.

Congressional legislation is necessary to correct the problem of externalities<sup>434</sup> imposed on a host city's taxpayers and fans when a professional sports league exercises its monopoly power to limit the supply of franchises in a destructive combination with a franchise owner that engages in opportunistic behavior.<sup>435</sup> During its tenure in a host city, a privately owned sports franchise often reaps the benefits of public subsidization, while not having to bear the costs imposed on the community after the team relocates.<sup>436</sup> A team owner generally chooses to move to another city to enhance profitability. A city may be faced with continuing to pay off playing facility or infrastructure bond indebtedness, while bearing the cost of other externalities, such as a reduced tax base and disruption of ancillary business activity and employment after a professional sports franchise departs for greener pastures.<sup>437</sup>

The unfortunate reality is that the marketplace, if left entirely alone, will not equalize the supply of, and demand for, professional sports franchises in order to eliminate the significant disparity of bar-

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433. See Rosenbaum, *supra* note 432, at 772-73.

434. An "externality" is "an uncompensated pecuniary or social cost imposed on society by a business." Charles Gray, Comment, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329, 1350 (1986) (citation omitted).

435. See *id.* at 1350-52.

436. See *id.* at 1350-51.

437. See *id.*

gaining power between a city and team owner,<sup>438</sup> nor will the current marketplace effectively require a sports franchise to bear the public costs that its relocation creates.<sup>439</sup>

Current legal regimes fail to deal effectively with the problem. Private law may be inadequate to safeguard a city's interests because city officials may not have the political strength, will power, or foresight to insist on appropriate contract terms to ensure that the city receives the full benefit of its bargain from providing multi-million dollar public subsidization to host a sports team.<sup>440</sup> An incumbent government official may agree to provide millions in public subsidization to reap an immediate gratification—the political benefits of retaining or attracting a team—but will escape downstream accountability for allowing a sports franchise to drain the local treasury.<sup>441</sup> Even if appropriate contractual provisions are considered and requested, a city may lack the bargaining power necessary to obtain a franchise owner's agreement.<sup>442</sup>

In the private law context of commercial transactions, courts generally hold parties to the express terms of their agreement and are reluctant to impose implied obligations, even if necessary to remedy an imbalance of bargaining power.<sup>443</sup> Although, if proved with reasonable certainty, damages may be recovered for breach of a playing facility lease, it is uncertain whether judicially compelled specific performance is an available remedy to prevent a team from prematurely departing and depriving its host city of the agreed upon term of the team's stay.<sup>444</sup>

The current public law regime also does not provide an appropriate measure of protection for a host city's taxpayers and fans. Applying antitrust law to interfere with a league's business judgment concerning franchise location and expansion decisions does not further the antitrust policy objectives of preserving the competitive process as a means of allocating scarce resources, while maximizing consumer welfare.<sup>445</sup>

Rather than alleviating the negative effects of externalities on cities created by a major professional league's monopoly power, current federal law contributes to the problem. Congress approved the 1966

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438. See *supra* Part III.

439. See Gray, *supra* note 434, at 1350-52.

440. See Ross, *supra* note 168, at 649-53.

441. See *supra* notes 212-218 and accompanying text.

442. See Ross, *supra* note 168, at 650-51.

443. See *supra* Part I.C.

444. See *supra* notes 73-91 and accompanying text.

445. See *supra* notes 296-307 and accompanying text.

merger between the AFL and NFL,<sup>446</sup> thereby reducing competition among those leagues to establish football teams in all cities with the population and economic bases to support a franchise. The same federal statute authorizes the NBA, NFL, NHL, and MLB to pool their television rights and divide television revenues.<sup>447</sup> This legislation makes it easier for teams to move from large market cities to medium and small market cities because a relocating franchise shares, on a pro rata basis, any reduction in national television revenues from these moves.<sup>448</sup> The Raiders litigation impedes a league's ability to restrict a member team from abandoning a host city despite a demonstrated history of community support for the team.<sup>449</sup>

The federal tax laws provide special benefits to owners of professional sports franchises.<sup>450</sup> Professional sports is the only industry in which player salaries may be claimed as depreciable capital assets.<sup>451</sup> Player contracts are considered to be capital assets that can be depreciated over the average length of the player's career.<sup>452</sup> In general, up to fifty-percent of the purchase price of a sports franchise may be allocated to player contracts.<sup>453</sup> This facilitates characterizing appreciation in franchise value as a capital gain and enables the team owner to take advantage of favorable tax treatment. Because many sports franchises are part of conglomerates of unrelated businesses, creative accounting can be used to selectively include different parts of the team's operation in various enterprises to minimize overall tax liability.<sup>454</sup> In addition, tax-exempt municipal bonds are frequently used to finance playing facilities for professional teams, thereby providing another form of taxpayer subsidization that benefits sports franchise owners.<sup>455</sup>

There are several potential bases for federal legislation to protect host cities and their taxpayers and fans from exploitation by owners of professional teams. Pursuant to its authority to regulate interstate commerce, Congress may govern the conduct of the members of na-

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446. See 15 U.S.C. § 1291 (1994).

447. See *id.*

448. See *supra* note 237 and accompanying text.

449. See *supra* notes 289-307 and accompanying text.

450. See Martens, *supra* note 171, at 349-54; Stafford Matthews, *Taxation of Sports Franchises*, in 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS 22-1 (G. Uberstine ed., 1995); Benjamin A. Okner, *Taxation and Sports Enterprises*, in GOVERNMENT AND THE SPORTS BUSINESS 159, 165-67 (Roger G. Noll ed., 1974).

451. See Okner, *supra* note 450, at 165.

452. See Matthews, *supra* note 450, at § 22.02[2]; Okner, *supra* note 450, at 165-66.

453. See 26 U.S.C. § 1056(d) (1995); Matthews, *supra* note 450, at § 22.02[2].

454. See EUCHNER, *supra* note 24, at 47-49.

455. See Ross, *supra* note 168, at 649-51.

tional professional sports leagues.<sup>456</sup> Congress may also modify the antitrust laws, the tax laws, or both to strengthen league authority to restrict franchise relocations, to provide a disincentive for profitable teams to move, and to enable cities to protect themselves from harm caused by franchise free agency and opportunistic behavior.<sup>457</sup>

Consistent with the belief that a solution to this problem be based on free market and private law principles to the greatest extent possible,<sup>458</sup> Congress should enact legislation effective enough to correct existing problems, yet least intrusive upon a sports league's autonomy to govern itself and a franchise owner's property rights. Before discussing these recommendations, it is important to identify some legislative proposals that appear to be unwarranted.

### A. *Others' Regressive Proposals*

Some have suggested that a sports franchise should be prohibited from relocating unless certain legislatively enumerated criteria are satisfied. In January 1985, responding to the proposed move of the Raiders to Los Angeles,<sup>459</sup> California Congressman Ronald V. Dellums reintroduced the Professional Sports Franchise Relocation Act of 1983,<sup>460</sup> which would have permitted any professional baseball, football, basketball, hockey, or soccer franchise to move outside of the city or county of the team's current operation only if (1) the stadium owner materially breached the team's lease; (2) the stadium is inadequate to enable profitable operation of the team, and the stadium owner refused to make necessary improvements; or (3) the team has incurred net losses for three consecutive years.<sup>461</sup>

This proposal unduly interferes with a franchise owner's property rights as well as a league's ability to place teams in the most desirable locations. It also limits the ability of cities without sports franchises to engage in competitive bidding to attract a team and disregards the potential competing desires of different cities and fans for the same franchise. The bill does not establish an unambiguous and complete

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456. See Gray, *supra* note 434, at 1343-44.

457. See *supra* notes 248-271 and accompanying text.

458. See *supra* notes 417-421 and accompanying text.

459. See *supra* notes 289-295 and accompanying text.

460. H.R. 3944, 98th Cong. (1983) (reintroduced as H.R. 785, 99th Cong. (1985)).

461. *Id.*; see York, *supra* note 32, at 360-61. In response to the proposed move of the Philadelphia Eagles to Phoenix in 1985, Pennsylvania Senator Arlen Specter introduced the Professional Football Stabilization Act of 1985, S. 172, 99th Cong. (1985), which would have prohibited moves by professional football teams previously located in a city for at least six years, unless certain conditions similar to those in Congressman Dellums's bill were met. *Id.* § 4; see York, *supra* note 32, at 358-59.

standard to guide courts in litigation brought by a city seeking to prevent a team from relocating.<sup>462</sup>

Even if a sports franchise is able to satisfy one of the criterion necessary to relocate, Congressman Dellums's bill would have allowed the team's host city to purchase the franchise at its fair market value.<sup>463</sup> This is a form of congressionally authorized eminent domain that, while protecting a host city's local interests, does not consider fully the welfare of all cities and fans from a national perspective. The proposal obviously deprives fans in cities without a team from competing to attract a franchise.

A team owner normally wants to relocate to enhance the profitability of its franchise.<sup>464</sup> If it can be forced to sell its team at its current fair market value so that the team remains in its present location, the owner is being prevented from maximizing the future value of its investment in the team by moving to another city. This would be contrary to our strong national policy of relying on free market competition to ensure that scarce resources are allocated to their most productive and efficient use, thereby providing the greatest net benefits to all consumers.<sup>465</sup> Congressman Dellums's proposal would adversely affect a league's ability to place teams in the optimal geographical locations that would further the best interests of the league and enhance the value of the league's entertainment product to consumers.<sup>466</sup>

Similarly, the Sports Community Protection and Stability Act,<sup>467</sup> proposed in 1985 by Arizona Senator Dennis DeConcini, would have inhibited a professional league's ability to select its franchise locations and disregarded the interests of a community seeking to attract a sports team.<sup>468</sup> This bill would have granted antitrust immunity to decisions by professional basketball, football, hockey, and soccer leagues refusing to allow a member franchise to relocate to another city, yet it did not establish any specific criteria to be considered.<sup>469</sup> League approvals of franchise relocations would not have been immunized from antitrust challenges.<sup>470</sup> This proposal, if enacted, would have had the potential to lock a franchise into its current location, "regardless of

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462. See York, *supra* note 32, at 360-61.

463. See *id.* at 360.

464. See *id.* at 356.

465. See Ross, *supra* note 168, at 702-06.

466. See *id.* at 706-11.

467. S. 298, 99th Cong. (1985).

468. See York, *supra* note 32, at 361-62.

469. See *id.*

470. See *id.*

inadequate facilities, financial losses, and fan disloyalty."<sup>471</sup> The bill did not affect MLB's antitrust exemption<sup>472</sup> and would have allowed league-approved baseball franchise movements to remain outside the scope of the antitrust laws, thereby perpetuating unjustified disparate antitrust treatment of major league professional sports.<sup>473</sup>

Some previously proposed federal legislation attempted to equalize the overall supply and demand for major league sports franchises by mandating league expansion. In 1984, Washington Senator Slade Gorton introduced the Professional Sports Team Community Protection Act,<sup>474</sup> which would have required MLB and the NFL to expand the number of baseball and football franchises.<sup>475</sup> It is unwise for Congress to interfere directly with the output decisions of private businesses, particularly those that do not produce products essential to the public health, welfare, or safety.<sup>476</sup> Legislatively mandated expansion of professional sports leagues would be an unwarranted interference with the working of a free market system.<sup>477</sup> The federal government obviously is not well suited to determine the most appropriate number or location of league teams.<sup>478</sup> Moreover, Senator Gorton's legislation provided no means for determining which communities receive expansion franchises.

Consistent with Senator Gorton's proposal, one commentator recently suggested Congress should reduce barriers to entry by requiring MLB to grant a franchise to any city willing and able to pay a

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471. *Id.* at 362.

472. See *supra* note 357 and accompanying text.

473. See York, *supra* note 32, at 361.

474. S. 2505, 99th Cong. (1984) (reintroduced as S. 287, 99th Cong. (1985)).

475. See Slade Gorton, *Professional Sports Franchise Relocation: Introductory Views from the Hill*, 9 SETON HALL LEGIS. J. 1, 4-5 (1985).

476. See *supra* notes 411-416 and accompanying text.

477. During 1985 congressional hearings on regulation of the professional sports industry, Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, stated:

In a free market system, firms—not regulators or legislators—are generally considered the best judges of how and where their products are marketed. . . . The assessment of demand and the amount of athletic and managerial talent available to satisfy this demand are best left to the judgment of the NFL and Major League Baseball.

Gray, *supra* note 93, at 158. Legal scholars agree that Congress should not force professional leagues to expand. See, e.g., Beisner, *supra* note 31, at 443; Wong, *supra* note 37, at 74-75. For these same reasons, establishment of a federal regulatory agency for "sports leagues," as proposed in Roger G. Noll, *Alternatives in Sports Policy*, in GOVERNMENT AND THE SPORTS BUSINESS 423-26 (Roger G. Noll ed., 1974), is an unwarranted government interference with league policies and decisions.

478. See Wunderli, *supra* note 41, at 117-18.

predetermined price for league entry.<sup>479</sup> John Wunderli proposes that entry requirements "should approximate the population and stadium capacity of the community with the smallest media market currently in the league" and that a city meeting these criteria can obtain a franchise by agreeing to subsidize a team, if necessary, in an amount equal to the target city's average annual gate receipts over a given time period.<sup>480</sup> In his view, a city would be able to determine whether the cost of hosting a franchise is worthwhile, thereby promoting allocative efficiency.<sup>481</sup>

This proposal, which attempts to eliminate all competition among cities to host professional sports franchises,<sup>482</sup> would radically skew the free market process. It offers no workable means of fairly and accurately determining when a city deserves to acquire or lose a franchise, because league expansion decisions necessarily involve consideration of a variety of factors, not merely gate receipts. It would eliminate the ability of a league to have any control over the number or location of its member teams. Despite Wunderli's contention to the contrary,<sup>483</sup> forced expansion on these terms has a very real and significant potential for severely reducing the quality of a league's entertainment product to the detriment of consumers.<sup>484</sup>

Recently proposed congressional legislation would require the NFL, NHL, and NBA to provide a replacement team within three years to a city that loses a league franchise from relocation if certain conditions are met.<sup>485</sup> In the wake of the announced intention of the Cleveland Browns to relocate to Baltimore, Ohio Representative Martin R. Hoke, and several cosponsors, introduced the Fan Freedom and Community Protection Act of 1995.<sup>486</sup> This bill would require a professional sports league to grant an expansion franchise to an investor that is financially able to purchase and support a team in a city that

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479. See *id.* at 118-19. Others have advocated federal government-mandated expansion of professional sports leagues to satisfy cities' demands for teams. See, e.g., Noll, *supra* note 477, at 414-15.

480. Wunderli, *supra* note 41, at 119.

481. See *id.*

482. Wunderli notes:

Cities without franchises could get one if they wanted one, and cities with franchises could not be extorted by threats of relocation, since a city could replace a lost franchise. It appears to be the only solution which does not distinctly advantage the "haves" over the "have-nots," or vice versa.

*Id.* at 118.

483. See *id.* 119-20.

484. See *supra* notes 432-433 and accompanying text.

485. See H.R. 2740, 104th Cong. § 5(b)(2) (1995).

486. *Id.*

formerly hosted a league franchise.<sup>487</sup> Within three years after the franchise's relocation, the identity of a proposed investor must be submitted to the league by a city that formerly hosted a league team.<sup>488</sup> The investor must pay an expansion fee to the league in an amount no greater than the expansion fee charged by the league the last time it expanded.<sup>489</sup>

The bill provides for draconian punishments to ensure league compliance with this provision. Any league that fails to grant an expansion franchise to an investor satisfying these conditions is liable to the host city for damages equal to three times the greater of the purchase price or market value of the team.<sup>490</sup> In addition, the league's antitrust exemption permitting joint pooling of television rights is suspended for one year,<sup>491</sup> and an antitrust exemption created by the bill for league decisions concerning franchise movement is lost.<sup>492</sup> A qualified investor may seek injunctive relief in federal court to require a league to sell an expansion franchise to the investor.<sup>493</sup>

Congressman Hoke's bill would require a league to expand each time it permits a franchise to relocate if the former host city finds a buyer with the financial strength and willingness to locate a league team within its environs. It would force a league to expand its overall operations every time it permits the relocation of a franchise to a more profitable location. By establishing a city's vested right to a team once it has hosted a franchise, this proposal makes it difficult for a league to shift the locations of its franchises or leave a less profitable city.<sup>494</sup> This proposal interferes with league autonomy and governance and severely frustrates the marketplace by making it extremely difficult for cities that have never hosted a league team to bid for an expansion franchise.<sup>495</sup>

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487. *Id.* § 5(a).

488. *Id.*

489. *Id.*

490. *Id.* § 7(a)(1).

491. *Id.* § 7(a)(2).

492. *Id.* § 8(b).

493. *Id.* § 7(b).

494. Congressman Hoke's bill does not expressly require that a relocating team have been profitable in its former host city. If it was not, however, it is unlikely that an investor would have a strong financial incentive to place an expansion franchise in that city.

495. Essentially, unlike other private businesses, a professional sports league that chooses to relocate some aspects of its business operations would be forced to pay a form of ransom to a former host city as the cost of leaving. This grants a proprietary preference to the first location, rather akin to the old English preservation policies under the doctrine of ancient lights or first user and other similar legal principles. See generally *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446-47 (1882) (holding that the first appropriator of water from a stream for a beneficial purpose has a "priority of appropriation"); *Fontainebleau*



On January 26, 1996, the Executive Committee of the United States Conference of Mayors adopted a resolution titled, Professional Sports Franchise Location and the Protection of Local Governments and Taxpayers, which called for federal legislation imposing restrictions on the movement of professional sports franchises.<sup>496</sup> It would require a professional sports league "to provide a city or community from which a profitable team has relocated the first option on any expansion the league would pursue exclusive of any expansion fees."<sup>497</sup>

This proposal would allow a former host city to regain a team, without paying an expansion fee, as soon as a league expands.<sup>498</sup> Facially, this appears to be an unconstitutional attempted taking of the economic value of a league-created expansion opportunity.<sup>499</sup> Like Congressman Hoke's bill, the Conference's proposal also severely hampers cities that have never hosted a league team from obtaining an expansion franchise. Accordingly, enactment of this proposal would provide cities desiring a team with an added incentive to acquire an existing league team by luring it away from another city. This proposal appears to unduly favor cities that have historically hosted major league professional sports franchises and to improperly interfere with a league's property rights and ability to govern its internal affairs.

Regulations requiring the forfeiture of team logos and trademarks have been proposed.<sup>500</sup> Such proposals act as additional disincentives to franchise free agency by requiring a profitable franchise that moves from a community, in which it has been located for a designated number of years, to forfeit the trademark ownership rights in the team's name, logos, and colors to the former host city. If, as part of the price of relocation, a profitable franchise is required to leave its identity in the city in which it was developed, opportunistic behavior

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Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 360 (Fla. Dist. Ct. App. 1959) (explaining that the English doctrine of ancient lights has been unanimously repudiated in the United States). Such doctrines create a system whereby the first party to acquire an interest trumps the rights of all other parties, wherever located, regarding future allocation of resources. See generally *id.*

496. UNITED STATES CONF. OF MAYORS POLICY RESOLUTION, PROFESSIONAL SPORTS FRANCHISE LOCATION AND THE PROTECTION OF LOCAL GOVERNMENTS AND TAXPAYERS, Jan. 26, 1996 [hereinafter MAYORS].

497. *Id.* at ¶ 9F.

498. See *id.*

499. The *Raiders II* court recognized that an expansion opportunity is a property right for which a professional sports league is entitled to charge a fee. See *supra* notes 321-327 and accompanying text.

500. See, e.g., S. 1598, 104th Cong. (1996); H.R. 2740, 104th Cong. (1996).

by a team owner may be discouraged, and a city may retain an important part of its sports heritage.<sup>501</sup> A provision of the Fan Freedom and Community Protection Act of 1995,<sup>502</sup> as originally introduced by Ohio Representative Martin R. Hoke, would require a league to reserve a departing franchise's trademarks for use by another league team that subsequently locates in the former host city,<sup>503</sup> thereby raising an intriguing Takings Clause issue.<sup>504</sup>

The Takings Clause<sup>505</sup> issue is a very close one under current Supreme Court doctrine. A statute or regulation such as that proposed by Congressman Hoke would instantly run afoul of the Fifth Amendment requirement that compensation be paid when an owner is deprived of all economic benefits of real property rights;<sup>506</sup> this result does not apply with equal force to personal property rights.<sup>507</sup> Accordingly, government regulations requiring that the departing team's personal property rights in its name, logo, and colors be forfeited to the former host city might escape the Takings Clause requirement for paying just compensation. Notwithstanding this technical distinction between real and personal property, the policy of forfeiture of business interests without payment of just compensation

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501. See *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 416 (7th Cir. 1994) (finding "Colts" name continues to signify NFL team to Baltimore residents 10 years after team moved to Indianapolis); *Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd.*, 817 F. Supp. 1103, 1128 (S.D.N.Y. 1993) (finding that the "Brooklyn Dodgers" was a nontransportable cultural institution separate from the "Los Angeles Dodgers"). Settlement of the litigation concerning the relocation of the Cleveland Browns to Baltimore required the "Browns" name, colors, and logos to remain in Cleveland, to be used by another NFL franchise to be placed by 1999. See Larry Weisman, *NFL Approves Browns Move*, USA TODAY, Feb. 9, 1996, at C1, available in 1996 WL 2045811; John Williams, *Cleveland to Get "Browns" by '99*, HOUS. CHRON., Feb. 9, 1996, at B1, available in 1996 WL 5580959.

502. H.R. 2740.

503. *Id.* § 3.

504. A representative of the International Trademark Association recently testified before a House Judiciary Committee that this proposed statute would unconstitutionally deprive the owner of a relocating team of property rights protected by the Fifth Amendment. See *Group Challenges Trademark Curbs in Sports Team Relocation Bill*, 51 PAT., TRADE-MARK & COPYRIGHT J. (BNA) 471 (Feb. 8, 1996). In its April 26, 1996, modification of this bill, the House Judiciary Committee deleted this provision. See H.R. REP. NO. 104-656, pt. 1, at 11 (1996).

505. The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V.

506. *Id.*

507. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (finding only two situations that do not require case-specific inquiry: (1) regulations that are tantamount to a physical invasion of property and (2) regulations denying all "economically beneficial or productive use of land"); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.").

is precisely the type of mischief by the sovereign that fueled the American Revolution and the Bill of Rights in the eighteenth century.<sup>508</sup>

*B. Level the Bargaining Table*

"[F]reedom of contract begins where equality of bargaining power begins."<sup>509</sup>

1. *Limited League Antitrust Immunity.*—The objective of any congressional legislation should be to "create a level playing field for all participants,"<sup>510</sup> and "government must involve itself only so far as to make the position of the owners and the cities at the bargaining table equal."<sup>511</sup> The first step in accomplishing this objective is to strengthen a league's authority to prevent franchise free agency and opportunistic behavior by individual team owners. Congress should modify the antitrust laws to immunize professional sports league rules governing franchise relocations and actions taken thereunder from antitrust challenge. A league's internal franchise location decisions should not be subject to review under the antitrust laws.

Several House and Senate bills introduced in 1995 and 1996 propose that professional sports league decisions on franchise movement be immunized from antitrust scrutiny. The Fans Rights Act of 1995,<sup>512</sup> introduced in the Senate by Ohio Senators John Glenn and Michael DeWine and Washington Senator Slade Gorton and in the House of Representatives by Ohio Congressman Louis Stokes, would provide this exemption.<sup>513</sup> In addition, the Fan Freedom and Community Protection Act of 1996;<sup>514</sup> the Professional Sports Franchise Relocation Act of 1996,<sup>515</sup> sponsored by Pennsylvania Senator Arlen Specter; and the Professional Sports Antitrust Clarification Act of 1996,<sup>516</sup> sponsored by South Carolina Senator Strom Thurmond, also would provide antitrust immunity.<sup>517</sup>

Each bill appropriately would immunize all league decisions regarding franchise movement, not only decisions against a team's pro-

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508. See Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 OR. L. REV. 603, 606-10 (1993).

509. Oliver Wendell Holmes, Jr., *quoted in* GEORGE SELDES, *THE GREAT QUOTATIONS* 229 (1967).

510. Wunderli, *supra* note 41, at 118.

511. Beisner, *supra* note 31, at 443.

512. S. 1439, 104th Cong. (1995); H.R. 2699, 104th Cong. (1995).

513. S. 1439 § 4; H.R. 2699 § 4.

514. H.R. 2740, 104th Cong. (1995).

515. S. 1625, 104th Cong. (1996).

516. S. 1696, 104th Cong. (1996).

517. See *supra* notes 459-493 and accompanying text.

posed relocation, from antitrust attack.<sup>518</sup> These bills set forth specific criteria that must be considered by a league in determining whether a franchise should be permitted to relocate.<sup>519</sup> Each bill lists a variety of factors that a league must consider, including the host city's history of fan loyalty and support for its team; the extent of any public subsidization received by the team and not generally available to other businesses; the effect of franchise relocation on the team's contracts with public and private parties; the degree to which the franchise owner has engaged in good faith negotiations to keep the team in its present location; the adequacy of the stadium in which the team played its home games in the previous season and the willingness of the stadium, arena authority, or local government to remedy any deficiencies in the facility; whether the team has incurred net operating losses, exclusive of depreciation and amortization, sufficient to threaten the continued financial viability of the team; and whether a bona fide investor has offered fair market value for the team and intends to keep it in its current location.<sup>520</sup>

Each bill requires that appropriate notice of a team's intention to relocate be given to certain parties and that the league hold a hearing in which interested parties may participate before the league votes on the proposed relocation.<sup>521</sup> A league should be required to permit all interested parties, including representatives of a team's host city and prospective host city, to be heard concerning the propriety of a proposed franchise movement before the league decides whether to allow relocation.

All of the bills, except the Fan Freedom and Community Protection Act of 1996,<sup>522</sup> provide for judicial review of league franchise movement decisions. The Professional Sports Antitrust Clarification Act of 1996 provides for *de novo* judicial review,<sup>523</sup> whereas the Professional Sports Franchise Relocation Act of 1996 provides that a league's franchise relocation decision will be upheld unless it is arbitrary or capricious.<sup>524</sup> The proposed 1984 Professional Sports Team Community Protection Act<sup>525</sup> would have established a federal arbitration board to determine whether a league-approved franchise relocation is

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518. See H.R. 2740 § 6; S. 1625 § 4; S. 1696 § 2; S. 1439 § 4; H.R. 2699 § 4.

519. See H.R. 2740 § 6; S. 1625 § 5(b); S. 1696 § 3; S. 1439 § 4; H.R. 2699 § 4.

520. See *supra* note 519.

521. See H.R. 2740 § 4; S. 1625 § 5(a); S. 1696 § 3(a)(2); S. 1439 § 5; H.R. 2699 § 5.

522. See H.R. 2740.

523. S. 1696 § 4(a).

524. S. 1625 § 6(d)(2).

525. S. 2505, 98th Cong. (1984).

"necessary and appropriate,"<sup>526</sup> and the Act would have empowered federal courts to review the arbitration decision.<sup>527</sup>

In determining whether a franchise should be permitted to relocate, it is appropriate to require that a league give due regard to the interests of the team's host city and its taxpayers, as well as to local fans. These parties' interests are not considered fully in antitrust litigation concerning the relocation of professional sports franchises<sup>528</sup> and are not otherwise effectively protected under existing public law. Providing a host city with a cause of action for a league-approved relocation contrary to the league's established criteria would create a strong incentive for a league to consider fully the interests of that host city. It would also establish a powerful remedy, which presumably would include a court order requiring reconsideration of the league's decision or prohibiting a franchise from relocating, if the league fails to consider adequately a host city's historical record of fan support and public subsidization for its local team.<sup>529</sup>

Creating a procedure for judicial or administrative review of league decisions regarding franchise location, however, would require second-guessing the business judgment of a private entity. A neutral court or administrative body would find it virtually impossible to resolve fairly the question of whether a league team should remain in its host city or be permitted to move to another city.<sup>530</sup>

None of the relocation criterion in any of the proposed legislation necessitates analyzing the terms of an offer submitted by a city that seeks to entice a franchise to move, nor does any proposal require a comparative evaluation of competing cities' respective offers. This is an economic blind spot. Requiring a franchise to remain in its current location against the judgment of both the team owner and league members is an improper exercise of governmental authority and

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526. *Id.* § 7.

527. See Gray, *supra* note 434, at 1362-63. Other 1985 federal legislation proposals would have provided for judicial review of league franchise relocation decisions. See *id.* at 1364. Some commentators favor administrative oversight of franchise movements, see, for example, Lazaroff, *supra* note 314, at 217-20; whereas, others advocate judicial review as the preferred means of oversight. See, e.g., York, *supra* note 32, at 364-71.

528. See *supra* notes 275-288 and accompanying text.

529. See *supra* notes 289-299 and accompanying text.

530. Several commentators have expressed opposition to government resolution of disputes regarding franchise movements. See, e.g., Beisner, *supra* note 31, at 443 ("This approach is inappropriate because market forces, not political ones, should control franchise movement."); Gray, *supra* note 434, at 1365-67 ("Government intervention . . . could aggravate league instability, as well as produce delay, expense, and inhibit league competition."); Wong, *supra* note 37, at 71-72 ("While each of the legislative proposals was laudable, each had its faults.").

would likely result in allocative inefficiency regarding the geographical distribution of sports franchises.<sup>531</sup>

Permitting a league to exercise its autonomy in determining the location of its franchises, without the potential for antitrust challenge or judicial oversight of its decisions, will not, alone, create the necessary incentive to discourage franchise free agency and opportunistic behavior. Merely "allowing the fox to guard the hen house" will not ensure that the interests of a host city's taxpayers and fans are protected adequately.<sup>532</sup> Congress should enact the following proposals to satisfy this objective.

2. *Publicly Traded Ownership.*—League antitrust immunity for franchise relocation decisions should be conditioned upon a league's allowing publicly traded ownership of a minority interest in each franchise.<sup>533</sup> In addition to providing a franchise with an infusion of local capital, this would enable fans and investors to have an ownership interest in a local team and some voice in its management.<sup>534</sup> It would also be more difficult for a profitable franchise to abandon its host city and engage in opportunistic behavior. To prevent the short-term profit motives of a franchise's shareholders from adversely affecting the team's competitiveness and the league's collective long-term interests, restrictions could be placed on the size of any individual's stock holdings, and the total extent of public ownership could be limited to a minority percentage.<sup>535</sup>

The NBA, NHL, and MLB all have at least one publicly owned franchise in their respective leagues.<sup>536</sup> The Green Bay Packers franchise has been publicly owned by citizens of its local community

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531. See Gray, *supra* note 93, at 153-59; Wong, *supra* note 37, at 61-69.

532. See Wong, *supra* note 37, at 12-18.

533. A resolution by the Executive Committee of the United States Conference of Mayors calls for allowing professional sports teams to be publicly owned. See MAYORS, *supra* note 496. The First Circuit recently held that an NFL policy restricting franchise owners from selling shares of stock to the public may violate the antitrust laws. See *Sullivan v. National Football League*, 34 F.3d 1091, 1106 (1st Cir. 1994). Commentators have opined that an absolute, class-based prohibition against franchise ownership does not have a legitimate business purpose. See, e.g., *The Super Bowl and the Sherman Act*, *supra* note 419, at 428 (explaining that other league owners may not "be very convincing in the role of disinterested advocates"). The Fan Rights Act of 1995 would prohibit a league from preventing a group of multiple owners or one or more local governments from owning a franchise. S. 1439 § 5(d)(1) (1995); H.R. 2699 § 5(d)(1) (1995).

534. See *supra* note 119.

535. See *Sullivan*, 34 F.3d at 1102-03.

536. PAUL C. WEILER & GARY R. ROBERTS, CASES, MATERIALS AND PROBLEMS ON SPORTS AND THE LAW 175 (1995 Supp.).

for many years,<sup>537</sup> and forty percent of the Boston Celtics franchise is publicly owned.<sup>538</sup> The Toronto Blue Jays, New York Knicks, and Boston Bruins are publicly owned in whole or in part.<sup>539</sup> Permitting public ownership of a minority interest in a professional team's stock has not harmed the operation of the franchise or a sports league.

3. *Collective League Decisions on Revenue Sharing.*—Collective league decisions requiring the sharing of each franchise's locally generated revenues and all nationally generated revenues among all league teams should be immunized from antitrust challenge by a team owner.<sup>540</sup> The primary impetus behind franchise free agency in the NFL is the availability of certain locally generated revenues, such as the rental of luxury suites and the sale of personal seat licenses, which are kept by a team owner and not shared with other owners.<sup>541</sup> This creates a strong economic incentive for a franchise owner to relocate, or threaten to relocate, to obtain a new stadium, or improvements to an existing stadium, thus enhancing revenues generated from these local sources.<sup>542</sup>

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537. See Mike Royko, *Cheeseheads Fear No Franchise Loss*, HOUS. CHRON., Nov. 12, 1995, at C6, available in 1995 WL 9414341.

538. See *Sullivan*, 34 F.3d at 1095.

539. See WEILER & ROBERTS, *supra* note 536, at 174.

540. Courts have recognized the appropriateness of league-required sharing of a franchise's locally generated revenues because of the financial interdependence of all league teams and the symbiotic nature of a league's commercial success. See, e.g., *Chicago Prof'l Sports, Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992). However, it would not be appropriate to require league members to share all stadium-related revenues because some franchises own their playing facilities in whole or in part and have made a capital investment that others have not. A league should be allowed to determine collectively the percentage of locally generated revenues to be shared and to create an economic incentive for a franchise to retain some of the fruits of its on-field success and self-promotion. It is necessary to provide each team with a strong economic incentive to field a winning team to maintain the integrity of a sports league. See Ross, *supra* note 168, at 677-78 n.158. The NFL and the Dallas Cowboys franchise recently settled their litigation regarding the legality of certain aspects of league revenue sharing. See Thomas Heath, *NFL, Cowboys Settle Suits*, WASH. POST, Dec. 14, 1996, available in 1996 WL 14680011.

541. See *supra* note 239 and accompanying text.

542. The Professional Sports Antitrust Clarification Act of 1996 would provide league immunity for franchise relocation decisions only if a league "promotes comparable economic opportunities by sharing revenue among member franchises to account for disparities in revenue received or costs saved due to direct or indirect public benefits and subsidies." S. 1696, 104th Cong. § 3(a)(3) (1996). In his introduction of this bill, Senator Strom Thurmond stated that this provision "would level the playing field, so to speak, so that teams need not move or threaten to move in order to obtain more public funds to keep from falling behind others in the league." 142 CONG. REC. § 3954-02, S3956 (Apr. 23, 1996) (statement of Sen. Thurmond). He provided the following illustration:

Revenue sharing allows small-market teams with an inherently lower local revenue base to exist along with large-market teams, thus enhancing a league's competitive balance.<sup>543</sup> This improves the economic viability of the league as a whole and of each member franchise.<sup>544</sup> By reducing revenue disparities among league teams, a franchise has a reduced economic incentive to relocate in search of enhanced individual revenues.<sup>545</sup> Thus, revenue sharing helps to protect a city's investment in a local franchise, particularly if a team's locally generated revenues are also required to be shared with other league teams.

4. *Model Lease Terms by Cities.*—Congress should also provide antitrust immunity to enable cities to collectively establish model terms for playing facility leases necessary to protect a host city's taxpayers and fans.<sup>546</sup> Under existing federal law, cities are subject to antitrust liability for collectively agreeing on uniform lease terms.<sup>547</sup> Cities

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Last fall, Art Modell, owner of the Cleveland Browns, announced that he planned to move his team from Cleveland to Baltimore. His move reportedly was motivated by financial pressure on the franchise caused by rapidly increasing player salaries, plus promises of large public benefits from Baltimore. If my revenue-sharing provisions had been in place, however, Mr. Modell would have faced different options. Under my legislation the league would have instituted procedures to promote comparable economic opportunities to address disparities in team revenue due to public benefits and subsidies. So in our example, if Mr. Modell was obtaining fewer public benefits in Cleveland than average, he would receive transfers to bring his team up to the league average. On the other hand, if the annual public benefits received for moving to Baltimore pushed Mr. Modell above the average, he would have to share some of the value of the public benefits in order to keep his team at the league average. Faced with these choices and a hometown that loved his team, it is hard to imagine that Mr. Modell would have chosen to move—and endure tremendous criticism—if he would receive the league average either way. Even if Mr. Modell still wishes to relocate, however, the league might well have blocked the move, based on the factors established and the antitrust certainty provided by this legislation.

*Id.*

543. See Martens, *supra* note 171, at 366-69; Quirk, *supra* note 167, at 45-46. But see Wunderli, *supra* note 41, at 88-89 (arguing that revenue sharing may create an incentive for a team owner to move from a large city to a smaller one).

544. See Martens, *supra* note 171, at 366-69.

545. See Gray, *supra* note 93, at 132-33, 151-53; Morris, *supra* note 39, at 95-96.

546. One commentator aptly noted: "The professional leagues are organized to protect the interests of the owners; an individual city's ability to protect its interests during negotiations is limited because no adequate method exists for cities to band together to insist on conditions that will protect all taxpayers." Beisner, *supra* note 31, at 437.

547. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 57 (1982) ("[W]hen the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions . . . must obey the antitrust laws." (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 416 (1978))); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 396 (1978) (explaining that "a municipality is not a 'person'



should be permitted to band together to protect their mutual interests in order to counteract a league's monopoly power. If a league should have antitrust immunity for franchise location decisions, cities should have a corresponding antitrust exemption for their joint efforts to develop model lease terms to protect cities' interests.<sup>548</sup>

Even if cities are allowed jointly to establish uniform lease terms without fear of antitrust liability, officials of some cities will deviate from such terms if necessary to attract or retain a team. Cities cannot be required to adhere to all jointly proposed model lease terms. While allowing price competition among cities and the exercise of collective league autonomy to determine the geographical location of franchises, Congress should correct the imbalance of bargaining power between host cities and sports franchises by enacting the following proposals.<sup>549</sup>

5. *Tax-Exempt Debt Service and Lease Length.*—A May 29, 1996, Congressional Research Service (CRS)<sup>550</sup> report analyzed tax-exempt stadium bond financing and federal subsidization of professional sports playing facilities.<sup>551</sup> This subsidy exists when a stadium is financed by state or local bonds, or both, issued at below-market interest rates, because interest on such bonds is exempt from federal income tax.<sup>552</sup> The report found that the federal government loses millions of dollars in tax revenues without generating any net eco-

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within the meaning of § 8 of the Sherman Act"). Although a city is not liable for treble damages, it may be enjoined from engaging in an antitrust violation and be required to pay a prevailing plaintiff's attorneys fees. See Local Government Antitrust Act of 1984, 15 U.S.C. §§ 35-36 (1996).

548. It would be inappropriate to allow cities to engage in "price fixing" by agreeing on the maximum amounts or forms of public subsidies to be offered to attract or retain a professional sports franchise. Doing so would eliminate competition among cities for sports franchises and result in an inefficient geographical allocation of franchises. At most, cities should be permitted to agree on the necessary contractual terms to protect their respective investments of public funds in local sports teams.

549. As previously discussed, the relationship between a sports franchise and its host city is analogous to that of a franchisor-franchisee relationship in which unequal bargaining power often exists. See *supra* notes 48-56 and accompanying text. Congress previously has enacted legislation to remedy disparate bargaining power in certain private commercial relationships. See, e.g., Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225 (1994) (authorizing contract suits by automobile dealers against manufacturers in federal courts, regardless of the amount in controversy); Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841 (1996) (preempting state law and defining preconditions and grounds for termination or nonrenewal of a franchise relationship). It has an even greater justification for protecting the financial interests of a state or local government body.

550. See Zimmerman, *supra* note 7.

551. *Id.*

552. See *id.* at 1.

conomic benefits to the nation as a whole from sports stadium construction.<sup>553</sup> Moreover, federal taxpayers' revenue loss usually exceeds the value of stadium bond interest savings to state or local taxpayers, or both, who, in reality, do not collectively receive any net economic benefits from stadium construction in their community.<sup>554</sup>

The CRS report noted that current federal laws require stadium bonds to be issued as governmental bonds,<sup>555</sup> which are structured as an open-ended matching grant and essentially make stadium subsidies a form of federal entitlement program.<sup>556</sup> In other words, all federal taxpayers automatically subsidize the construction of new professional sports stadiums if state and local officials and voters agree to build them and bond financing and repayment are structured appropriately.<sup>557</sup> The report concludes that "[t]he economic case for federal subsidy of professional sports stadiums is weak" and should be reconsidered.<sup>558</sup> The report correctly recognizes that federal subsidization of stadium construction is an unwarranted wealth transfer from federal taxpayers to team owners and players.

The report discusses two options to reduce the loss of federal tax revenues from tax-exempt stadium bond financing. Congress could eliminate any state or local government use of tax-exempt bond financing for stadium construction.<sup>559</sup> Alternatively, Congress could prohibit state and local governments from issuing tax-exempt governmental bonds for stadium financing, but allow the issuance of tax-exempt private activity bonds for such financing.<sup>560</sup> The latter type of bonds is subject to a state volume cap, thereby requiring the prioritization of a limited amount of available bond financing in light of anticipated taxpayer benefits.<sup>561</sup> Private activity bond financing also would reduce the total amount of federal subsidization of professional sports stadium construction.<sup>562</sup>

On June 14, 1996, New York Senator Daniel Patrick Moynihan introduced the Stop Tax-Exempt Arena Debt Issuance Act.<sup>563</sup> The Moynihan proposal was propelled by the CRS report's conclusion that

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553. *See id.* at 7-12, 17-18.

554. *See id.* at 10.

555. *Id.* at 5.

556. *Id.* at 12.

557. *See id.*

558. *Id.* at 19.

559. *See id.* at 19-20.

560. *See id.* at 20-22.

561. *See id.* at 21.

562. *See id.* at 22.

563. S. 1880, 104th Cong. (1996).

new stadiums have little impact upon economic development, and thus the traditional logic for tax exemption is absent.<sup>564</sup> If enacted, this bill would amend Section 141 of the Internal Revenue Code<sup>565</sup> by designating any bonds to provide "professional sports facilities" as a "private activity bond" if the proceeds of the issue exceed the lesser of five percent of such proceeds or \$5 million.<sup>566</sup> This bill effectively would eliminate federal subsidization of stadium construction in most instances.

Consistent with the findings of the above CRS report, the bill attempts to remedy the loss of federal tax revenues from activity that does not provide an economic benefit to federal taxpayers.<sup>567</sup> By increasing the cost of new playing facility construction, this bill also may reduce the willingness of state and local officials and taxpayers to offer necessarily higher multi-million dollar public subsidies to entice sports franchise owners to relocate. This proposal further demonstrates that market forces and private contract, combined with limited modification of public law, are the best means of governing the relationship between a professional sports franchise and its host city.

Despite receiving the benefits of millions of dollars of public subsidization, a team owner is often reluctant to enter into a long-term lease commitment with a city.<sup>568</sup> Congress should condition the availability of tax-exempt local bond issues to finance sports playing facilities on a franchise owner's agreement that the minimum duration of its lease with a publicly owned playing facility will be at least as long as the length of public debt service incurred to build or improve the facility for the benefit of the franchise.<sup>569</sup> This is necessary to ensure that taxpayers' substantial investment in a local sports franchise is ade-

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564. See *supra* notes 553-554 and accompanying text.

565. I.R.C. § 141 (1996).

566. S. 1880 §§ 2(c)(1), (2).

567. *Id.*

568. See Johnson, *supra* note 123, at 526; Ross, *supra* note 168, at 652; see also William M. Welch, *Federal Taxpayers Shut out of Stadium Payoff*, USA TODAY, May 31, 1996, at A1, available in 1996 WL 2057083 (describing the tax-exempt financing as "little more than a public housing program"); McGraw, *supra* note 24 ("And for the most part, citizens are buying the deals.").

569. At least one team owner agrees this proposal is fair. Ted Turner, owner of the Atlanta Braves baseball team and Atlanta Hawks basketball team, has stated: "What I personally think is that when a city is going to build a stadium that requires millions of dollars of long-term funding and they do it for a team, they ought to make that team, at the time they do the funding and build the stadium, sign a lease that it would at least cover the amortization of the stadium." Baade & Dye, *supra* note 29, at 267. Alternatively, one commentator has proposed that "the length of the lease should be at least as long as the time required for the asset to depreciate to a net value of zero, assuming the use of generally accepted accounting principles and no salvage value." Beisner, *supra* note 31, at 447 n.89.

quately protected and that a host city receives the full benefit of its bargain as the consumer of a franchise. Congress should provide federal courts with the express authority to enjoin a franchise from relocating, prior to the expiration of its lease with a publicly owned or subsidized playing facility financed with tax-exempt bonds, absent clear and convincing evidence that the franchise is not financially viable and is unable to field a competitive league team in its current location.<sup>570</sup>

A team owner should be required to provide notice of an intent to relocate at least one year before a franchise's existing lease obligations will expire. This will provide time to allow city officials to analyze whether continued association with, or requested public subsidization of, the team is desirable and to make an appropriate cost-benefit analysis. It will also enable community and business leaders to determine the feasibility of private financing of all or part of the cost to build or improve a playing facility.

The franchise owner should negotiate exclusively and in good faith<sup>571</sup> for a given time period (for example, six months) and, after providing the necessary notice, with local officials to keep the team in

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570. A city should have the option of allowing a franchise to relocate prematurely if it agrees to pay the full amount of outstanding public indebtedness incurred to build or improve a playing facility in order to keep or attract the franchise. See Beisner, *supra* note 31, at 446. However, it should not be limited to a damages remedy because of the unique nature of a major league professional sports franchise and the need to allow a city to reap the intangible benefits of its bargain flowing from the team's presence during the agreed upon term of the lease. See *supra* notes 69-80 and accompanying text. The Fan Freedom and Community Protection Act of 1995 would require a franchise owner who relocates his team in breach of a playing facility lease to pay, within thirty days after playing its first game in a new location, an amount equal to the value of all publicly provided financial assistance previously received to the appropriate government entities. Violation of this requirement would subject the franchise owner to a penalty equal to three times the value of such publicly provided financial assistance. See *supra* notes 486-495 and accompanying text. The Team Relocation Taxpayer Protection Act of 1996 would prohibit an NFL franchise that relocates before its current lease expires from benefiting from the use of any federal funds or tax deductions in connection with its move. S. 1529, 104th Cong. § 2 (1996). The Professional Sports Franchise Relocation Act of 1996 would require a relocating franchise to pay its proportionate share, based on dates of facility usage, of the outstanding debt for construction of, or improvements to, a publicly owned playing facility, apparently even if it moves after its lease expires. S. 1625, 104th Cong. § 7(1)(1) (1996).

571. One court held that a contractual obligation merely to negotiate in "good faith" is too vague and indefinite to be enforceable. See *Candid Productions, Inc. v. International Skating Union*, 530 F. Supp. 1330, 1338 (S.D.N.Y. 1982). Therefore, it is advisable to list the club's specific obligations. For example, team officials should be expressly required to disclose certain information to their host city to enable them to submit a financial package to keep the team, to exchange offers and counteroffers, and to participate in face-to-face meetings with city officials and stadium officials.

its host city.<sup>572</sup> This will provide a fair opportunity for a city to retain a cherished local team and source of community pride, as well as prevent a team owner from surreptitiously reaching a deal with another city to relocate the franchise.<sup>573</sup>

### CONCLUSION

Public law does not solve the problem of opportunistic behavior by sports franchise owners who generate bidding wars and abandon their host cities for other venues, often contrary to both league and host-city interests. Present ordering of city-team arrangements by private law mechanisms may be inadequate because of existing league monopoly power that creates a disparity of bargaining power in favor of team owners. The solution is to make narrow, tactical changes in public law by congressional legislation so that the private ordering of these relationships may be given fuller effect. Individual team owners should not be allowed to harm a host city's fans and taxpayers or defy a league's collective interests by opportunistic or exploitative conduct designed primarily to enhance the economic value of the owner's franchises.

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572. See *supra* note 521 and accompanying text.

573. Cleveland Browns owner Art Modell engaged in a series of clandestine meetings with Maryland and Baltimore officials before suddenly announcing a deal to move his NFL franchise to Baltimore. See Ann Davis, *Jones Day; Squire Sanders: Scrimmaging over the Browns*, NAT'L L.J., Dec. 11, 1995, at A4; *A Combination of Circumstances: Increasingly Discouraged by the Situation in Cleveland, Owner Art Modell Saw a Narrow Window of Opportunity for Moving His Browns Franchise to Baltimore*, CLEV. PLAIN DEALER, Dec. 16, 1995, at A16, available in 1995 WL 11022081; Ken Rosenthal, *It's Time for Cleveland and Browns to Work It Out*, BALT. SUN, Jan. 3, 1996, at D1, available in 1996 WL 6598573. Our proposal would prevent secret negotiations with a competing city during the exclusive negotiation period with a team's host city.