Antitrust and Sports League Franchise Relocation: Bringing Raiders I into the Modern Era of Antitrust Law

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Antitrust and Sports League Franchise Relocation: Bringing Raiders I into the Modern Era of Antitrust Law

by

BRET GIBBS

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* J.D. Candidate, University of California, Hastings College of the Law, 2007; B.A. University of Southern California, 2004. I would like to thank Professor James R. McCall for contributing his insight to this Note.
I. Introduction

Every year sports fans in a number of cities around the United States are faced with the prospect of their city losing one of its professional sports franchises to relocation.\footnote{For a discussion on this trend see discussion by U.S. Senator Spector in 145 CONG. REC. S. 4665, 4673 (1999).} Franchise relocation can mean an abrupt uprooting of the deeply valued traditions for many fans who enjoy attending games and rooting for their favorite team. It also causes significant economic impacts on the city that loses the team. Sports are not “only a game” to those die-hard National Football League fans who work hard Monday through Friday so that they can afford to root for their team on Sunday or to parents who want to partake in the enduring tradition of bonding with their children while enjoying a Major League Baseball game. I believe the movie BASEKETBALL comically captures this modern phenomenon best:

Soon it was commonplace for entire teams to change cities in search of greater profits. The Minneapolis Lakers moved to Los Angeles where there are no lakes. The Oilers moved to Tennessee where there is no oil. The Jazz moved to Salt Lake City where they don’t allow music. The Raiders moved from Oakland to LA back to Oakland. No-one in LA seemed to notice.\footnote{BASEKETBALL (MCA/Universal Pictures 1998).}

Though farcical, the quote describes a phenomenon that has plagued U.S. sports, which is yearly becoming more commonplace. For some owners this threat is merely a façade or a tool to capitalize on a city’s dedication to their sports teams. Teams merely threaten to leave a city in order to leverage measures for bigger, better, and more costly stadiums for their teams.\footnote{145 Cong. Rec. S. at 4673 (1999). \textit{See also} Brower v. State, 969 P.2d 42, 46 (1998) (affirming summary judgment dismissing taxpayer challenges to the validity of emergency legislation for new stadium passed in face of threat by Seattle Seahawks owner that the franchise would move to California if legislation did not pass); \textit{Sports Franchise Movement: Hearing on H.R. 2740 and H.R. 2699 Before the House Comm. On the Judiciary, H.R. REP. NO. 104-656, at 1 (1996) [hereinafter \textit{Sports Franchise Movement Hearings}] (testimony of N.F.L. Commissioner Paul Tagliabue); \textit{Id.} (testimony of Professor Andrew Zimbalist).} What has happened to the loyalty of sports franchises to their local fan base? Is there any way for the sports leagues to stop this trend and ensure sports fans’ security across the United States?

Over 20 years ago, the Ninth Circuit decided \textit{Los Angeles Memorial Coliseum v. National Football League (Raiders I)},\footnote{4. \textit{Los Angeles Mem’l Coliseum v. NFL}, 726 F.2d 1381 (9th Cir. 1984) [hereinafter \textit{Raiders I}].} a case cited by many courts as the authority on sports league franchise
relocation. The court held that the National Football League’s (NFL) restriction on franchise relocation was illegal under the Sherman Antitrust Act and, in a later case, awarded damages to the Raiders and the Los Angeles Memorial Coliseum for this violation.

In part A of section II, this note provides a general overview of antitrust law. In part B of section II, this note explores how antitrust law applies to sports leagues and reviews the Ninth Circuit’s analysis in Raiders I.

Section III considers the Raiders I decision in light of two developments in antitrust law that arose since the decision in Raiders I. First, it looks at how changes in other areas of antitrust law could apply to the sports league context. Second, it explores how these changes could affect how a similar sports league franchise relocation antitrust case would be decided today. Overall, these modern developments seem to weigh in favor of sports leagues regulating their franchise’s ability to relocate, which benefits sports fans seeking stability and continuity in modern sports programs.

II. Legal Overview and History

A. Antitrust Law Historical Approach and Analysis Overview

1. Antitrust Law Overview

The Sherman Antitrust Act was first enacted in 1890 as the federal government’s uniform response to monopolization and cartel behavior that restrained trade in the United States. Sherman Act section 1 made illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Section 2 of the act makes actual or attempted monopolization illegal. This paper will focus on section 1 conduct as it relates to professional sports leagues.

6. Raiders I, 726 F.2d at 1386-87; Los Angeles Mem'l Coliseum v. NFL, 791 F.2d 1356, 1376 (9th Cir. 1986) [hereinafter Raiders III].
7. See infra section III.B.
The two main types of collusive restraints that are potentially illegal under section 1 are horizontal restraints and vertical restraints. Horizontal restraints are agreements and collaborations between market competitors. Vertical restraints involve firms at different levels of the production/distribution chain, for example, an agreement between a manufacturer and its distributors. Thus, in the context of a sports league, a horizontal restraint would occur when teams made agreements that restrained trade, whereas a vertical restraint would occur when the league collaborated with a team or multiple teams to restrain trade (in the example above, the league would be the manufacturer and the teams the distributors). The first step in an antitrust case is for the plaintiff to prove the nature of the defendant’s alleged illegal restraint and its anti-competitive impact.

2. Per Se versus Rule of Reason Analysis

Some trade restraints are so highly offensive that they are considered illegal per se, meaning the “mere existence of the restraint is illegal.” Others are less clear and require courts to use a test called the rule of reason to determine whether “the restraint’s harm to competition outweighs its pro-competitive effects.” Under the rule of reason, a court’s determination of unreasonableness “may be based either 1) on the nature or character of the contracts, or 2) on surrounding circumstances giving rise to the interference or presumption that they were intended to restrain trade and enhance prices.” The Supreme Court has held that the nature of sports leagues, and namely the fact that some horizontal constraints are necessary to preserve league integrity and competitive balance, necessitates using the rule of reason analysis as opposed to per se illegality.

Under the rule of reason approach, the plaintiff in the antitrust suit must first show an anti-competitive impact on a competitive

11. POSNER, supra note 8, at 1-15.
13. Id.
15. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001).
17. NCAA, 468 U.S. at 100-01; See also Raiders 1, 726 F.2d 1381, 1387; Nat’l Basketball Ass’n v. SDC Basketball Club, Inc. 815 F.2d 562, 564 (9th Cir. 1987) [hereinafter SDC].
market (the horizontal or vertical restraint discussed above). This can either happen under the "quick look" approach, where an anti-competitive impact is inferred by virtue of higher prices and lower output, or the court can fully examine the relevant product and geographic markets and establish that the defendant has market power in the relevant markets. This analysis, along with the court's analysis in deciding whether to implement the "quick look" approach, is explained in greater detail in the context of franchise relocation below.

3. Relevant Product and Geographic Market Determinations

All parties in the antitrust suit are given a chance to define the relevant market. Understanding the overall relevant market allows the court to determine the defendant's market power and evaluate the alleged competitive restraint on trade. Also, whether the restraint is reasonable or not often depends on how the relevant product and geographic markets are defined. In many cases, this definition is key to understanding whether there has been an antitrust violation.

Defining the product market requires each party to offer their own "process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." Previously, cases have not used a set uniform method as to how to come up with that evidence. Past sports franchise relocation cases, for instance, have used concepts such as "reasonable interchangeability" of other products in the market and "cross elasticity of demand between the product itself and the substitutes for it." This analysis does not provide the court with an exact methodology to come up with a relevant market.

Defendants in antitrust litigation will always try to define the product markets as broadly as possible. The broader the definition, the less the defendant's market power and the more minuscule defendant's restraint on trade appears to be in consideration of the

18. NCAA, 468 U.S. at 103.
19. Id. at 109.
20. See discussion infra section II.B.2.b, III.B.1.
22. Raiders I, 726 F.2d at 1392.
23. See infra discussion of SSNIP test in section III.B.2.
25. See discussion infra section II.B.2.b, III.B.1.
market as a whole. In contrast, plaintiffs will always try to define the relevant product market as narrowly as possible, in order to amplify the actions of the defendant and exaggerate its anti-competitive effects. The same game is played with the geographic market. The geographic market is the area in which the seller conducts business and the buyer can turn for supplies or substitutes. The defendant in antitrust litigation will likely define the geographic market as broadly as possible. The plaintiff will do the opposite. Once a relevant market is established and the plaintiff has proven that the defendant’s actions had a significant anti-competitive impact on the relevant market (unless the “quick look” approach is applied, which relieved the plaintiff of its burden), the burden shifts to the defendant to show pro-competitive justifications for its actions. Then, if the defendant convinces the court that pro-competitive justifications outweigh its anti-competitive impacts, the plaintiff can still discredit the defendant’s actions by showing that the defendant did not implement the least restrictive means (on trade) in achieving its pro-competitive goal.

4. Ramifications of Finding a Sherman Act Violation

The significant power of antitrust litigation is contained in two words: treble damages. If in the court finds a violation of section 1 of the Sherman Act, the defendant faces the prospect of threefold damages. For an example of this effect on sports leagues, even the mere threat of treble damages has caused sports leagues to change their rules in fear of antitrust liability. These leagues would rather not take a chance on slightly anti-competitive rules that could greatly benefit their sports in order to avoid the prospect of treble damages. In turn, this affects a sports league’s control over the relocation of its

26. See, e.g., Raiders I, 726 F.2d at 1392-93.
27. See, e.g., id.
29. See, e.g., id.
30. NCAA, 468 U.S. at 112.
31. Id. at 112 (“arguably tailored to serve such an interest”).
32. Sports Franchise Movement Hearings, supra note 3 (testimony of NFL Commissioner Paul Tagliabue).
33. 15 U.S.C. § 15(a); Los Angeles Memorial Coliseum v. National Football League, 726 F.2d 1381, 1399 (9th Cir. 1984)
34. Sports Franchise Movement Hearings, supra note 3 (testimony of NFL Commissioner Paul Tagliabue); see also Tygart, supra note 5, at 55 (“The mere threat of an antitrust lawsuit in response to the NFL challenging a team’s relocation is equivalent to using a ‘nuclear weapon.’”).
member teams to be faced with even the mere threat of antitrust litigation. Thus, the result is that leagues are afraid to stand up against teams seeking relocation, to the detriment of local fans and cities.

B. Sports Antitrust and Franchise Relocation Cases

1. History of Anti-Trust Application to Professional Sports

The Supreme Court first looked at the Sherman Act in the context of professional sports in *Federal Baseball Clubs, Inc. v. National League of Professional Baseball Clubs.* The Court relied on scope limitations of the Sherman Act to hold that Major League Baseball (MLB) was not subject to the Sherman Act because the league’s activities did not constitute “interstate commerce” and thus were not within Congress’s discretion to regulate. Since then, the Supreme Court has upheld this antitrust exemption for the MLB despite the fact that its trade would most definitely constitute “interstate commerce” in even the strictest definition of the term today. Besides the Curt Flood Act, which recently lifted the antitrust exemption for Baseball (but only in the area employment issues), Congress has yet to further to restrict this exemption.


37. 259 U.S. 200 (1922).

38. *Id.* at 208-09; see also U.S. CONST. art. I, § 8, cl. 3.

39. Toolson v. New York Yankees, Inc., 346 U.S. 356, (1953) (despite finding that baseball is most likely engaged in interstate commerce, court is reluctant to overturn *Federal Baseball* especially since Congress has not acted on the issue); Flood v. Kuhn, 407 U.S. 258, (1972) (stating “baseball is a business and it is engaged in interstate commerce” and the court admits that, if not for strict adherence to *stare decisis*, the MLB would not be exempt from antitrust scrutiny).


41. See 15 U.S.C. § 26b(b) (stating “No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a)); see also Matthew Ryan McCarthy, *Sports: Revenue Sharing in Major League Baseball: Are Cuba’s Political Managers on Their Way Over Too?*, 7 VAND. J. ENT. L. & PRAC. 555 (2005).
As stated in *Flood v. Kuhn*, the MLB's exemption is "an exception and an anomaly," one that is not enjoyed by the other professional sports.\(^4\) In *Radovich v. National Football League*, 352 U.S. 445 (1957), the NFL argued that it too deserved an exemption equal to that of the MLB in *Federal Baseball* because of its similar status as a sports league.\(^4\) The Court rejected the NFL's argument.\(^4\) The Court went on to fully limit the scope of *Federal Baseball* to the "business of organized professional baseball," refusing to extend the exemption by analogy to the NFL or any other sport that sought it.\(^4\) This idea of applying the Sherman Act to other professional sports (besides the MLB) has been generally affirmed ever since.\(^4\)

2. *Antitrust Implications of Franchise Relocation Rules and Raiders I*

*Raiders I* is cited by many as the forefront case in matters of sports teams franchise relocation.\(^4\) In *Raiders I*, the Ninth Circuit held that sports leagues (besides the MLB) are subject to antitrust rules when trying to restrict the relocation of their sports franchises.\(^\) I believe, however, as will be discussed below, the general feeling that *Raiders I* permanently resolved the issue of sports leagues regulation of franchise relocation is overstated when considering all of the changes in antitrust law over the last 20 years.

a. Overview of the Findings in *Raiders I*

In *Raiders I*, the Ninth Circuit found that the NFL had violated section 1 of the Sherman Act by restricting a team’s ability to relocate within the home market of another team.\(^4\) In 1980, Al Davis, the owner of the Oakland Raiders, agreed with the Los Angeles Memorial Coliseum to move the Raiders to Los Angeles.\(^4\) The NFL initially objected to the move because it would cut in on the Rams of Anaheim’s established market.\(^4\) The NFL, after revising its relocation rule, primarily based its rejection of the relocation on principles of

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\(^4\) *Flood*, 407 U.S. at 282.
\(^4\) *Id.* at 450-51.
\(^4\) *Id.* at 451; *see also* *Flood*, 407 U.S. at 278-79.
\(^4\) *See* *Flood*, 407 U.S. 258; *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378 (1983) (court found that the NFL is engaged in interstate commerce and subject to the antitrust laws); *Raiders I*, 726 F.2d 1381 (9th Cir. 1984).
\(^4\) *See* Tygart, *supra* note 5; *See also* Wunderli, *supra* note 5.
\(^4\) *Raiders I*, 726 F.2d at 1385-87.
\(^4\) *Id.* at 1395.
\(^4\) *Id.* at 1384-85.
\(^4\) *Id.*
league control over the location of its franchises.\textsuperscript{52} Just prior to the

\textit{case, Rule 4.3 of Article IV of the NFL Constitution stated:

The League shall have exclusive control of the exhibition of

football games by member clubs within the home territory of each

member. No member club shall have the right to transfer its

franchise or playing site to a different city, either within or outside

its home territory, without prior approval by the affirmative vote of

three-fourths of the existing member clubs of the League.\textsuperscript{53}

Rule 4.3 also instructed that, in order to defeat the relocation of

one of its member teams, three-fourths of the team owners would

have to vote against the trade.\textsuperscript{54} The three-fourths margin was easily

met to defeat the Raiders' move.\textsuperscript{55} The Raiders and the Los Angeles

Memorial Coliseum then brought suit against the NFL for antitrust

violations in regards to Rule 4.3.\textsuperscript{56}

\textbf{b. Rule of Reason Analysis in Raiders I}

The Ninth Circuit and the district court claimed to have done a

dull rule of reason test of the relevant product market as opposed to

the "quick look" approach.\textsuperscript{57} This means that the plaintiff had the

burden of proving that Rule 4.3 had an actual anti-competitive

effect.\textsuperscript{58} If the court had taken a quick look approach, on the other

hand, the plaintiff would have been relieved of its burden to prove

this anti-competitive harm.

Neither the Ninth Circuit nor the district court, however, did the

full in depth rule of reason analysis that would be required in a

modern antitrust case after \textit{California Dental Association v. FTC (CDA)}.\textsuperscript{59} Holding that the plaintiffs had proven one of the elements

of their burden, the Ninth Circuit simply stated, "Rule 4.3 is on its

face an agreement to control, if not prevent, competition among the

\textsuperscript{52} The NFL's original constitution included a restriction on another team entering a

home territory (75 mile radius around any existing team), but this restriction was omitted

due to other pending litigation by the Los Angeles Memorial Coliseum. Despite the

change, however, the Ninth Circuit still treated Rule 4.3 as an "exclusive territory" market

division arrangement, which aided in its finding of antitrust violations. This is discussed

below at II.B.2.b.

\textsuperscript{53} \textit{Raiders I}, 726 F.2d at 1385.

\textsuperscript{54} \textit{Id}.

\textsuperscript{55} \textit{Id}.

\textsuperscript{56} \textit{Id.} at 1385.

\textsuperscript{57} \textit{Id.} at 1391.

\textsuperscript{58} \textit{Id}.

\textsuperscript{59} 526 U.S. 756 (1999) [hereinafter \textit{CDA}]; \textit{See infra section III.B.1 for discussion on

\textit{CDA}'s impact on modern antitrust analysis.}
NFL teams through territorial divisions.”60 The court not only
overstates the scope of the rule, but it also relies on the presumption
that Rule 4.3 is clearly anti-competitive “on its face.”61 In doing so,
the court actually excused the plaintiffs of their burden to prove the
anti-competitive effects despite the court’s claim that this assumption,
in and of itself, was “evidence” enough to meet the burden.62 While
this approach might have been satisfactory for its time, this
assumption would not pass muster in a modern antitrust case since
the Supreme Court’s decision in CDA.63

c. Relevant Market Definition in Raiders I

Raiders I presented a basic inquiry into the relevant markets. There was no in-depth market analysis and it was conducted by each
party with general notions of interchangeability (or lack there of).64

The NFL attempted to define the product market as
entertainment in general (including college football, other sports, and
other types of entertainment outside the sports realm) and the
relevant geographic market as the entire United States.65 Thus, the
NFL submitted a very large relevant market. The Raiders, on the
other hand, defined the product market as NFL football and accepted
no reasonable consumer substitutes for the NFL product.66 The
Raiders also submitted a narrower definition of the geographic
market—Southern California as opposed to the entire United States.67
The Los Angeles Memorial Coliseum (a plaintiff along with the
Raiders) defined the product market as all stadiums competing for
NFL teams.68 The district court allowed the jury to decide which
definition to follow. In the end, it chose the Raiders’ narrow
definition.69

60. Raiders I, 726 F.2d at 1391.
61. See id.
62. See id. at 1392 (The court finds that “[o]n its face, Rule 4.3 divides markets among
the 28 teams” and therefore was anti-competitive).
63. See infra section III.B.1.
64. 726 F.2d at 1392. There was an issue about stipulation to the testimony of non-
experts, but the Ninth Circuit finds that the laymen testimony was adequate to establish a
market, though there is not much discussion of defining the relevant market.
65. Id. at 1393.
66. Id.
67. Id.
68. Id. The product market definition and the Ninth Circuit’s reaction to it are
discussed in section III.B.2.c infra.
69. Raiders I, 726 F.2d at 1393-96.
With the definition of the market so restricted, the NFL had little wiggle room; its market power was huge and any slight restraint on trade was magnified. Considering that the definition of the relevant market can make or break the case, this narrow definition of the product market was so unfavorable to the NFL that it proved a hurdle too formidable for the NFL to overcome.\(^7\) It was likely because of this market definition that the NFL lost its case.\(^7\)

### III. Shifting Focus to Developments in Modern Antitrust Law

#### A. Not Just Sports Law, Antitrust Law

Before addressing the modern trends of antitrust law since *Raiders I*, I would like to clear up what I believe to be an inaccurate distinction between antitrust issues and sports law cases. Some law review articles and court decisions consider sports antitrust law as a different breed of antitrust law with its own set of precedent.\(^7\)

General precedents of emerging antitrust law are too often ignored or simply distinguished. However, there is no indication in the Sherman Act, the Clayton Act, or any of the supporting legislative materials that Congress intended to treat antitrust in the context of professional sports differently than general antitrust doctrine.\(^7\)

The very nature of sports leagues and the competition that they promote amongst their teams presents a more extensive rule of reason analysis when compared to other markets. However, the way in which sports league antitrust issues are analyzed should not differ from the conventional structure of antitrust analysis. Modern Supreme Court antitrust rulings should drive the analysis of sports league relocation rules and, within this framework, take into account the nuances and special needs of sports leagues in weighing pro-competitive justifications and anti-competitive results. Applying the modern rulings more accurately indicates the antitrust implications of sports league franchise relocation restrictions in future cases. This

\(^{70}\) Wunderli, *supra* note 5, at 103; Harris & Jorde, *supra* note 21, at 5.

\(^{71}\) Wunderli, *supra* note 5, at 103. ("the consequence of this market definition is that the NFL loses").

\(^{72}\) See, e.g., Jeffrey Gordon, *Note: Baseball's Antitrust Exemption and Franchise Relocation: Can a Team Move?* 26 FORDHAM URB. L. J. 1201 (1999); Tygart, *supra* note 5; *Raiders I*, 726 F.2d at 1385-93; SDC, 815 F.2d 562; *But see* Scott Hale, *Jerry Jones Versus The NFL: An Opportunity To Apply Logically The Single Entity Defense To The NFL*, 4 SPORTS L.J. 1, 7 (Spring 1997) ("Although *Copperweld* did not involve sports, the Court set out the general policies underlying Section 1..." which the author explains could apply to sports league antitrust cases).

\(^{73}\) With the exclusion of Major League Baseball.
approach would link “sports antitrust law” to modern antitrust analysis.

While *Raiders I* may have been consistent with the antitrust analysis standards circa 1984, it is not fully consistent with the analysis in current controlling antitrust precedent.  

*Raiders I*, as precedent, is only as strong as its underlying analysis. If the underlying analysis is plainly wrong or insufficient in light of more recent and inconsistent Supreme Court rulings, the case’s value, as precedent, is weakened. The case need not be overruled entirely to lose its value as precedent. The Supreme Court does not have to grant certiorari to a sports franchise relocation case to settle the rules in this area of law. It is legitimate to use the court’s modern rulings in other areas of antitrust law to reshape our understanding of *Raiders I*. For this reason, *Raiders I* should not be followed blindly today, without considering the changes in antitrust law discussed below. These changes could lead to a different outcome in sports league franchise relocation cases today.

B. Developments in Antitrust Law Since *Raiders I*

Significant developments in antitrust law have occurred since *Raiders I* was decided in 1984. Those developments should be incorporated into any future sports league relocation case.

First, the Supreme Court has recognized that a modern antitrust case can be complex and may deserve a more extensive market analysis by the plaintiff (to show an anti-competitive effect due to the defendant’s action) than what is afforded by the “quick look” approach. In *CDA*, the Supreme Court further narrowed the application of the “quick look” approach to cases where the defendant’s actions have a clear cut anti-competitive impact. In doing so, the Court restored emphasis to the plaintiff’s initial burden of proving the anti-competitive impact of the defendant’s actions while also considering the pro-competitive justifications before putting the alleged antitrust violator on the defensive.

Second, another theory of defining the relevant product and geographic market has emerged since the decision in *Raiders I*. As discussed later, the “Small but Significant and Non-transitory Increase in Price” test (SSNIP) applies a more detailed methodology for establishing the relevant market, requiring a more in-depth analysis.

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74. *See infra* section III.B.
1. In Depth Rule of Reason Approach Provided by CDA

a. Abbreviated Analysis and Burden Shifting in *Raiders I*

In *Raiders I*, the Ninth Circuit claimed that its analysis was a full rule of reason analysis, with no mention of the "quick look" approach.\(^76\) The court stated that the burden did in fact rest on the plaintiff to show: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition."\(^77\)

The court stated that the plaintiff met the first prong in showing the nature of the agreement between the 28 NFL teams (and the court's rejection of the NFL's single entity defense). The court merely assumes, however, that the second prong was obvious by the nature of the agreement.\(^78\) The third prong, the court admitted, was "more troublesome," yet the court never stated whether or not the plaintiff affirmatively met its burden in proving an actual injury to competition before shifting the burden to the defendant to justify its actions.\(^79\) The court discussed the validity of the NFL's defense to that inquiry as being insufficient to rebut the plaintiff's anti-competitive allegations, but not affirmative proof that there was an anti-competitive impact in the first place.\(^80\) With the second prong assumed by the court and the third prong of the plaintiff's burden essentially shifted to the defendant to disprove, the court did not strictly enforce the plaintiff's initial burden.

This analysis cannot legitimately be considered a burden on the plaintiff. The court seems to have in fact conducted a "quick look," excusing the initial burden on the plaintiff and jumping directly into a balancing of the pro-competitive justifications with anti-competitive harms under the remaining rule of reason analysis.\(^81\) Despite the fact that the court claims to have done a full and in-depth rule of reason inquiry with the initial burden on the plaintiff, the analysis (or lack there of) speaks for itself.

\(^76\) *Raiders I*, 726 F.2d at 1391
\(^77\) Id. (quoting Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979), cert. denied, 447 U.S. 924 (1980)).
\(^78\) Id. ("Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions")
\(^79\) Id. at 1391, 1395.
\(^80\) Id.
\(^81\) See *CDA*, 526 U.S. at 770.
b. "Quick Look" Approach Before CDA

The "quick look" approach is not a fatal flaw in antitrust cases. It was used in other antitrust cases prior to 1984 and could have been justified by the Supreme Court's ruling in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma (NCAA)*. In *NCAA*, the Court found that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." Thus, in "quick look" cases, an initial "detailed market analysis" by the plaintiff to show anti-competitive effects of the defendant's actions was not required in order to start scrutinizing the defendant's pro-competitive justifications to the anti-competitive allegations.

In *NCAA*, the NCAA's rules limited universities' ability to contract television broadcasts in an effort to give everyone a chance to contract for such broadcasts. The Supreme Court found this to be "naked restraint on price and output," and thus, quite clearly anti-competitive, justifying a "quick look" without a burden on the plaintiff to prove an anti-competitive effect.

However, even under *NCAA*, it was not so clear in *Raiders I* that a sports league restraining a team's ability to relocate was a "naked restraint on price and output," thus justifying a relief of the plaintiff's burden. The "abbreviated analysis" used in *Raiders I* becomes even more suspect after *CDA*.

c. Rejection of "Quick Look" Approach in CDA

In *CDA*, the Supreme Court clarified when a "quick look" approach is appropriate and when a full market analysis is necessary. The case involved the California Dental Association's advertising restrictions on its member dentists. The CDA restricted dentists from advertising their quality of care and price discounts. The Court rejected the Ninth Circuit's use of the "quick look" approach in *CDA*

82. 468 U.S. 85, at 100-05.
83. Id.
84. Id.
85. Id.
86. Id. at 110
87. Id. at 100-105.
88. See Raiders I, 726 F.2d at 1391; see also infra III.B.1.d.-e.
89. CDA, 526 U.S. at 769, 770.
90. Id. at 777-78.
91. Id. at 759.
92. Id. at 759-60.
because it was not clearly a constraint effecting output or price. In fact, the Court found that the “CDA’s advertising restrictions might plausibly be thought to have a net pro-competitive effect, or possibly no effect at all on competition.” The Court remanded for “fuller consideration” because “the Court of Appeals did not scrutinize the assumption of the relative anti-competitive tendencies.” The Court especially focused on the purpose behind the rules, consumer protection, and found that consumer protection alone was possibly enough to validate any alleged anti-competitive results. \textit{CDA} teaches us that even if the court initially assumes conduct to be anti-competitive, this still warrants a deeper probe by the court into the anti-competitive effects and provides no relief of the plaintiff’s burden.

The overall effect of \textit{CDA} was to greatly limit the applicability of the “quick look” approach in antitrust cases. Essentially, without overruling \textit{NCAA}, the Supreme Court in \textit{CDA} found that the “quick look approach carries the day [only] when the great likelihood of anti-competitive effects can easily be ascertained.” Given that this case did not provide a classic anti-competitive scenario where the defendant was limiting price or output to the detriment of the consumer, the “quick look” approach was not appropriate. The Court also held that, in these types of cases, a court should look at the pro-competitive effects of the restraints, without shifting the burden to the defendant. Thus, the plaintiff’s initial burden remains.

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93. \textit{Id.} at 771.
94. \textit{Id.}
95. \textit{Id.} at 781.
96. \textit{Id.} at 772 (“difficulty for customers or potential competitors to get and verify information”).
97. \textit{Id.} at 760.
98. Melissa Pientka, \textit{Antitrust Violations}, 41 AM. CRIM. L. REV. 267, 275 (Spring 2004) (“It has been argued that the Court’s ruling in \textit{California Dental Ass’n v. FTC} constitutes a ‘set back’ for the quick look movement and may narrow the application of this doctrine in future cases.”).
100. \textit{Id.} at 769-70.
101. \textit{Id.} at 775 n.12 (“before a theoretical claim of anti-competitive effects can justify shifting to a defendant the burden to show empirical evidence of pro-competitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anti-competitive effects and considered whether the effects actually are anti-competitive”); \textit{see also} Pientka, \textit{supra} note 98, at 311 n.39.
102. \textit{CDA}, 526 U.S. at 775.
d. Applying CDA to Raiders I and Sports Franchise Relocation

Applying CDA’s theories to the facts in Raiders I changes the analysis. Restricting franchise relocation is not, in and of itself, meant to be a restriction on price or output to the consumer, and thus deserves a full market analysis with the burden of proving anti-competitive effects resting squarely on the plaintiff. It seems clear that CDA would require a court to do a more extensive analysis with the burden of in-depth anti-competitive proof put on the plaintiff than was performed in Raiders I. CDA puts the teeth back into the plaintiff’s initial burden, by not requiring the sports league to be immediately on the defensive concerning its relocation rule. CDA also requires the pro-competitive justifications to be examined during the period of the plaintiff’s initial burden, making it a higher bar for the plaintiff to overcome.

CDA states that “quick-look analysis carries the day when the great likelihood of anti-competitive effects can easily be ascertained.” The fact that the Raiders I court admitted that proving actual anti-competitive harm was “more troublesome” favors the use of a full in-depth market analysis with the burden on the plaintiff. As stated in CDA, it takes an “obvious anti-competitive effect [in order to] trigger abbreviated analysis.” This obviousness was not present in Raiders I.

It seems, using CDA as a model, if Raiders I came to the Ninth Circuit today (with the same analysis), it should be remanded for further in-depth market analysis by the plaintiffs to prove the anti-competitive harm. Under CDA, a court in the same situation could not assume that the plaintiff met its burden as a matter of law. The plaintiff would have to come up with “empirical evidence” of the anti-competitive effects of the NFL’s relocation restrictions without the court aiding the plaintiff with its assumptions. In CDA, the Court showed an aversion to the types of assumptions rampant in Raiders I. Thus, the restoration of this full initial burden on any plaintiff challenging a sports league’s relocation restrictions would be greatly beneficial to that sports league’s case.

In similar vein, under CDA, a court should consider the pro-competitive justifications presented by the sports league without

103. Id. at 770.
104. Id. at 778.
105. See id. at 775 n.12
106. See id. ("Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.").
shifting the burden to the defendant. In *Raiders I*, the third prong of the plaintiff's initial burden, in reality, was shifted to the defendant. *CDA* clearly reinforces the plaintiff's burden and also forces the court to initially factor in the defendant's pro-competitive justifications, making the plaintiff's burden heavier to carry.

e. Ultimate Benefit to the Consumer in *CDA*

*CDA* also teaches another justification that the NFL should be more mindful of in the future, something that Ninth Circuit even pointed out in *Raiders I* and current NFL by-laws stress. In *CDA*, the court points out that the advertising restrictions were meant to benefit the consumer and could even have a net pro-competitive effect because they were meant to protect consumers from potentially deceptive advertising.

In *Raiders I*, the NFL seemed too focused on the effect of competition between teams in the same market because of the relocation. This type of market division can even be considered illegal per se under certain contexts if prices are raised as a result of the division. The NFL changed its by-laws prior to the case to avoid market division scrutiny. The Ninth Circuit nonetheless still fixated on the NFL's market division as its reason for Rule 4.3's existence as opposed to general matters of league control. The court did not focus enough on the potential harm that team relocations could have on the fans, who are the ultimate consumers. The Supreme Court's analysis in *CDA* suggests that a benefit to consumers in the form of valid consumer protection is an important consideration, especially since the Sherman Act was intended to benefit consumers in the first place. In *CDA*, the Court seems to emphasize that the reason behind the restraint was not to economically benefit the defendant,

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107. See id.
108. See supra section III.B.1.a.
109. See *CDA*, 526 U.S. at 770-75.
111. Either it was the NFL actually focusing on this justification or it was the court's focal point because of the previously implemented Rule 4.3. *Raiders I*, 726 F.2d at 1392.
113. *Raiders I*, 726 F.2d at 1392 (“On its face, Rule 4.3 divides markets among the 28 teams . . .”)
114. Hale, *supra* note 72, at 8 (defining “fan support” is the “sports equivalent of consumption”).
but rather to benefit the consumer. Following the same line of reasoning, a sports league should stress that its restraint on franchise relocations is not aimed at putting money into its own pocket, but is aimed at making a better product and pleasing fans.

There is evidence that the NFL has adhered to this fan-friendly justification in its modern restrictions on relocations. Perhaps a sports league in a future antitrust case dealing with a rule that is completely divorced from the market division concerns and truly aims to benefit consumers could rely on CDA to show an overall pro-competitive effect (through consumer protection) of that rule during the plaintiff’s initial burden phase.

2. The SSNIP Test and Its Application in Modern Antitrust Law

a. Origin and Application of the SSNIP test

In 1992, the Department of Justice (DOJ) released a revised version of its horizontal merger guidelines (DOJ Guidelines). The purposes of the DOJ Guidelines are to make transparent the procedure by which the DOJ evaluates mergers for antitrust issues, and to provide more detailed guidelines for its own implementation. Among other things, the guidelines provide a more technical way to analyze the relevant market. Specifically, they stress the interchangeability of substitute products that fit into the same market as the product in question.

Under the DOJ Guidelines approach, the first step in defining the product market is to take the product at issue (a widget, for example) and assume a hypothetical single seller makes all sales of the product. The second step assumes that this seller implements a hypothetical “small but significant and nontransitory” increase in price (SSNIP) to that product. The rule of thumb is that a 5% increase in price usually qualifies as a SSNIP, but this can vary depending on the market at issue (it seems to be up to the DOJ’s...
discretion). Essentially, if enough buyers would buy substitute products to make the price increase unprofitable for the hypothetical seller, then any product that buyers would substitute for the widget when faced with a SSNIP would be considered within the relevant product market of widgets. For example, if a SSNIP imposed on buyers of beef would result in enough consumers switching to pork to make the beef SNIP unprofitable, pork and beef would be in the same product market.

In order to gauge the hypothetical buyers’ reactions to this price increase, the DOJ Guidelines suggest that certain evidence should be taken into account. An evaluator must consider: (1) whether the buyers in the past “have shifted or have considered shifting” to other products in response to price changes; (2) whether sellers base their “business decisions on the prospect of buyer substitution between products in response to relative changes in price;” (3) the “influence of downstream competition faced by buyers in their output markets;” and (4) “the timing and costs of switching products.” Because of the hypothetical nature of the inquiry, these factors are hugely important in determining the results of the SSNIP test.

Using the SSNIP test, a court trying to gauge the product market is forced to do a fairly extensive inquiry into how this hypothetical price increase would affect the product market. It is forced to consider all alternatives and realistically estimate how the consumer would react to the increase in price.

The SSNIP test is also used to test the relevant geographic market. If, upon implementation of a “small but significant and nontransitory” increase in price, consumers would switch to outside locations for substitutions to the product with a SSNIP, then these outside locations are also part of the expanded product market under review.

121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
128. DOJ Guidelines, supra note 118, §1.2.
129. DOJ Guidelines, supra note 118, §1.2.
b. Use of the SSNIP Test in *United States v. Microsoft*\(^{130}\)

In *United States v. Microsoft Corporation*, the D.C. Circuit used the SSNIP test to evaluate the relative product market of Microsoft Windows.\(^{131}\) The United States argued, and the district court agreed, that the product market could not include Mac OS because "consumers would not switch from Windows to Mac OS in response to a substantial price increase" because of new hardware costs.\(^{132}\) Thus, the court relied on the excessive "costs of switching products" factor listed in the DOJ Guidelines in order to discount Microsoft's expanded product market definition.\(^{133}\) The *Microsoft* court's analysis also endorsed the necessity of an extensive inquiry into the question of the product market.\(^{134}\)

The SSNIP test is the centerpiece of product market definitions in many types of modern antitrust cases.\(^{135}\) This has translated into a much more in-depth product market analysis by economic experts on the basis of the SSNIP test than occurred in *Raiders I*.\(^{136}\) As the next discussion will uncover, the analysis portrayed in *Raiders I* is no longer considered to be up to modern day standards in antitrust law simply because the SSNIP was not implemented.

c. Using the SSNIP Test in *Raiders I* and Other Relocation Cases

In *Raiders I*, the jury found, and the Ninth Circuit agreed, that "NFL Football" was the product market.\(^{137}\) The court did not go into any analysis as to how the district court arrived at this narrow

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131. Id. at 52.
132. Id.
133. Id.; DOJ Guidelines, supra note 118, §1.1.
134. Microsoft, 253 F.3d at 52.
136. See Calder et. al, Milton Handler Annual Antitrust Review: Supplement to the 2003 Milton Handler Annual Antitrust Review Proceedings: Committee on Antitrust & Trade Regulation: Ass'n of the Bar of the City of N.Y., 2004 Colum. Bus. L. Rev. 379, 448 (2004) (Sophistication in antitrust cases economic and market analysis has gone up significantly since the mid-1980s); See also Harris & Jorde, supra note 21, at 5.
137. *Raiders I*, 726 F.2d at 1394.
definition or why the Ninth Circuit accepted this definition. There are many unresolved questions with such a general definition of the product market. The district court, with the Ninth Circuit affirming, seems to have approached the question in the wrong way.

Who are the customers of “NFL Football?” There are clearly different markets in which the NFL competes for business. In a modern day analysis using the SSNIP test, those markets would be separated and analyzed individually, otherwise the application of the SSNIP test would make no sense. In order to accurately gauge the product market, the court must take into account other competitors in those markets and whether a SSNIP would induce consumers in those markets to switch products. A fuller market analysis begins with an in-depth breakdown of the actual market and what is being sold.

This breakdown analysis is not a new phenomenon. In Brown Shoe Co. v. United States, the Supreme Court favored the district court’s breakdown of the shoe market into women’s shoes, men’s shoes, and children’s shoes, because these narrow sub-markets better identified the competition for antitrust purposes. In breaking down a product market into its appropriate sub-markets for a more in-depth analysis, the Court gave some guidance:

[t]he boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Many other courts have followed the Brown Shoe sub-market model for determining the relevant product market.

Using these guidelines, the NFL product can be broken down into other sub-markets such as advertising and sponsorships, live attendance ticket sales, television contracts, NFL merchandise, championship games as distinguishable from regular season games, and so on. Once you have the sub-markets, the SSNIP test makes

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138. Besides stating that there is no substitute for NFL football and that the jury’s findings were reasonable, we are given nothing as technical as a SSNIP analysis to investigate why these findings were reasonable.

139. For example: advertising, fans for live attendance, sponsorships, NFL merchandise, championship games as distinguishable from regular season games, etc.

140. 370 U.S. 294 at 325 (1962) (involving a challenge to a merger as potentially illegal under §7 of the Clayton Act).

141. Id.

more sense and is easier to apply. For example, the customer base targeted by the NFL for advertising and sponsorship deals is likely different from the customer base targeted by live attendance ticket sales. While a SSNIP in ticket sales may not deter some sports fans from attending the games, a SSNIP in advertising prices may deter an advertiser with a bottom line who is only trying to reach a certain demographic. The customer/advertisee, when presented with a SSNIP, might determine its ability to reach the same number of individuals within that demographic to be below the increase in price through alternative means. The viable alternatives to a SSNIP in this sub-market could range from sports teams in other leagues to other types of entertainment such as television advertising during other sports events or different types of shows.

In *International Boxing Club v. United States*, the court recognized championship boxing matches as a distinct market from regular boxing matches. Similarly, in a relocation case, *Piazza v. Major League Baseball*, the district court defined the relevant market as the “sports franchise market” because the facts of the case involved the potential sale of sports franchise.

While *Raiders I* did discuss the stadium leasing market in determining the relevant product market, it did not come close to the in-depth analysis a SSNIP test would provide. During the district court trial, Los Angeles Memorial Coliseum argued that the relevant product market was stadiums offered as a venue to NFL teams. On appeal, the Ninth Circuit explored this definition of the product market, but found that the sports market was very complex. Instead of exploring the complexities of the market by looking at sub-markets and reactions to a price increase, the court merely accepted the jury’s finding that NFL football was the product market because of the

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143. However it might deter borderline sports fans, season ticket holders that might not be able to afford the price increase, and companies buying luxury boxes who might be able to turn to other arenas to entertain clients and employees. Why else would teams advertise lower ticket prices to induce more fans to come to the games?
145. This case involved the potential relocation of the San Francisco Giants to Tampa Bay and the MLB’s alleged interference with the move. While the MLB has normally been exempt from antitrust scrutiny, the court found that the antitrust exemption did not apply to the relocation issue at hand.
147. *Raiders I*, 726 F.2d. at 1393.
148. Id. at 1394.
harm to competition caused by Rule 4.3 and then moved on to the rule of reason inquiry.149 If a SSNIP test analysis were used, a modern day case with the same facts as Raiders I could not simply brush over the product market analysis. As a matter of fact, the SSNIP test forces a more extensive look at the market and sub-markets in order for a court to implement the test successfully.

IV. Conclusion

Raiders I was decided over 20 years ago. While Raiders I has not been overruled directly, the Supreme Court has overruled major aspects of its analysis through other precedents in antitrust law. Because of these new developments, Raiders I is not a good candidate for blind reliance as precedent without incorporating the modern antitrust concepts discussed above. Raiders I is out of date and should not control our beliefs about the antitrust nature of sports league franchise relocation rules.

Leagues are hesitant to formulate strict franchise relocation rules in the face of the threat of treble damages.150 My aim in writing this note, however, is to introduce new factors that should be taken into consideration by those sports leagues contemplating a change in their franchise relocation rules. One approach, for example, could be to encourage a more extensive market analysis by these leagues using the SSNIP test, especially in the area of advertising sales. The SSNIP test seems to be a potentially beneficial market definition for a sports league in light of all the money involved in modern sports leagues and all the alternatives available to fans, advertisers, and other clients of the sports league. Further, CDA is of great benefit to a sports league that has been subject to a “quick look” approach in the past. It not only teaches a more extensive market analysis on the part of the plaintiff, it also teaches what pro-competitive justifications (i.e., benefit to the consumer) are valid considerations in evaluating whether or not the plaintiff presented its case.

Obviously, there are lots of factors involved in sports franchise relocation decisions. My only hope is that these new precedents could embolden sports leagues to come up with stricter franchise relocation rules aimed at benefiting the hometown fan, such as myself.

149. Id.
150. See supra note 32.