



NORTHEASTERN UNIVERSITY  
LAW JOURNAL

# Extra Legal

---

## The NFL in Los Angeles?

### Eminent Domain and the Revitalization of Rule 4.3

*A look at tools that may keep a city from losing its NFL team*

*By Michael J. Cullen\**

Sports fans are well-accustomed to their franchises relocating. In the National Basketball Association (NBA), it is why a city with no lakes – Los Angeles, California - has a team called the Lakers, and a city not known for its jazz scene - Salt Lake City, Utah - has a team called the Jazz. In the 1990s, the National Football League (NFL) saw a huge upswing in relocations. In particular, 1995 was a significant year for NFL franchise relocation: the Cleveland Browns moved to Baltimore and became the Ravens, the Houston Oilers moved to Nashville and became the Titans, and the Raiders returned to their original home in Oakland.<sup>1</sup>

---

\* Northeastern University School of Law, Class of 2014; City Year Little Rock/North Little Rock Corps of 2010 & 2011; St. Mary's College of California, Class of 2009. The ideas in this paper stem from the author's experience in Professor Roger Abrams' class on sports law.

<sup>1</sup> Brett Gibbs, *Antitrust and Sports League Franchise Relocation: Bringing Raiders I Into the Modern Era of Antitrust Law*, 29 *HASTINGS COMM. & ENT. L.J.* 217, 218–19 (2007) (citing *BASEketball* (MCA/Universal Pictures, 1998)).

---

Most NFL fans are aware of Los Angeles' attempts to be the destination of the next franchise relocation. At this point, four teams are realistic relocation candidates: the San Diego Chargers, the Oakland Raiders, the St. Louis Rams, and the Jacksonville Jaguars.<sup>2</sup> No matter what franchise moves to Los Angeles, its value is expected to increase substantially. For example, it is believed that a Los Angeles Chargers' franchise would be valued at \$400 million more than a San Diego team.<sup>3</sup> "A team in Los Angeles, even if it is awful, will generate twice as much annual revenue as a team in San Diego. If that team in L.A. is a winner, I'm not sure we have the mathematical capabilities of predicting how much more that franchise would make."<sup>4</sup>

While relocating to Los Angeles would undoubtedly increase a team's profits, franchise relocation negatively affects fans and the city losing its team. For fans, it means the destruction of deeply rooted traditions passed down through generations. For cities, it causes significant economic impacts. On the one hand, franchises bring in money; stadiums alone are the source of employment for a spectrum of citizens beyond the players and coaches, including concession workers, security guards, and the like. On the other hand, the mere threat of relocation can cause significant expenditures for cities. Many cities subsidize NFL teams in the form of favorable lease agreements, construction of practice facilities and stadiums, loans, and direct cash payments.<sup>5</sup> "This is the picture of the current NFL: the owners make demands upon their cities for public subsidies, and if their

---

<sup>2</sup> Albert Breer, *NFL in L.A.? Five teams could move, but nothing's imminent*, NFL.COM, [www.nfl.com/news/story/09000d5d82905f97/article/nfl-in-la-five-teams-could-move-but-nothings-imminent](http://www.nfl.com/news/story/09000d5d82905f97/article/nfl-in-la-five-teams-could-move-but-nothings-imminent).

<sup>3</sup> Kyla Calvert, *NFL Could Charge Hefty Fee For LA Relocation*, KPBS, <http://www.kpbs.org/news/2010/dec/01/nfl-could-charge-hefty-fee-la-relocation/>.

<sup>4</sup> Kevin Acee, *Events Here, Not LA, More Important for Chargers*, SAN DIEGO UNION-TRIBUNE, <http://www.utsandiego.com/news/2012/jul/02/chargers-future-san-diego-depends-more-what-happen/>.

<sup>5</sup> Bradley J. Stein, *How the Home Team Can Keep From Getting Sacked: A City's Best Defense to Franchise Free Agency In Professional Football*, 5 TEX. REV. ENT. & SPORTS L. 1, 3 (2003).

---

demands are not met, they flee to another city willing to offer them favorable terms and unlimited control.”<sup>6</sup>

Multiple factors contribute to the increase in franchise relocations. Increases in player salaries mean owners must seek to maximize profits through other avenues.<sup>7</sup> Yet, the biggest factor may be the weakening of the NFL’s authority – known as NFL Rule 4.3 – to inhibit franchise relocation. NFL Rule 4.3 states that in order for an owner to relocate, they must first get approval of three-quarters of the other owners.<sup>8</sup> This rule has not been enforced since the ruling in *L.A. Coliseum (L.A. Coliseum I)*.<sup>9</sup>

In that case, the Ninth Circuit held that the NFL could not prevent the Raiders from moving to L.A. from Oakland.<sup>10</sup> This case is widely cited as the main authority in franchise relocation, holding that sports leagues’ control over relocation is a violation of the Sherman Antitrust Act.<sup>11</sup> However, inspection of subsequent case law reveals that the Ninth Circuit’s opinion was narrower than originally thought.

*L.A. Coliseum I* made its way back to the Ninth Circuit when the NFL appealed the damages awarded in district court (*L.A. Coliseum II*).<sup>12</sup> The Court vacated the damages and clarified its holding in *L.A. Coliseum I*. “[W]e have determined that Rule 4.3 was found to be invalid *only as it was applied*

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2–3.

<sup>8</sup> *Los Angeles Mem’l Coliseum v. NFL*, 726 F.2d 1381 (9<sup>th</sup> Cir. 1984).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See, e.g.,* Gibbs, *supra* note 1, at 218–19 (citing Travis Tygart, *Antitrust’s Impact on the National Football League and Team Relocation*, 7 SPORTS L.J. 21, 31 (2000)); John Wunderli, *Squeeze Play: The Game of Owner, Cities, Leagues and Congress*, 5 MARQ. SPORTS L.J. 83 (1994).

<sup>12</sup> *Los Angeles Mem’l Coliseum v. NFL*, 791 F.2d 1356, 1359–60 (9<sup>th</sup> Cir. 1986).

to the Raiders' proposed move in 1980."<sup>13</sup> The Court acknowledged that due to "the unique nature of professional athletic leagues vis-à-vis the antitrust laws [...] the nature of NFL football requires some territorial restrictions."<sup>14</sup> Restrictions based on "objective factors such as population, economic projections and the like" would be more likely to pass antitrust scrutiny.<sup>15</sup>

The Ninth Circuit was presented with another franchise relocation case in 1987 involving the then Los Angeles Clippers and the NBA. In 1984, the Clippers moved from San Diego to L.A., and the NBA, not wanting to face damages like the NFL had in *L.A. Coliseum I*, decided not to block the move.<sup>16</sup> Instead, the NBA sued the Clippers, seeking a judicial declaration that the league could, if they chose, lawfully prohibit relocation.<sup>17</sup>

In that case,<sup>18</sup> the Ninth Circuit confirmed that "*Raiders I* merely held that a reasonable jury could have found that the NFL's application of its franchise movement rule was an unreasonable restraint of trade...Neither the jury's verdict...nor the court's affirmance... held that a franchise movement rule, in and of itself, was invalid under the antitrust laws."<sup>19</sup> Furthermore, the Court held that "franchise movement restrictions are not invalid as a matter of law[...] the question of what restraints are reasonable is one of fact."<sup>20</sup>

Together, *L.A. Coliseum II* and *San Diego Clippers Basketball Club* suggest that the NFL, if it desired, could again control franchise relocation. The NFL's reasons for wanting to control

---

<sup>13</sup> *Id.* at 1375 (emphasis added) (internal quotations omitted).

<sup>14</sup> *Id.* at 1373.

<sup>15</sup> *Id.*

<sup>16</sup> PAUL C. WEILER ET AL., *SPORTS AND THE LAW* 619 (4<sup>th</sup> ed. 2011).

<sup>17</sup> *Id.*

<sup>18</sup> *NBA v. San Diego Clippers Basketball Club*, 815 F.2d 562 (9<sup>th</sup> Cir. 1987).

<sup>19</sup> *Id.* at 567.

<sup>20</sup> *Id.* at 568.

---

relocations are numerous. First, the NFL may want to ensure that the least profitable franchise relocates, rather than a middle-tier one wanting to turn a quick profit. Second, the NFL may not want to lose ideal Super Bowl destinations in warm weather cities. Moreover, Commissioner Roger Goodell appears keen on regaining NFL control, as he wrote in a memo to owners “that issues such as approval to relocate[...] must come from the full membership of teams. Any such approval would require a three-quarters vote.”<sup>21</sup>

Even if the NFL declines to utilize Rule 4.3, a city that has an interest in keeping a franchise could take matters into its own hands by taking the franchise via its eminent domain powers. Although this appears extreme, both Baltimore and Oakland attempted it in the 1980s, though they both ultimately failed. In *Mayor and City Council of Baltimore v. Baltimore Football Club*,<sup>22</sup> the federal district court held that Baltimore did not have any legal authority over the Colts because the franchise had moved beyond state lines.<sup>23</sup> Although Baltimore filed an eminent domain action, the city had not yet paid just compensation.<sup>24</sup> The Court held that the mere filing of an eminent domain action gave no power over the franchise.<sup>25</sup>

Oakland lost its eminent domain action on less technical grounds. After summary judgment was granted to the Raiders, the Supreme Court of California reversed, holding that intangible property could be taken as a matter of law (*Raiders I*).<sup>26</sup> The Court held that if a valid public use could be shown, and just compensation paid, “[t]he operation of a sports franchise may be an

---

<sup>21</sup> Sam Farmer, *Roger Goodell gives NFL guidelines for any relocation to L.A.*, L.A. TIMES, <http://articles.latimes.com/2012/jun/29/sports/la-sp-nfl-la-goodell-20120630>.

<sup>22</sup> *Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278 (D.Md 1985).

<sup>23</sup> *Id.* at 284.

<sup>24</sup> *Id.* at 283–284.

<sup>25</sup> *Id.* at 283.

<sup>26</sup> *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982).

---

appropriate municipal function.”<sup>27</sup> Furthermore, the Court noted that it made no difference if Oakland condemned the franchise with the intent of reselling it under California law.<sup>28</sup> This is important because it would probably not be economically feasible for a city to purchase and retain ownership of an NFL franchise.

Unfortunately for Oakland, the case did not end there. On remand the trial court, and later the Court of Appeals, held that a taking of the Raiders would violate the dormant Commerce Clause (“*Raiders II*”).<sup>29</sup> The Court reasoned that because the NFL was involved in interstate commerce and subject to national uniform regulation, it was subject to the Commerce Clause.<sup>30</sup> The Court also rejected the argument that Oakland was exempt from Commerce Clause review under the market participant exception.<sup>31</sup> The reasoning has faced much criticism.<sup>32</sup>

In any future action attempting to take an NFL franchise, *Raiders II* will no doubt be part of the analysis, since it is only one of two cases dealing with franchise relocation. However, future opinions will likely deviate from the *Raiders II* analysis in either the applicability of the dormant Commerce Clause or the inapplicability of the market participant exception.

Future courts should hold that the Commerce Clause is inapplicable. “The appellate court relied on *Partee v. San Diego Chargers Football Company*...in reasoning that an eminent domain action

---

<sup>27</sup> *Id.* at 843.

<sup>28</sup> *Id.*

<sup>29</sup> *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 156 (Cal. Ct. App. 1985) (“Although plaintiff would escape commerce clause review if it had in fact acted as a mere market participant—i.e., if it had attempted to enter the football market on equal footing, bidding with other potential market participants and seeking to purchase from someone willing and able to see—it does not escape commerce clause review in this situation in which its action is grounded on its governmental power of eminent domain that it possesses as an agent of a sovereign, the State of California.”).

<sup>30</sup> *Id.* at 157–58.

<sup>31</sup> *Id.* at 156.

<sup>32</sup> See, e.g., Leon F. Mead, *Raiders: \$7.2 Million, City of Oakland: 0... Was That the Final Gun? A Story of Intrigue, Suspense, and Questionable Reasoning*, 9 LOY. ENT. L.J. 401, 417 (1989).

---

over a football team impermissibly burdens interstate commerce.”<sup>33</sup> However, *Partee* is not analogous.

The *Partee* court reasoned that “since the NFL is involved in interstate commerce and requires national uniform regulation, an award of damages under a state antitrust statute would violate the Commerce Clause.”<sup>34</sup> While employment contracts and the NFL collective bargaining contract affect interstate commerce and therefore require a degree of uniform governance, no burden on interstate commerce arises due a city putting forth an eminent domain action.<sup>35</sup> Regardless of which city takes the team, the league structure would remain intact, whereas in *Partee*, the league’s collective bargaining agreement and employment contracts were at stake.<sup>36</sup>

Even if the Commerce Clause is applied, the market participant exception would be a viable exception. The market participant exception allows a city or state to enter the market even though such participation affects interstate commerce.<sup>37</sup> In *Raiders II*, the Court of Appeals held that Oakland could not receive the market participant exception because it did not enter the market on equal footing and instead used “its governmental power of eminent domain.”<sup>38</sup> However, the Court ignored the nature of professional sports franchise purchases, where open bidding often does not occur and instead one bidder pays a market price that has already been made public.<sup>39</sup> Also, the California Supreme Court typically does not allow for the market participant exception when the state actor has “acted both as a private party by participating in the market and as a regulator by

---

<sup>33</sup> Stein, *supra* note 5, at 25 (citing *Partee v. San Diego Chargers Football Co.*, 34 Cal.3d 378 (1983)).

<sup>34</sup> *Id.*

<sup>35</sup> Stein, *supra* note 5, at 31–32.

<sup>36</sup> *Id.* at 32.

<sup>37</sup> Leon F. Mead, *Raiders: \$7.2 Million, City of Oakland: 0... Was That the Final Gun? A Story of Intrigue, Suspense, and Questionable Reasoning*, 9 LOY. ENT. L.J. 401, 411 (1989).

<sup>38</sup> *Raiders II*, 220 Cal. Rptr. at 156.

<sup>39</sup> Stein, *supra* note 5, at 30.

---

restricting the flow of the product... In none of these cases did the Supreme Court distinguish the means by which the city chose to enter the market.”<sup>40</sup>

If the Commerce Clause applies and a city does not receive the market participant exception, all is not lost. A city would need to argue that the local benefits outweigh the burden on interstate commerce.<sup>41</sup> As for the burden, a city could argue that not only would the NFL schedule remain unaltered,<sup>42</sup> but since the city would most likely resell to another owner, who promised to remain in the city, the structure of the NFL would remain unaltered once the deal was completed.<sup>43</sup> In regard to the local benefits, a city could show that a sports team contributes to the welfare of city residents and offers a sense of community.<sup>44</sup> In addition, the city could argue that a team provides jobs to local residents, assists in tourism, and protects these benefits from owners with only profits in mind.

Before a city loses its NFL team by way of relocation to L.A., multiple legal factors may be at work. First, Commissioner Goodell and other NFL owners may attempt to block the move in order to get the right team, rather than just any team, in L.A. This would expose the NFL up to another antitrust lawsuit, and potentially allow a court to clarify the ability of sports leagues to control franchise relocation.<sup>45</sup> Second, a city faced with losing its team could follow Oakland and Baltimore and pursue the first taking of an NFL franchise since the 1980s.<sup>46</sup> Regardless, what some see as the

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 25 (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978); *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 774 (1945)).

<sup>42</sup> Mead, *supra* note 37, at 415.

<sup>43</sup> Stein, *supra* note 5, 32.

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., Gibbs, *supra* note 1; Mead, *supra* note 37.

<sup>46</sup> See, e.g., Stein, *supra* note 5.

---



football's inevitable return to Los Angeles may be delayed or even stopped by the NFL, a city losing its team, or both. Cities like Jacksonville and San Diego would be wise to explore their legal options.

