NFL Stadiums and Antitrust: Yesterday, Today and Tomorrow

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INTRODUCTION

Vince Lombardi once said that there are three important things in life: family, religion and the Green Bay Packers.1 The truth of the matter is that this holds true to football fans across the nation, and any team in the National Football League (“NFL”) could be substituted for the Green Bay Packers in Mr. Lombardi’s statement. The NFL’s television ratings, game attendance and revenues suggest it is the most popular sports league in the United States.2 However, this popularity has not come without its attendant share of criticism, especially when team relocation is involved. In the past fifteen years, nearly all of the NFL’s member clubs have sought new or renovated stadiums, funded in large part by public dollars, and have threatened to leave their home city in order to have their demands met.

Perhaps the most striking example of such a scenario occurred in 1984, when the NFL’s Colts moved to Indianapolis after over thirty years of playing in Baltimore.3 The Colts’ departure came after years of failed negotiations with the city about the Colts’ asserted need for a new stadium.4 The most stunning aspect of the departure was the way in which it was accomplished. On the day of the move, eminent domain legislation, which could have taken the team from its owner, Robert Isray, was pending and could have become law within the next twenty four hours.5 Accordingly, the owner decided to move before the legislation could become law. However, Isray thought that if they began the move before 5 p.m., the owners of the stadium would attempt to lock the Colts out.6 With these time constraints in mind, the Colts’ accomplished their move under cover of night, employing a small fleet of Mayflower moving trucks and a small group of Colts’ management and employees.7 The move shocked not only the City of

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3. Ken Murray, Dark details readily recalled 10 years after Colts' move, THE BALTIMORE SUN, March 29, 1994, 1C.
4. Id.
5. Id.
6. Id.
7. Id.
Baltimore and NFL fans, but the team’s players and personnel as well.\textsuperscript{8}

Six cities have lost NFL teams since 1983. Many more have suffered threats to leave by team ownership. This trend of teams relocating is often credited\textsuperscript{9} to the landmark case of \textit{L.A. Memorial Coliseum Commission v. NFL} ("Raiders I").\textsuperscript{10} Indeed, when the Colts left Baltimore, owners of NFL teams voted to take no action, citing the multi-million dollar verdict they suffered in the Raiders I case for trying to stop the Raiders from moving from Oakland to Los Angeles.\textsuperscript{11}

In 1978, when the Los Angeles Rams left their city and stadium and moved to Anaheim, California,\textsuperscript{12} the Rams’ former stadium, Los Angeles Memorial Coliseum ("Coliseum"), was left without a tenant.\textsuperscript{13} The Coliseum began to negotiate with other NFL teams in the hope that it could convince a team to relocate.\textsuperscript{14} Rule 4.3 of the NFL’s constitution, however, proscribed any team from changing locations without the unanimous approval of the owners of the other teams in the league.\textsuperscript{15} Claiming that Rule 4.3 was anticompetitive, Coliseum brought an antitrust suit against the NFL.\textsuperscript{16} This suit would be dismissed because, at the time, there was no NFL team committed to moving to Los Angeles.\textsuperscript{17}

The threat of litigation over Rule 4.3 caused the NFL to change its relocation rule to require only three-fourths of member clubs’ votes to approve franchise transfer to a different city.\textsuperscript{18} Nevertheless, when the Oakland Raider’s owner, Al Davis, committed to move his team to Los Angeles, the controversy was renewed after the other NFL team owners voted 22-0 against allowing Davis to move his team.\textsuperscript{19} A

\textsuperscript{8} Ken Murray, \textit{Dark details readily recalled 10 years after Colts’ move}, \textit{The Baltimore Sun}, March 29, 1994, 1C.


\textsuperscript{10} \textit{L.A. Mem’l Coliseum Comm’n v. Nat’l Football League}, 726 F.2d 1381 (9th Cir. 1984).

\textsuperscript{11} Robert Thomas Jr., \textit{Colts Move to Indianapolis is Announced}, \textit{The New York Times}, March 30, 1984, 23A.

\textsuperscript{12} See \textit{L.A. Mem’l Coliseum Comm’n v. Nat’l Football League}, 726 F.2d 1381, 1384 (9th Cir. 1984).

\textsuperscript{13} \textit{Id.} at 1384.

\textsuperscript{14} \textit{Id.} at 1384.

\textsuperscript{15} \textit{Id.} at 1385.

\textsuperscript{16} \textit{Id.} at 1385.

\textsuperscript{17} \textit{Id.} at 1385.

\textsuperscript{18} \textit{Id.} at 1385.

\textsuperscript{19} \textit{Id.} at 1385.
jury found the NFL liable for antitrust violations, and the court imposed monetary penalties in excess of fifty million dollars.\textsuperscript{20}

To some, the reaction to the case was that the little guy won and that a monopolist was being punished for its behavior. Many critics point out, however, that what happened was really a loss for the littlest guy of all—the consumer—and, in the case of publicly financed stadiums, the taxpayer.\textsuperscript{21} The real winners, they argue, were the NFL team owners, who had now struck a blow against the NFL’s ability to stop them from relocating their teams. The loss for the NFL gave owners a newfound power, because ownership threats to relocate were now more credible than before. No longer could local governments expect significant support from the NFL in resisting ownership plans for relocation. In negotiations with local governments, the owners’ new power translated into more dollars promised for new or refurbished stadiums for their teams.

\textit{Raiders I} had long lasting implications,\textsuperscript{22} but some more recent antitrust actions against the NFL may be curing the wounds the NFL incurred in its battle against the Raiders over two decades ago. The most recent action against the NFL ended quietly in February of 2006 when an action by the taxpayers of Hamilton County, Ohio, was dismissed based on statute of limitations violations. In that case, taxpayers had brought suit against the NFL’s Cincinnati Bengals (“Bengals”) because they had come to believe that the team had attempted to “shake down” the taxpayers, not for its economic survival, as the team had claimed, but to enrich the team’s owners.\textsuperscript{23}

The death of the Hamilton County case provides an opportunity to reflect on the current state of stadium negotiations between NFL teams and their actual or potential home cities. This note first looks at the history of stadium financing in professional football, then discusses some other factors that contribute to the present state of affairs. The second part of this note looks at some prior antitrust actions involving the NFL and team relocation. The next section turns to the case between Hamilton County and the Cincinnati Bengals. 

\begin{footnotes}
\item[20] Id. at 1359.
\item[22] Id.
\item[23] This may or may not be true. From financial disclosures the NFL was forced to make in 1999, it seems that the NFL has come to rely on its sports subsidies to the extent that they must be subsidized, in part, to remain competitive, both financially and on the field, with other teams. However, this is not discussed in this note. For more information on the disclosures, see Alan Abrahamson & Sam Farmer, NFL Ledgers Reveal Profits Depend on New Stadiums, \textit{LA TIMES}, May 13, 2001.
\end{footnotes}
nally, the note looks forward, discussing some current issues and what the Hamilton County case portend about the future.

II. HOW WE ARRIVED AT WHERE WE ARE TODAY

A. The History of Stadium Finance

The growth of professional sports near the turn of the nineteenth century gave rise to the need for stadiums. The NFL was originally founded as the American Professional Football Association in 1920, while Major League Baseball ("MLB") was formed after the National and American Leagues combined in 1903.

Stadiums for these fledgling leagues were originally privately financed and owned. The entrepreneurial owners of the professional sports teams needed a venue to put on their "exhibitions of sport." At the time, sports had not yet captured the nation's attention in the way they have today. This practice of private financing continued until 1924. In that year, Los Angeles, competing to host the 1924 Olympics, funded the construction of the L.A. Coliseum through taxpayer dollars as a means to attract the Games to the city. It was the first stadium funded in such a way, and it started a trend that continues almost unabated today.

Shortly after the L.A. Coliseum was built, Chicago and Cleveland built stadiums in an attempt to attract the Olympics. Although politicians promised that the stadiums would pay for themselves, some, such as the mayor of New York in 1947, warned of the dangers of subsidizing privately owned sports teams, claiming that if professional sports leagues had their stadiums subsidized by the City, all types of businesses would demand similar concessions.

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28. Id.
31. Id.
32. Id.
34. Keating, supra note 24.
ertheless, by the 1950's, taxpayer funded stadiums had become commonplace.\textsuperscript{35}

Today, city, county and state governments employ a multitude of creative taxes to pay for stadiums. Approximately fourteen billion taxpayer dollars have been spent over the last twenty years building such stadiums and arenas.\textsuperscript{36} Some use an alcohol and cigarette tax, otherwise known as a "sin tax."\textsuperscript{37} Others have used hotel taxes and rental car taxes, thereby placing the burden of stadium finance on tourists and business travelers.\textsuperscript{38} Milwaukee imposed a five countywide sales tax to pay for its stadium.\textsuperscript{39} In Florida, the NFL's Miami Dolphins received a $60 million sales tax rebate for their stadium.\textsuperscript{40} Hamilton County voters in Ohio approved a half-cent sales tax increase in 1996 to pay for Paul Brown Stadium and MLB's Cincinnati Reds' Great American Ball Park.\textsuperscript{41} Similarly, the Dallas Cowboys and the Kansas City Chiefs recently became the beneficiaries of voter-referendum-approved fractional sales tax increases to fund a new stadium in Arlington, Texas, and to refurbish Arrowhead Stadium in Kansas City, Missouri.\textsuperscript{42}

\textbf{B. Self Imposed Scarcity}

Many argue that the NFL benefits from a self-imposed scarcity of teams—that by having fewer teams than the market demands, NFL teams are able to threaten relocation when bargaining for new facilities. In \textit{No Team, No Peace: Franchise Free Agency in the National Football League},\textsuperscript{43} Katherine C. Leone argues that the NFL's control over professional football give it the bargaining power it needs to "elicit wide-ranging concessions from local governments to the detri-
ment of taxpayers and fans.” This negotiating power, she asserts, comes as a result of the NFL’s special treatment under the federal antitrust laws and the NFL’s control of the number of franchises it allows to enter the league. Ms. Leone cites a study that argues that in 1990, when the league had a total of 28 teams, it could have supported 42. This contention was based on the fact that Buffalo was the NFL team with the smallest market and there were 14 larger markets at the time. Perhaps this idea of an artificial scarcity is supported by the fact that Los Angeles, the second largest city in the nation, with the second largest national television market, has gone 11 seasons without a NFL franchise in its city. As Jerry Richardson, the owner of the Carolina Panthers, said in 1995: “[w]e have the most popular sport franchise in the world and there’s only thirty of them. There are a lot of places that want one.”

This is not to say that every market that could possibly support a team should receive one. There are reasons to restrict entry. In *Mid-South Grizzlies v. National Football League*, a case about a team that was not allowed in the NFL, the NFL produced several reasons for not allowing the Grizzlies into the league. It argued that allowing another team in the league would create scheduling difficulties. Further, it argued that ongoing labor disputes and other unresolved litigation made it unwise to allow additional teams into the league at the time. An interesting aspect of the *Mid-South Grizzlies* decision was it pointed out that allowing another team in the league would not necessarily benefit the consumer—that it would not necessarily bring down prices through increased competition. For example, adding a new franchise in Los Angeles would not bring down ticket prices in Chicago. Competition would only increase, the court noted, if the prospective team were to enter a market in which it would actually compete with other teams for tickets, local broadcast rights, or the like.

44. Id.
45. Id.
46. Id.
47. Leone, supra note 21, at n. 44.
50. 720 F.2d 772 (C.A.Pa.,1983).
52. Id.
53. Id. at 787.
54. Id.
While this observation may be true to some extent, it should not detract from the fact that when there is a vacant city, NFL owners are quick to use them for leverage in stadium negotiations. Should a city want to retain its NFL team, that team, leveraging its scarcity, shows that there are other cities willing to build and publicly subsidize a stadium in order to attract them. In turn, franchises demand that either their current city pay the bill for new or upgraded facilities, or face the prospect of losing its NFL team.

This bargaining power is multiplied by the fact that the NFL is usually dealing with elected officials—politicians afraid of losing a sports team while they are in office. The politicians are up against other local governments, willing to invest substantial sums of money in the hope they can attract a team to their city, so they can enjoy the status of a "major league city." The fact is, many cities, if not all of them, consider their professional sports teams as a source of civic pride they are unwilling to do without. Six cities have lost NFL teams since 1983; Oakland in 1983, Baltimore in 1984, St. Louis in 1988, Los Angeles, which lost two teams in 1995, Cleveland in 1997, and Houston in 1997. All but Los Angeles have franchises again, and Los Angeles is certainly not missing an NFL team for lack of trying; billionaires, politicians and movie stars have been trying to get the NFL back in Los Angeles ever since the city lost its teams. These losses have not come without attendant prices, either. Three years after St. Louis lost the Cardinals for failing to allocate $120 million for a new stadium, the voters approved $280 in public funding for a new stadium. Oakland, Baltimore and Houston each increased their public funding offers by one third after losing their franchises. The situation faced by the Hamilton County taxpayers in dealing with the Bengals seems to serve as a good example of stadium negotiations in the NFL. Sometime around 1993, Mike Brown, the owner of the Cincinnati Bengals, began to argue that in order to stay competitive in the NFL his team would need a new stadium. "During a 1995

56. Phelps, supra note 37.
59. Rappaport & Wilkerson, supra note 57.
60. Id.
owners’ meeting held to discuss franchise movement, Mike Brown declared that the City of Cincinnati had breached its lease agreement by tendering $167,000 in concession receipts from a game one week late, allowing the Bengals to seek relocation.” A month later, Brown said that if a new stadium was not forth-coming, moving to Los Angeles was a “real possibility.”

Baltimore, in the meantime, had offered to build a $200 million stadium for the Bengals and offered to pay $44 million in assured income. “Armed with this offer, Mike Brown levied an ultimatum on June 24, 1995: If Cincinnati and Hamilton County did not agree to a new stadium deal within five days, the Bengals would begin relocation negotiations with Baltimore.” Not long after, the Bengals had the stadium deal they sought from Cincinnati.

C. Revenue Sharing

The NFL’s revenue sharing scheme has widely been credited as a reason for the NFL’s success. By sharing revenue, small-market teams, such as the Green Bay Packers and Buffalo Bills, have the money to compete with big-market teams, such as the New York Giants, in terms of attracting top tier talent that helps maintain a competitive balance around the league and, as a result, continued interest from fans around the nation in their local team. Of over five billion dollars in annual revenue, approximately three billion dollars is distributed equally among the NFL’s member clubs. This means that each team starts out with a base of about $100 million from the NFL’s television and radio contracts, national sponsorships, and portion of each team’s ticket revenues. With so much shared revenue, it is often what teams do with their unshared revenue that makes a team a financial success.

An NFL team can direct unshared money to many causes. For example, an NFL team with more revenue can attract high-end players, allowing it to bring in more fans, compete for championships and sustain profitability. It is certainly common for teams to claim that they

62. Id.
63. Id.
64. Id.
65. Id.
67. Id.
68. Id.
need to increase independent revenues to be competitive; discussing
the relationship between exempt revenue and team performance,
Kansas City Chiefs' President Carl Peterson said “[t]he disparity is
real” and “it is widening.”70 Some statistics support this conclusion.
Of the eleven teams with the lowest revenue in 1999, only three made
the playoffs.71 In the four years prior to 1999, three out of four teams
that made the Super Bowl had recently moved into new or renovated
stadiums.72

These claims, however, can be refuted by other statistics. The
Washington Redskins, who have one of the highest revenue streams in
the NFL, at approximately $245 million in 2004, have seldom seen a
winning season since Dan Snyder took over in 1999.73 Eight of the
teams in the twelve team playoff field in the 2004-2005 season were
ranked in the bottom half of revenue production in the league the
previous year,74 and the owner of the Houston Texans, Bob McNair,
believes just the opposite of Carl Peterson of the Chiefs, and claims
that there is no correlation between high-revenue producing teams
and winning percentages.75

Regardless of the statistics, many teams focus on the structure of
their stadiums as a way to garner higher independent revenue streams.
Under the NFL’s revenue sharing agreement, team owners have con-
siderable incentive to put their team in a stadium with more skyboxes,
club seats and personal seat licenses because they are exempt under
the NFL revenue sharing agreement.76 Typically, luxury boxes will sell
for $50 thousand to $175 thousand per season, and new stadiums will
have hundreds of them.77 In addition to luxury seating, teams may be
offered valuable assets not counted in the revenue sharing agreement,
such as ownership of practice facilities or even the stadium itself.78

This scheme of revenue sharing obviously gives a team incentive to
seek a new stadium. From a fan and taxpayer perspective, the reve-

70. Id.
71. Id.
72. Id.
73. Mark Maske & Thomas Heath, NFL’s Economic Model Shows Signs of Strain, WASHING-
74. Id.
75. Id.
76. Mildred Wigfall Robinson, Public Finance of Sports Stadia: Controversial but Permissi-
    ble. .Time for Federal Income Tax Relief for State and Local Tax Payers, 1 VA. SPORTS & ENT.
    L.J. 135, 144 (2002).
77. Alan Abrahamson & Sam Farmer, NFL Ledgers Reveal Profits Depend on New Stadi-
78. M. COZZILLO ET AL., SPORTS LAW, CASES AND MATERIALS 566 (Carolina Academic
    Press 1997).
nue sharing agreement is poorly modeled because it has given NFL teams a greater incentive to seek new and improved facilities. If these exempt revenues were shared, one could argue, each team’s incentive to seek a new stadium would be reduced, by a certain degree, because the teams would not reap the same benefits they do under the current scheme.

III. Antitrust Law and The NFL

A. L.A. Memorial Coliseum Comm’n v. NFL

As discussed in the introduction, L.A. Memorial Coliseum Comm’n v. NFL ("Raiders I") was perhaps the most famous, or infamous, antitrust case involving team relocation. The case left the NFL unsure of its ability to prevent team owners from relocating their franchises.

In Raiders I, a jury found that the NFL had violated the antitrust laws, for which damages of nearly fifty million dollars were imposed against the NFL. The antitrust liability was based on the NFL’s rules regarding team relocation, which required three-fourths of member clubs’ votes to allow a team to transfer a franchise to a different city. The jury found this rule was an anticompetitive agreement under the antitrust laws.

On appeal, the Ninth Circuit’s opinion reviewed the NFL’s relocation rule under the Rule of Reason. Normally, it noted, an agreement between competitors to divide territories would be per se illegal. However, the court found, the unique structure of the NFL prevented such an application of the per se rule, and it opted to use the Rule of Reason instead. The court used the Rule of Reason to examine the NFL’s relocation rule and determine if it reasonably served the legitimate concerns of the parties or instead allowed them to take in excessive profits at the public’s expense. As discussed above, the Court affirmed the judgment entered by the trial court, leaving the NFL wounded for years to come.

80. Id. at 1385.
81. Id. at 1392.
82. Id. at 1392.
83. Id. at 1392.
B. St. Louis Convention & Visitors Comm'n v. National Football League

In St. Louis Convention & Visitors Comm'n v. National Football League,\(^8\) the United States Court of Appeals for the Eighth Circuit was faced with a situation where a team had actually moved. In the St. Louis case, the plaintiff claimed that, as a result of an anti-movement “atmosphere” in the NFL, it was forced to accept unfavorable lease terms with the NFL’s Rams.

In 1988, St. Louis’ football team, the Cardinals, moved to Phoenix.\(^5\) The Missouri legislature gave the St. Louis Convention & Visitors Commission (“CVC”) the job of finding a new team by 1995.\(^6\) The city built a new football stadium in downtown St. Louis to attract a team. In 1993, after failing to attract one of the NFL’s expansion franchises, CVC began to court established NFL teams, eventually reaching an agreement with the Los Angeles Rams.\(^7\)

When the proposed relocation was presented to the NFL member clubs, they initially voted against it. After further negotiations, the Rams agreed to pay the NFL fee of $29 million for moving, of which the CVC would pay $20 million.\(^8\) While St. Louis was happy to have an NFL team again, the honeymoon did not last long. In the first year of play, the CVC was unable to meet its financial obligations.\(^9\) It subsequently filed suit against the NFL and its member clubs, agreeing to split any verdict or settlement with the Rams.\(^10\)

CVC’s theory was that the NFL violated antitrust laws because its relocation rule, which provides that three-fourths of the member clubs must approve a relocation before it could take place, and “the accompanying guidelines [for voting under Rule 4.3], and their application over time functioned as an agreement among the league and the individual teams to restrain relocations, creating an atmosphere which deterred teams from moving and therefore from bidding on the [football

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\(^8\) St. Louis Convention & Visitors Com’n v. Nat’l Football League 154 F.3d 851 (8th Cir. 1998).
\(^9\) Id. at 853.
\(^10\) Id. at 853.
stadium's] lease." The CVC claimed damages of $77 to $122 million.\textsuperscript{92}

Prior to trial, the court held that "CVC would . . . have to offer proof that the alleged conspiracy to suppress movement of teams in fact caused the absence of competing bids on the Trans World Dome lease before a jury would be permitted to decide whether harm to competition, caused by Article 4.3 and its enforcement, outweighed the positive effects on competition."\textsuperscript{93} This was because, the district court reasoned, "CVC's claim was unlike cases alleging damage from a direct application of a regulation," and there was nothing to suggest there was an explicit ban or limit on competitive bidding for leases.\textsuperscript{94}

After the CVC presented its case, the NFL moved for judgment as a matter of law on CVC's claim that the NFL had violated Section 1 of the Sherman Act.\textsuperscript{95} Granting the NFL's motion, the court found that CVC had not presented any evidence that Rule 4.3 or its guidelines "actually had caused league teams other than the Rams to refrain from competitive bidding on the Trans World Dome lease."\textsuperscript{96}

On appeal, the Eighth Circuit stated that "analysis of whether a restriction's harm to competition outweighs any procompetitive effects is necessary if the anticompetitive impact of a restraint is less clear or the restraint is necessary for a product to exist at all."\textsuperscript{97} To prevail in its case, the court stated, CVC would have had to prove "(1) there was an agreement among the league and member teams in restraint of trade; (2) it was injured as a direct and proximate result; and (3) its damages are capable of ascertainment and not speculative."\textsuperscript{98} This evidence would have to exclude the possibility that the NFL and its member teams acted independently.\textsuperscript{99} The court found CVC failed to do this at trial. With respect to the causation element that the district court actually rested its judgment on, the Eighth Circuit found that CVC would have had to show that prior suppression of team move-

\textsuperscript{91} St. Louis Convention & Visitors Com'n v. Nat'l Football League 154 F.3d 851, 856 (8th Cir. 1998). In the wake of the \textit{L.A. Memorial Coliseum Commission} case, the NFL had adopted "objective" guidelines that NFL owners were to follow when deciding to vote on a proposed relocation of another member club. \textit{Id.} at n. 3. These guidelines were suggested by the Ninth Circuit so that the NFL could prevent future scrutiny of the NFL's relocation rule. \textit{Id.} at n. 3.

\textsuperscript{92} St. Louis, 154 F.3d at 856.

\textsuperscript{93} \textit{Id.} at 857.

\textsuperscript{94} \textit{Id.} at 857.

\textsuperscript{95} \textit{Id.} at 858-859.

\textsuperscript{96} \textit{Id.} at 859.

\textsuperscript{97} St. Louis Convention & Visitors Com'n v. Nat'l Football League 154 F.3d 851, 861 (8th Cir. 1998).

\textsuperscript{98} \textit{Id.} at 862.

\textsuperscript{99} \textit{Id.} at 862.
ment and the anti-movement atmosphere “effectively prevented all other teams from dealing with CVC” on the lease.\textsuperscript{100} Again, this was something CVC had failed to show at trial.\textsuperscript{101}

C. Cases Compared

The cases of \textit{St. Louis} and \textit{Raiders I}\textsuperscript{102} are interesting to compare in that they both dealt with stadium relocation, and in both the stadium to which a team wanted to move was the plaintiff, yet the outcomes were completely different—mainly, one could argue, because of the way the pleadings and theories of the case stood. In \textit{Raiders I}, the question was whether Rule 4.3 was anticompetitive;\textsuperscript{103} in \textit{St. Louis}, it was not only Rule 4.3 that was questioned, but whether Rule 4.3 and guidelines for voting under Rule 4.3 created an atmosphere in which other teams did not even attempt to negotiate a lease with CVC.\textsuperscript{104} Thus, the CVC plaintiffs did not even have proof of an agreement in their case.

According to the Eighth Circuit, the crucial difference between the case before it and others was that CVC had not challenged a vote by NFL team owners or a particular application of the NFL’s rules.\textsuperscript{105} Further, it had obtained the team that it sought. CVC’s complaint was focused on market conditions and an atmosphere created by the NFL’s rules.\textsuperscript{106}

In \textit{Raiders I}, the court said that it was obvious that “the purpose of Rule 4.3 was to restrain competition among the 28 [NFL] teams.”\textsuperscript{107} It then went on to consider whether the rule actually harmed competition or whether its procompetitive benefits outweighed any harm the Rule caused because “some agreements which restrain competition may be valid if they are ‘subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.’”\textsuperscript{108} Much to CVC’s chagrin, the court in \textit{St. Louis} would never reach this step in its analysis. In order to prove that the NFL was

\begin{footnotesize}
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\item[100.] \textit{Id.} at 862.
\item[101.] \textit{Id.} at 862.
\item[102.] 726 F.2d 1381 (9th Cir. 1984).
\item[103.] L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1386 (9th Cir. 1984).
\item[104.] \textit{St. Louis Convention & Visitors Com’n v. Nat’l Football League} 154 F.3d 851, 856 (8th Cir. 1998).
\item[105.] \textit{Id.} at 861.
\item[106.] \textit{Id.} at 861.
\item[107.] L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984).
\item[108.] \textit{Id.}; internal quotes from United States v. Addyston Pipe & Steel Co., 85 F. 271, 281-282 (6th Cir. 1898).
\end{itemize}
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acting pursuant to a conspiracy, CVC had to exclude the possibility that other NFL teams were not bidding on the lease offered by the CVC for independent reasons. The court found that CVC failed to prove the teams were acting pursuant to a conspiracy because they failed to exclude the possibility of independent action.

IV. THE HAMILTON COUNTY CASE

The controversy in Hamilton County Board of Commissioners v. National Football League ("Hamilton County") stemmed from taxpayer unhappiness with the terms of their lease, signed in 1997, for a new stadium built for the Cincinnati Bengals. A series of news articles detailed just how good a deal the Bengals got on their new stadium and just how much the taxpayers were actually paying for it. For example, an article published in May of 1998 in the Cincinnati Business Courier began by stating "[w]hen the Cincinnati Bengals signed a preliminary lease agreement for a new stadium in September of 1996, team owner Mike Brown joked that his team had finally found a squad it could beat: Hamilton County." That was followed by a quote from an economics professor who opined that "Hamilton County [was] left with one of the most heavily exploitative leases in the NFL." An analysis by the Cincinnati Business Courier showed the Bengals' twenty-six year lease gave the team approximately ninety percent of the nearly two billion dollars in revenue that the stadium would produce and required the team to pay only about three and a half percent of the approximately one billion dollars in predicted expenses for the stadium, while leaving Hamilton County with deficits from five to seven million dollars per year. Another article, published in the Los Angeles Times in May 2001, revealed the high profit margins of NFL teams, calling into question the tactics the Bengals used in negotiating their stadium deal. Not long after, the Hamilton County taxpayers filed suit.

109. Id. at 861.
110. Id. at 861.
114. Id.
115. Id.
117. Monk, supra note 114.
The lawsuit accused the NFL and the Bengals of, among other things, using their monopoly over professional football to extort huge subsidies from the county taxpayers to build Paul Brown Stadium. Specifically, the Hamilton County taxpayers alleged that the NFL’s strict control over the number of franchises in the league, its prohibition against public ownership and its disregard of guidelines instituted to prevent antitrust violations gave teams tremendous leverage to extract excessive monies for stadium deals.

The case was ultimately dismissed on the grounds that it was filed after the statute of limitations passed. The plaintiff filed its case against the NFL and its member clubs in May of 2003. The injury, however, occurred on May 29, 1997, when the lease for Paul Brown stadium was executed. Thus, the defendants alleged in their motion for summary judgment, unless something, such as a fraudulent concealment of the plaintiff’s cause of action against the defendants was present, the statute of limitations had run out four years after the execution of the contract, on May 29, 2001, and the plaintiff’s cause of action was no longer viable. The court had found that the league and team owner had possibly made misrepresentations about the Bengals’ financial position, and let the case proceed into discovery.

While the case proceeded in discovery, the named plaintiff was switched from the Hamilton County taxpayers to the Hamilton County Board of County Commissioners (“Board”). Interestingly, this substantially changed the nature of the proceedings. The question about fraudulent concealment was no longer about what was concealed from the taxpayers, but what was concealed from the Board. The discovery process revealed that the Board was very well informed of the team’s financial situation at the time the lease was signed in 1997.

In ruling that no fraud had occurred, and, consequently, that the statute of limitations had passed, the court found it significant that several of the commissioners were aware the Bengals were a highly

120. See *Defendants’ First Motion for Summary Judgment (Antitrust Statute of Limitations)* at 1, No. 1-03 355 (S.D. Ohio 2003).
121. *Id*.
122. *Id*.
124. *Id*.
125. *Id*.
profitable venture throughout the lease negotiations and, thus, would have known about the alleged fraud prior to and at the time of the lease signing.\textsuperscript{126} The Board was also aware of the antitrust litigation stemming from the relocation of the Rams to St. Louis.\textsuperscript{127} One of the commissioners, at a hearing prior to the execution of the lease, stated that he had talked to Mayor Daley of Chicago and Mayor Schmoke of Baltimore, who expressed the sentiment that the NFL was doing nothing less than "extorting" money from them.\textsuperscript{128} These things, the court found, made the Board aware of exactly what was going on and that the NFL and the Bengals made no misrepresentations during the parties' negotiations for the stadium.\textsuperscript{129} The court concluded its opinion by saying:

It may even be that this lease was the consequence of unlawful anticompetitive behavior by the Bengals and the NFL. Despite these truths—if they be truths—this Board cannot advance stale claims. Whether for good or ill, prior members of the Board negotiated the instant lease with the Bengals fully aware of the possibility that the team and the NFL allegedly wielded unlawful antitrust power to obtain favorable terms under the lease. They simply failed to object or to otherwise advance a claim... until it was lost to the passage of time.\textsuperscript{130}

V. Today and Tomorrow

The NFL is dynamic and constantly changing. What litigation has transpired in the past does not necessarily foretell the future. For example, in March of 2006, the NFL and the NFL's Player's Association reached an agreement on their collective bargaining agreement that included an approval of a concept of heightened revenue sharing.\textsuperscript{131} More revenue sharing, among other changes, are issues that may have a strong impact on the NFL and its member clubs' behavior and, consequently, antitrust implications in future lawsuits.

A. Emerging Trends

The approval of heightened revenue sharing could, in theory, ensure that parity in NFL competition continues into the future. At the

\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Hamilton County Bd. of Comm'rs v. Nat'l Football League, 445 F. Supp. 2d 835 (S.D. Ohio 2006).
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} UPI NewsTrack Sports, March 9, 2006.
time of this publication, however, the NFL’s team owners have not reached a final agreement on the new revenue sharing structure. Several NFL member clubs are opposed to heightened revenue sharing.

Led by Dan Snyder of the Washington Redskins and Jerry Jones of the Dallas Cowboys, NFL owners are claiming that the current revenue structure takes away from NFL teams’ incentive to maximize profit independently. Stadium naming rights is one example of opportunities that some NFL teams have failed to take advantage of. The Arizona Cardinals recently sold the naming rights to their stadium for approximately $150 million over twenty years. The Houston Texans sold their naming rights for a whopping $300 million over thirty two years in 2002. Conversely, the Cincinnati Bengals and the Buffalo Bills, both relatively small market teams, have not sold the naming rights to their stadiums. Owners opposed to heightened revenue sharing believe that before they are forced to give up a larger percentage of their team’s revenue to smaller-market teams, those teams should exploit opportunities to increase their revenues independently.

While a new or refurbished stadium can increase a team’s revenue, the construction of new or refurbished stadiums has an interesting side effect. It feeds a cycle. Building a stadium increases other teams’ need to have a new or refurbished stadium. When a new stadium is built that brings in higher revenues, those revenues count toward the total amount of revenue shared among the league’s players, so it increases each NFL team’s labor costs. For example, the new stadium for the NFL’s New York Giants and Jets is expected to cost each team in the NFL an additional two million dollars per year in labor costs. Thus, when one team builds a stadium that increases revenues, it places a higher burden on all teams in the league and creates the need for other teams to increase their revenues.

Revenue sharing is not the only thing changing. Stadiums have become significantly more expensive than they were in the past. The joint stadium planned by the Jets and Giants as well as the new stadium for the Dallas Cowboys have price tags hovering around one

134. Id.
135. Id.
137. Id.
billion dollars. Most cities simply cannot afford to allocate so much money to an NFL team. The NFL’s New England Patriots’ new stadium was financed mainly by private monies, and the Jets/Giants proposed stadium will also be privately financed. In turn, teams are turning to other revenue sources, such as commercial developments around their new stadiums, to decrease the up-front costs associated with stadiums. While this may be the result of the increased costs of stadiums, the fact that the public has become wary of financing team stadiums most likely plays a role in the decision as well. For example, Seattle voters recently passed an initiative to block public monies from being spent on stadiums to support professional sports franchises.

The changes in revenue sharing and the way stadiums are financed may have a big impact on antitrust litigation in the future. For example, the NFL has persistently argued, albeit unsuccessfully, that it is a single entity for purposes of antitrust, which makes it exempt from liability under Section 1 of the Sherman Act. The cornerstone of a Section 1 claim is an allegation that two or more distinct entities entered into an understanding or agreement to take joint action against a plaintiff to achieve an unlawful objective. Accordingly, if the NFL were found to be a single entity for antitrust purposes, it would be exempt from this section of the Sherman Act.

As the Eighth Circuit Court of Appeals stated in *Mt. Pleasant v. Associated Elec. Coop., Inc.*:

A conglomeration of two or more legally distinct entities cannot conspire among themselves if they pursue the common interests of the

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140. Christopher Carey, *Two Privately Financed Stadiums May Hold Lessons for Cardinals; Homes of Patriots and Giants Have Features that Cut Risk, Saved Money*, ST. LOUIS POST-DISPATCH, September 29, 2002 (Patriot’s used private money to build their new stadium with limited public money for road and sewer work); Mark Maske, *Two Teams, One Major Request; Giants, Jets Seek Loan From NFL for New Stadium*, THE WASHINGTON POST, November 18, 2006.


142. Id.

143. Id.


whole rather than interests separate from those of the group itself because such coordination does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not activity that warrants § 1 scrutiny . . . The thrust [of case law] is that economic reality, not corporate form, should control the decision of whether related entities can conspire.146

Should NFL teams begin sharing more revenue and become more interdependent, the NFL will strengthen its argument that it acts as one single economic entity that is exempt from antitrust regulation under Section 1 of the Sherman Act.

The fact that teams are privately financing stadiums may also have a large impact on antitrust claims related to stadiums in the NFL. Teams that own their stadiums need not fear retaliation from the public under the antitrust laws. Should private financing by the team become the norm, antitrust litigation on this front could become a relic of the past.

B. Looking to the Future

1. Introduction

The NFL certainly had reason to regain a bit of the swagger it lost as a result of the Raiders I decision after its success in the St. Louis case as well as in Warnock v. National Football League, in which a court found a taxpayer did not have standing to challenge Allegheny County's expenditures and lease arrangements on Heinz Stadium, discussed infra. Indeed, the defendants in the St. Louis case were awarded nearly $100,000 in costs incurred as a result of CVC's suit.147 And the NFL certainly has reason to be happy the Hamilton County case was dismissed. Had the case gone to trial and Hamilton County taxpayers received a favorable verdict, it would have been a watershed moment for stadium negotiations. In theory, the case could have reversed what many found wrong with the Raiders I decision. Rather than giving the victory to the NFL owners, it would have gone to the taxpayers of Hamilton County or, at least, Hamilton County's treasury. Some estimated the damages of the case could have approached one billion dollars.148 However, before the NFL rests it must consider an important implication of the Hamilton County case. The fact that a

taxpayer was found to have standing in *Hamilton County* is substantial, and it could breed similar litigation against the NFL in the future.

2. **Standing in Hamilton County and Warnock**

The case brought by Hamilton County taxpayers was unique because it withstood an initial challenge to dismiss for lack of standing. A case involving similar allegations, *Warnock v. National Football League*,\(^{149}\) was dismissed in 2005 for lack of standing. *Warnock*, filed by a taxpayer in Allegheny County against the NFL and its member teams, similarly alleged antitrust violations in obtaining funding for the Pittsburgh Steelers' Heinz Field.

Both the *Warnock* and *Hamilton County* courts agreed on the broad doctrines of standing. Generally, a person cannot bring a lawsuit claiming to have suffered injury solely in his or her capacity as a taxpayer.\(^{150}\) Article III of the Constitution limits the “judicial power” of the United States to the resolution of “cases” and “controversies”\(^ {151}\) and in order to bring a lawsuit, an individual must have standing—a blend of Constitutional requirements and prudential considerations.\(^ {152}\)

In order to satisfy Article III of the Constitution, the plaintiff must show that he or she has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the defendant.\(^ {153}\) The Supreme Court has held that failure to allege any actual injury beyond a generalized grievance common to all taxpayers is not sufficient to warrant taxpayer standing.\(^ {154}\) Additionally, the plaintiff must generally assert his own legal interests and not those of third parties.\(^ {155}\)

The *Warnock* court assumed, for purposes of the motion to dismiss, that there was an injury—that the taxpayer's dollars were misspent and that a favorable decision would redress that injury.\(^ {156}\) What the *Warnock* court could not find was that the plaintiff's alleged injury was “fairly traceable to the conduct” of the NFL and its member

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\(^{151}\) *Id.* at 471.

\(^{152}\) *Id.* at 471.


The court stated "[p]laintiff in effect alleges that defendants committed an antitrust violation that caused Allegheny County to spend tax dollars in order to keep the Steelers in Pittsburgh." The court held there was a missing link in the chain of causation, that the defendants were not the entity that distributed the plaintiff's tax dollars. If the court allowed the case to proceed, it reasoned, any municipal taxpayer could bring suit against a private entity that receives tax dollars for some alleged violation of federal law, which would flood the Federal Courts with cases. The government entity, the court held, was the missing link; because the governmental entity was not a defendant in the suit, the injury was caused by a third party not before the court. The Third Circuit affirmed the lower court's ruling, agreeing the pivotal issue in the case was the directness of the harm the victim suffered. It found that the governmental entities responsible for distributing the tax dollars would have been the appropriate defendants.

Both the Warnock and Hamilton County courts considered the issue of municipal taxpayer standing, the doctrine which suggests a municipal taxpayer may have sufficient standing to assert a claim based solely on the litigant's status as a taxpayer. In Warnock, the court found that in order to assert municipal taxpayer standing the party must be (1) suing a governmental entity; and (2) requesting equitable relief. The Hamilton County court found that in order to assert municipal taxpayer standing, the plaintiff had to allege a "direct, measurable appropriation of the municipality that dramatically affects the public fisc, establishing a "good-faith pocketbook injury" sufficient to provide standing.

Under the framework it established for municipal taxpayer standing, the Warnock court found the plaintiff did not meet the requirements necessary for standing. The court found the plaintiff was not able to satisfy either of the two requirements it found necessary to establish standing, because the plaintiff was not suing a government

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157. Id. at 544.
158. Id. at 545 (emphasis in original).
159. Id. at 545.
160. Id. at 545.
163. Id. at 294.
165. Id. at 541.
entity and was not seeking equitable relief. Rather, the plaintiff was suing thirty private entities for damages in excess of $600 million.

The plaintiff in Hamilton County did not even initially argue that he enjoyed standing under the municipal taxpayer doctrine. Rather, the court took it upon itself to consider the matter. The court began its analysis of the doctrine by discussing the same seminal case on municipal taxpayer standing cited by the Warnock court, Frothingham v. Mellon, which basically stands for the proposition that while a federal taxpayer does not have standing to challenge federal expenditures, a municipal taxpayer may sue to enjoin the illegal use of the municipalities monies. It then noted that the Supreme Court has reaffirmed the municipal taxpayer rule in cases such as Flast v. Cohen, in which the Supreme Court reasoned the rule was justified because the taxpayer's relation to a municipal treasury was much greater than the taxpayer's relation to the federal treasury.

The court then turned to Sixth Circuit decisions on the matter, such as the case of Hawley v. City of Cleveland, in which the Sixth Circuit allowed an action by municipal taxpayers to proceed against the City of Cleveland for renting space to the diocese at a reduced rate, causing the City to lose revenue. Further, the court noted that in United States v. City of New York, the Second Circuit found plaintiffs had standing in a case against New York City and a number of private entities. In City of New York, the Second Circuit found that a taxpayer's relationship to a municipality was "direct and immediate" so that the taxpayer suffered injury when a measurable amount of funds are misappropriated. The Hamilton County court concluded by finding the plaintiff could "establish standing if they can show the challenged activity involves a measurable appropriation or loss of rev-

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168. Id. at 546.
170. 262 U.S. 477 (1923).
174. 773 F.2d 736 (6th Cir. 1985).
176. 972 F.2d 464 (2nd Cir. 1992).
178. Id. at 49-50.
enue and a direct dollars-and-cents injury.'”\textsuperscript{179} The court found the plaintiff’s complaint fulfilled this requirement because of the $400 million appropriated to construct the stadium.\textsuperscript{180}

Although the Hamilton County court found the plaintiff had standing, it continued its analysis because there are heightened standing requirements for antitrust litigants. In Warnock, the District Court found that the plaintiff failed to meet the normal requirements for standing, so it was unnecessary for the court to consider the heightened requirements.\textsuperscript{181} In Hamilton County, the court noted five factors the courts use to determine if antitrust injury exists, (1) the causal connection and whether the harm was intended by the defendant; (2) the nature of the plaintiff’s injury and whether the plaintiff was a consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether damages were speculative; (4) the potential for duplicative recovery; and (5) the existence of more direct victims of the alleged antitrust violations.\textsuperscript{182}

The court concluded that the plaintiff sufficiently pleaded the first four factors. It noted the plaintiff alleged that the defendants “were able to coerce the construction of a new stadium and unjustifiably favorable lease terms solely because of the monopoly that they enjoy over professional football.”\textsuperscript{183} The court thought it would have been difficult for the plaintiff to have alleged a more direct connection.\textsuperscript{184} The court also found the damages were not speculative because the amount paid by the taxpayers was known and economic models were capable of forecasting what price would have been paid for the stadium in a competitive market.\textsuperscript{185} Further, the court found there was no risk of complex apportionment because the plaintiff was asking that the lease be voided and that all damages flow directly to the county.\textsuperscript{186}

The court then addressed the defendant’s argument that there were more direct victims and that the plaintiff had not suffered injury to her
business or property.\textsuperscript{187} The court found that even if the defendant’s argument were true, the list of five factors was not conjunctive, and by fulfilling the first four factors the plaintiff had sufficiently pleaded antitrust injury to give her standing.\textsuperscript{188} Accordingly, the court found that the \textit{Hamilton County} plaintiff had antitrust standing. The court expressly admitted that its decision could lead to more cases of a similar nature but found that the Supreme Court’s decision in \textit{Frothingham} had foreseen this but found it acceptable.\textsuperscript{189} Accordingly, \textit{Frothingham}, and not the court’s decision on the matter before it, was the root cause of such concerns.\textsuperscript{190}

3. \textit{Opposing Decisions}

The \textit{Hamilton County} decision and the \textit{Warnock} decision, affirmed by the Third Circuit, stand in opposition to each other. The \textit{Warnock} court’s finding that standing in municipal taxpayer suits is not established unless the party is (1) suing a governmental entity; and (2) requesting equitable relief\textsuperscript{191} went unaddressed in \textit{Hamilton County}. The only case the \textit{Hamilton County} court noted that involved private entities was \textit{United States v. City of New York},\textsuperscript{192} which, in addition to the private entities, included the City of New York and other governmental entities as defendants. The \textit{Warnock} court’s finding was based on the fact that all of the cases it reviewed, including those relied on for the \textit{Hamilton County} court’s decision, had both a governmental entity as a defendant and injunctive or equitable relief sought as a remedy.\textsuperscript{193}

While the \textit{Warnock} decision has some initial appeal, the court ultimately put form over function, and should have found the plaintiff in that case had standing. A footnote in the \textit{Warnock} decision remarked that it was “interesting” the governmental bodies involved in the stadium agreement, Allegheny County and the Sports & Exhibition Authority, declined to be added as plaintiffs in the action against the NFL and its member teams.\textsuperscript{194} It also noted that they had not been added as defendants.\textsuperscript{195} The fact the government could have been a

\textsuperscript{188} \textit{Id.} at 55.
\textsuperscript{189} \textit{Id.} at 65.
\textsuperscript{190} \textit{Id.} at 55.
\textsuperscript{192} 972 F.2d 464 (2nd Cir. 1992).
\textsuperscript{194} \textit{Id.} at n. 4.
\textsuperscript{195} \textit{Id.} at n. 4.
plaintiff or a defendant in the case highlights the problem with the Warnock court’s decision.

Had the government been a plaintiff, the standing question before the court would be moot, as would the question of municipal taxpayer standing. Accordingly, what was pivotal in the Warnock case was the fact that the plaintiff failed to add the government as a defendant—and failed to seek equitable remedies. This should not have controlled the outcome of the case.

The plaintiff in Hamilton County sought to have changes in the lease, an equitable remedy, in conjunction with its plea for damages. The benefits of these remedies were not to accrue to the plaintiff-taxpayer personally, but to the governmental entities the taxpayer alleged were the victims of the antitrust laws. Accordingly, naming the governmental entities serves as a mere formality when the same result accrues with or without the government named as a defendant. The Warnock plaintiffs could have sought the same remedy. That court’s worry that allowing the case to proceed would proliferate lawsuits was ill founded. It was not the Warnock case itself that the court was really worrying over, but the doctrine of municipal taxpayer standing, which remains viable. Accordingly, the Warnock court’s worry was misplaced, and the case should not have been dismissed.

VI. Conclusion

As this note heads to publication, the City of San Francisco is facing the possibility of losing its beloved 49ers to nearby Santa Clara after it failed to reach a deal to build a new stadium at Candlestick Point.196 Today, the team is seeking $160 million from Santa Clara in order to help finance a new $850 million stadium there.197 Fans, needless to say, are upset at the thought of losing their team, and they continue to look for solutions. Coming to aid the fans, United States Senator Dianne Feinstein introduced a bill that would allow the NFL member clubs to say “no” to other team owners trying to move their team by eliminating their fear of antitrust reprisals.198 The bill states “[i]t shall not be unlawful by reason of any provision of the antitrust laws for the National Football League to enforce rules authoring the membership of the league to decide that a member club of such league shall

196. Patrick Hodge, City must kick in $160 million in cash to score new 49ers stadium, San Francisco Chronicle, B7, April 25, 2007: Phil Matier, Andrew Ross, 49ers say they are moving to Santa Clara, San Francisco Chronicle, B1, November 9, 2006.
197. Id.
not be relocated." Nevertheless, locals remain skeptical that such a bill would offer a real solution to the problem. Indeed, the 49ers do not think that it would stop them from moving to Santa Clara.

Whether Senator Feinstein's bill is mere posturing or an earnest attempt to eliminate the plague of franchise movement in the last thirty years remains to be seen. As noted previously, the NFL is a dynamic organization that is always changing, and the past does not necessarily foretell the future. While the 20th Century bore witness to the birth of professional sport in the United States and its subsequent attachment to the taxpayer funded stadium, the beginning of the 21st Century seems to be marked by a change in the way sports leagues and publicly financed stadiums will operate.

Changing revenue sharing schemes among the teams, ballooning costs of stadiums, private financing, the threat of municipal taxpayer standing in antitrust suits and, possibly, federal legislation, could change the complexion of antitrust liability the NFL and its member teams face. In the meantime, fans will continue to long for the day that the team they root for today will be the same team, in the same location, the next generation of fans roots for, making a football team, like family and religion in Vince Lombardi's world, things that simply do not change.

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199. Id.
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