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**THE MORE THINGS STAY THE SAME, THE MORE THEY CHANGE:
THE INFLUENCE OF JUDGE HARRY PREGERSON ON FRANCHISE
MOVEMENT POLICY IN PROFESSIONAL TEAM SPORTS**

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**THE MORE THINGS STAY THE SAME, THE MORE
THEY CHANGE: THE INFLUENCE OF JUDGE HARRY
PREGERSON ON FRANCHISE MOVEMENT POLICY IN
PROFESSIONAL TEAM SPORTS**

Christopher David Ruiz Cameron*

For a guy who thought sports were fun, and liked to say, “Fun is bullshit,” Judge Harry Pregerson has had a significant impact on the application of antitrust law to major league team sports. Harry’s landmark ruling forty years ago in Los Angeles Memorial Coliseum Commission v. National Football League, which rejected the NFL’s single-entity defense (“Single Entity Ruling”), helped improve the lives of others. The Single-Entity Ruling opened the door to significant franchise movement in professional teams sports, which in turn caused the big shots running major league sports to be more responsive to market forces in at least three ways. First, the Single-Entity Ruling ushered in a new era of franchise movement, especially in the NFL. Second, it exposed to antitrust scrutiny a variety of anticompetitive practices other than franchise relocation policy. Third, the Single-Entity Ruling helped spawn new forms of sports ownership that were designed, among other things, to evade antitrust scrutiny by looking more like genuine parts of a single business entity. Harry’s ultimate vindication came almost thirty years later, in American Needle, Inc. v. National Football League, in which the Supreme Court, without citing the Single-Entity Ruling by name, nevertheless embraced Harry’s reasoning and result, and did so unanimously.

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I. INTRODUCTION

The late Harry Pregerson didn't even like football. In fact, he wasn't much of a fan of any sport, professional or amateur.

Four decades ago, when I served as Harry's law clerk, the Raiders were in the middle of a championship run. It was their second season as the new tenants of the Los Angeles Memorial Coliseum.¹ Their roster included future Hall of Famers Marcus Allen at running back, Ray Guy at punter, Mike Haynes at cornerback, and Howie Long at defensive end.² Lyle Alzado, the other defensive end, was built and played like The Incredible Hulk; Todd Christensen, their tight end, went on to catch twelve touchdown passes that season; and Jim Plunkett, the durable quarterback who made those touchdown passes, threw what proved to be the game-winning touchdown to wide receiver Cliff Branch in Super Bowl XVIII (although Allen's magnificent seventy-four-yard-touchdown run to seal the victory is the play everyone remembers).³

At the same time, the team was morphing into a worldwide brand: their "colors, swagger, and anti-establishment ethos" became linked with the hip-hop scene that started in South Central L.A. and spread throughout the region.⁴ Rapper-turned-filmmaker Ice Cube, who wore a Raiders

1. *Los Angeles Raiders Team History*, SPORTS TEAM HIST., <https://sportsteamhistory.com/los-angeles-raiders> (last visited Oct. 2, 2020).

2. See *Raiders In the Pro Football Hall of Fame*, LAS VEGAS RAIDERS, <https://www.raiders.com/history/hall-of-fame> (last visited Oct. 2, 2020).

3. See *1983 Los Angeles Raiders Statistics & Players*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/rai/1983.htm> (last visited Oct. 2, 2020); Associated Press, *Allen's 74-yard run in 1984 among Super Bowl's best*, NBC SPORTS (Feb. 4, 2016), <https://www.nbc.com/bayarea/raiders/allens-74-yard-run-1984-among-super-bowls-best>.

4. *About Straight Outta L.A.*, ESPN, http://www.espn.com/30for30/film/_page/straight-outta-la (last visited Oct. 2, 2020).

cap everywhere he went, helped make the silver and black culturally significant and made the team the toast of Southern California, especially among Black and Latino fans.⁵ In the years that followed, a raft of Hollywood-caliber celebrities pledged their allegiance to the team. They included rapper M.C. Hammer, golf legend Tiger Woods, basketball icon Magic Johnson, and actor Tom Hanks.⁶ The region's loyalty ran deep; Southern California remained part of the Raiders Nation even after the club had returned to the East Bay. On the last day of the regular season in 2017, the Oakland Raiders visited the Los Angeles Chargers at the Stub Hub Center in Carson, California.⁷ It was the first game that they had played in the Los Angeles area since they left in 1994.⁸ But Raiders fans outnumbered Chargers fans in attendance by at least three to one.⁹ The game exposed a truth that the NFL had long refused to admit: even after breaking up with the city twenty-four years earlier, the Raiders were still L.A.'s favorite professional football team.¹⁰

None of this impressed Harry.

One day in chambers, I happened to mention that I had a ticket to watch the Raiders play the Broncos at the Coliseum. I figured that the author of one of the most important antitrust cases affecting professional team sports would be interested in the fruits of his labor. Instead, he asked me why I was going.

I said, "Because it'll be fun, Judge."

He replied, "Fun is bullshit."

Now, I should explain that this was Harry's instant reaction to every type of diversion. He liked to say, "Fun is bullshit," "Happiness is bullshit," and, "Vacations are bullshit." (I don't recall his saying, "Sports are bullshit," but it wouldn't surprise me if he did.)

That's because Harry liked to work, and he always was working. He spent Saturdays puttering in his backyard and Sundays visiting the homeless shelters that he helped build. He spent his weeknights working the telephones to get the support he needed to keep them going. He spent his weekdays reviewing his caseload and editing drafts of opinions prepared by law clerks. He didn't have time to watch sports on TV or,

5. *See id.*

6. *See* Richard Calhoun, *17 Famous Oakland Raiders Fans*, FOX SPORTS (Oct. 26, 2016, 4:50 PM), <https://www.foxsports.com/nfl/gallery/17-famous-oakland-raiders-fans-012815>.

7. *See* Dieter Kurtenbach, *Kurtenbach: The Raiders' L.A. 'home' game exposed the NFL's relocation mistakes*, MERCURY NEWS (Dec. 31, 2017), <https://www.mercurynews.com/2017/12/31/oakland-raiders-los-angeles-chargers-nfl-2017-relocation-las-vegas-san-diego-stubhub-center-stadium-soccer-gruden/>.

8. *Id.*

9. *Id.*

10. *See id.*

heaven forbid, attend the games. His wife Bern complained that Harry wouldn't even take her to watch California Bears football when he was attending law school at Berkeley and she was an undergraduate there. The only sporting events he went to in all the years I knew him were high school basketball games starring his grandson Bradley.

What Harry meant by calling fun "bullshit" was that true enjoyment in life comes not from pursuing one's selfish desires, but from helping other people. And he enjoyed life immensely. No federal judge in American history did more to help make other people's lives better than Harry Pregerson did. Both on and off the bench, where he served as a federal judge for fifty years, Harry Pregerson devoted all his energy to making other people's lives better,¹¹ even when his family might have preferred his spending more time relaxing with them.

Which brings me to the Raiders Antitrust Litigation. Harry's landmark ruling in *Los Angeles Memorial Coliseum Commission v. National Football League*,¹² which rejected the NFL's single-entity defense ("Single-Entity Ruling"), helped improve the lives of others—even if Judge Pregerson himself had doubts.¹³ The Single-Entity Ruling opened the door to significant franchise movement in professional teams sports, which in turn caused the big shots running major league sports to be more responsive to market forces. They were forced to honor the demands of fans in cities like Los Angeles who wanted their own teams, even when the owners of rival clubs resisted.

To these ends, this Article proceeds in three parts. Part I summarizes the Raiders Antitrust Litigation, including the plans of club owner Al Davis to move the franchise from Oakland to Los Angeles. Part II summarizes the Single-Entity Ruling and Harry's rationale for it. Part III explains the impact of the Single-Entity Ruling on franchise relocation in both the NFL and other professional team sports.

11. See Christopher David Ruiz Cameron, *Harry Pregerson, the Real Mayor of Los Angeles*, 36 SW. U. L. REV. 311 (2007); Christopher David Ruiz Cameron, *The Real Mayor of Los Angeles*, L.A. Daily J., Dec. 1, 2017, at 8 [hereinafter Cameron, *The Real Mayor of Los Angeles*].

12. L.A. Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

13. Harry once told me that the most important opinions he wrote concerned better schools for children; equal rights for women and minorities; dignity for veterans and immigrants; respect for gay people; food for the hungry and shelter for the homeless; and clean water, affordable housing, and better transportation for everyone. See Cameron, *The Real Mayor of Los Angeles*, *supra* note 11. His Single-Entity Ruling in the Raiders Antitrust Litigation didn't make the list. In fact, he rarely spoke about the case, and when he did, it was to talk about the lawyers' performances, not the merits of the case, much less the exploits of the Raiders.

II. THE RAIDERS ANTITRUST LITIGATION

A. *The Raiders Decide to Leave Oakland for Los Angeles*

In the forty years before the 1980 regular season, when the Raiders announced their plan to move from Oakland to Los Angeles, the NFL¹⁴ saw only five franchise relocations from one metropolitan area to another. These relocations included the Rams, who moved from Cleveland to Los Angeles in 1946; the Colts, who moved from Dallas to Baltimore in 1953 (and changed their name from the Texans); the Cardinals, who moved from Chicago to St. Louis in 1960; the Chargers, who moved from Los Angeles to San Diego in 1961; and the Chiefs, who moved from Dallas to Kansas City in 1963 (and also changed their name from the Texans).¹⁵

Of the many reasons accounting for this relative lack of movement, the most significant was Article IV, Section 3 of the NFL's Constitution and Bylaws ("Rule 4.3"), a rule that had been adopted by the club owners themselves.¹⁶ It banned any club from moving "its franchise or playing site to a different city" without the prior approval of three-fourths of the all the clubs in the league.¹⁷ Under Rule 4.3, Al Davis, the mercurial and

14. The term "NFL" as used in this Article refers to the combined franchises of both the old NFL and the old American Football League (AFL), a separate professional football league that merged into what is known collectively as the NFL. When the Chiefs moved to Kansas City and the Chargers moved to San Diego, they were both AFL franchises. Under the merger agreement, which was announced in 1966 and took effect in 1970, the two leagues became one league with two conferences. The history and records of the AFL were incorporated into the NFL, but the AFL's name and logo were retired. See History.com Editors, *NFL and AFL announce merger*, HISTORY (June 5, 2020), <https://www.history.com/this-day-in-history/nfl-and-afl-announce-merger>.

15. See Jeff Kerr, *Las Vegas Raiders latest NFL franchise to change cities: Here's a look at all 11 who've done it*, CBS SPORTS (Feb. 4, 2020, 4:02 PM), <https://www.cbssports.com/nfl/news/las-vegas-raiders-latest-nfl-franchise-to-change-cities-heres-a-look-at-all-11-who-ve-done-it/#:~:text=Other%20NFL%20franchises%20to%20relocate,Chicago%20Cardinals%20move%20to%20St>. Notes: The Patriots moved from Boston to Foxboro, Massachusetts, in 1971 (and changed their name from the Boston Patriots to the New England Patriots) but remained in the Boston metropolitan area. See *Team History*, PRO FOOTBALL HALL OF FAME, <https://www.profootballhof.com/teams/new-england-patriots/team-history/> (last visited Oct. 3, 2020). The Rams moved from Los Angeles to Anaheim, California, in 1980, but remained in the Los Angeles metropolitan area. See *Rams Sign Contracts With Anaheim*, N.Y. TIMES (Nov. 22, 1978), <https://www.nytimes.com/1978/11/22/archives/rams-sign-contracts-with-anaheim-a-35year-lease-signed.html>.

16. NAT'L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS § 4.3 (rev. ed. 2006).

17. *Id.* Originally, Rule 4.3 required the unanimous approval of the owners. In late 1978, with the relocation of the Rams from Los Angeles to Oakland on the horizon, the rule was amended to require the three-fourths approval of the owners. See *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1385 (9th Cir. 1984).

outspoken owner of the Raiders,¹⁸ had to persuade at least twenty-one of his twenty-seven colleagues to vote in favor of moving the Raiders from Oakland to L.A.¹⁹ Davis, who was unhappy with the lack of progress in negotiations for a new or expanded venue at the Oakland Coliseum, never got the chance. Against Davis' wishes, the NFL clubs met and voted against him, twenty-two to zero, with five abstentions.²⁰ Undeterred, Davis made plans to move anyway. His plans happened to coincide with a vacancy in what was then L.A.'s premier sports venue: the aging but still-venerable Los Angeles Memorial Coliseum.²¹

The Coliseum, which had opened in 1923 and later hosted the 1932 and 1984 Olympic Games, was located five miles south of City Hall.²² For decades, it had served as the home field for three major football teams: the Los Angeles Rams, the UCLA Bruins, and the USC Trojans. In fact, the USC campus was right across the street.²³ But in 1978, the NFL owners approved the Rams' move to Angel Stadium in Anaheim, California, which was located thirty-five miles south in Orange County.²⁴ The change would be effective for the 1980-81 season.²⁵ It would be the first time that the Coliseum had lacked a professional football tenant since 1946.²⁶ (A few years later, the Bruins would move nineteen miles north to the Rose Bowl in Pasadena, California, leaving the Trojans as the only football tenant.²⁷) The Coliseum Commission, which operated the venue, responded by requesting that the NFL provide a new tenant.²⁸ When a firm commitment to do so was not forthcoming, the Commission filed suit against the NFL and its member clubs on the theory that Rule 4.3 and related franchise movement rules violated the Sherman Act.²⁹ The Raiders had not yet expressed a desire to move to

18. *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1385; Jon Wertheim, *How the Influence of Al Davis Shaped the Modern NFL*, SPORTS ILLUSTRATED (Aug. 27, 2019), <https://www.si.com/nfl/2019/08/27/al-davis-oakland-raiders-nfl-100-seasons>.

19. *L.A. Mem'l. Coliseum Com'n v. NFL*, 791 F.2d 1356, 1385 (9th Cir. 1986).

20. *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1385.

21. *Id.*

22. *Coliseum History*, L.A. COLISEUM, <https://www.lacoliseum.com/coliseum-history/> (last visited Oct. 3, 2020); Driving Directions from LA Memorial Coliseum to Rosebowl Stadium, GOOGLE MAPS, <https://www.google.com/maps>.

23. *Getting Here*, L.A. COLISEUM, <https://www.lacoliseum.com/directions/> (last visited Oct. 3, 2020); *Coliseum History*, *supra* note 22.

24. *Rams Sign Contracts With Anaheim*, *supra* note 15.

25. *Id.*

26. *Coliseum History*, *supra* note 22.

27. *UCLA History*, UCLA ALUMNI (Aug. 18, 1982), <https://alumni.ucla.edu/ucla-history/ucla-history-4/#:~:text=The%20UC%20Board%20of%20Regents,Coach%20Terry%20Donahue%20'67%2C%20M.A.>

28. *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1384-85 (9th Cir. 1984).

29. *Id.* at 1385.

L.A. or joined the Commission as plaintiffs, and were, therefore, named a defendant as a member club.³⁰ Thereafter, the NFL filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and the plaintiffs filed a motion for partial summary judgment to enjoin enforcement of the Rule 4.3.³¹

In early 1979, Harry Pregerson, presiding as the District Court judge, granted the motion to dismiss the complaint, with leave to amend, but denied the motion to enjoin enforcement of Rule 4.3.³² The main reason was that the Commission had not proved its standing to sue.³³ In particular, the complaint did not allege the reasonable likelihood that the NFL would injure the business of operating the Coliseum by refusing to approve the tenancy of either an expansion team or a relocated franchise;³⁴ up to that point, nobody had asked and no votes had been taken. And without a plaintiff having standing, plus a fully developed record, Harry could not determine whether the application of Rule 4.3 unreasonably violated the antitrust laws.³⁵

B. The Raiders Antitrust Litigation: A Story in Three Parts

After studying Harry's dismissal ruling, lawyers for the plaintiffs filed an amended complaint addressing his concerns. But without an NFL franchise seeking to play in the Coliseum, the case languished for a year. Then, in early 1980, Davis helped revive the suit by announcing his intention to move the Raiders' home games to the Coliseum.³⁶ Without being asked, the NFL clubs reacted by meeting and voting to reject the move.³⁷ The many reasons for this resistance would no doubt fill a book, but one of the big ones seemed to lie in the personal animosity between Commissioner Pete Rozelle, the league's long-serving chief executive, and Davis, its most outspoken owner-critic.³⁸ Rozelle once described Davis as an "outlaw" among NFL owners.³⁹ In return, Davis claimed that the "real reason" why the NFL refused to grant permission to move was because Rozelle "wanted Los Angeles for himself. He

30. *Id.*; L.A. Mem'l Coliseum Comm'n v. NFL, 468 F. Supp. 154 (C.D. Cal. 1979).

31. *L.A. Mem'l Coliseum Comm'n*, 468 F. Supp. at 154.

32. *Id.* at 156, 167-68.

33. *Id.* at 157-62.

34. *Id.* at 159.

35. *Id.* at 167-68.

36. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1385 (9th Cir. 1984).

37. *Id.*

38. See Ken Belson, *Awkward Handoff of Lombardi Trophy Has Roots in Renegade Raiders*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/sports/football/super-bowl-pete-rozelle-al-davis-roger-goodell-robert-kraft.html>.

39. *NFL, Davis Fail to Reach Settlement*, FACTS ON FILE WORLD NEWS DIG., Feb. 6, 1981, at 1, LEXIS Job No. 126282435.

finally said it was the best city in the country to have a team and he wasn't about to let me have it."⁴⁰

Thereafter, Rozelle notified the Raiders that the league would continue to schedule all their home games in Oakland.⁴¹ So the Raiders switched sides and joined the Coliseum's suit as co-plaintiffs,⁴² and Davis signed an agreement with the Commission to permit the Raiders to play in their new venue as early as the 1980-81 season.⁴³

When repeated settlement efforts by Harry proved unsuccessful,⁴⁴ the Raiders Antitrust Litigation went to trial. The liability proceeding was bifurcated from the damages phase, and the case proceeded in three parts: there was a first liability trial ("First Liability Trial"), which ended with a hung jury and the grant of a motion for a new trial; there was a second liability trial ("Second Liability Trial"), which ended with a verdict and a judgment in favor of the Raiders and the Coliseum Commission; and there was a damages trial ("Damages Trial"), which resulted in a multi-million dollar verdict in favor of the plaintiffs.⁴⁵

I. First Liability Trial

The First liability Trial, which lasted from May to July 1981,⁴⁶ generated plenty of drama, perhaps due to the parties' perceptions that the stakes were high.

The proceedings, which each day began with the type of solemnity Harry preferred, were called to order by Dick Johnson, Harry's longtime courtroom deputy. Dick intoned: "In the presence of the flag of our

40. Rich Tosches, *Raiders Win Antitrust Suit*, UNITED PRESS INT'L, May 8, 1982, at 2, LEXIS Job No. 126282935.

41. Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 957 (1988).

42. *See, e.g., id.*

43. *See, e.g., Raiders Agree to Play in L.A.*, FACTS ON FILE WORLD NEWS DIG., Mar. 7, 1980, at 1, LEXIS Job No. 126283041.

44. The obvious settlement options were either to grant Los Angeles an expansion team and require the Raiders to remain in Oakland or to permit the Raiders to move to L.A. and grant Oakland an expansion team. The league resisted both options. *See, e.g., Dave Brady, Court Plan: Move Raiders, Give Oakland New Franchise; Raider Proposal Unsupported*, WASH. POST, Dec. 3, 1980, at E1, LEXIS Job No. 126283237; Byron Rosen, *Judge Urges Raiders, NFL to Solve Dispute*, WASH. POST, Jan. 20, 1981, at D3, LEXIS Job No. 126283400; *NFL, Davis Fail to Reach Settlement*, *supra* note 39; *see also, e.g., John F. Berry, Rozelle Denies '78 Deal With Davis on Transfer*, WASH. POST, May 23, 1981, at D1, LEXIS Job No. 126283525.

45. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1385-86 (9th Cir. 1984).

46. L.A. Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 581 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

country and the Constitution for which it stands, this United States District Court is now in session.”⁴⁷

Then the drama began. Early on, the NFL served subpoenas demanding that Melvin Durslag and Scot Paltrow, two reporters of the now-defunct Los Angeles *Herald Examiner*, a newspaper published by what was left of the Hearst empire, produce any notes, files, and recordings of conversations they might have had with confidential sources about the proposed transfer of the Raiders or the Rams to another city.⁴⁸ Citing the California journalists’ privilege, Harry issued an order quashing the subpoenas.⁴⁹

When Harry informed prospective jurors that the trial could take three to four months, more drama ensued. Of 130 potential jurors called to the courthouse on the first day of jury selection, fifty were excused after pleading hardships ranging from work schedules to vacations. One man told Harry, “I have a prepaid vacation planned for September.⁵⁰ If the trial lasted that long, I’d have to look for a new wife to take on a later vacation.” Harry replied, “I think we may all have the same problem.”⁵¹

Then the league, claiming that it would be prejudiced by what it called massive pretrial publicity, filed a motion to transfer venue from the Central District of California to another, unspecified district outside the seven-county metropolitan area surrounding L.A.⁵² Harry knew the district occupied a land mass the size of Delaware and Rhode Island combined, and counted some 10 million residents, so he observed: “[T]he court can easily imagine that many persons in the district have no interest in either professional sports or football.”⁵³ He knew this because he was one of them. He issued an order denying the venue transfer request.⁵⁴

As for everyone else, he reasoned that careful voir dire, which would be accompanied by detailed questionnaires put to everyone in the jury pool, could be used to screen out biased jurors.⁵⁵ Later, Harry

47. Email from Jeff Birren, former General Counsel, Raiders, to Christopher David Ruiz Cameron (May 4, 2020) (on file with author) (recollection of former Raiders General Counsel Jeffrey Birren).

48. L.A. Mem’l Coliseum Comm’n v. NFL, 89 F.R.D. 489, 490-92 (C.D. Cal. 1981); *The Last Los Angeles Herald-Examiner Strike*, CSUN U. LIBR. (Feb. 3, 2014), <https://library.csun.edu/SCA/Peek-in-the-Stacks/Examiner>.

49. See L.A. Mem’l Coliseum Comm’n, 89 F.R.D. at 496.

50. Rich Tosches, *Raiders-NFL Trial Gets Underway*, UNITED PRESS INT’L, May 11, 1981, LEXIS Job No. 126282935.

51. *Id.*

52. L.A. Mem’l Coliseum Comm’n, 89 F.R.D. at 497.

53. *Id.* at 510.

54. *Id.* at 512.

55. *Id.* at 509 n.7.

confided to me that he wasn't sure the NFL believed its own argument. When he offered to move the trial to Oxnard, a Central District farm town located over sixty miles from downtown L.A., Patrick Lynch, the NFL's lead attorney, refused. In any event, the venue transfer motion pushed back the scheduled trial date by several months.

But Harry did grant the NFL's motion to exclude testimony about alleged conversations between then-Commissioner Pete Rozelle and Rams owner Georgia Frontiere about a supposed scheme to scalp tickets to Super Bowl XIV at the Coliseum in 1980.⁵⁶ Lynch called it "one small step" for the league, but one that would not make it less "impossible to find an unbiased and indifferent jury."⁵⁷

During opening statements, Max Blecher, the Coliseum Commission's colorful lawyer, made it clear that the big-time business of professional football would be on trial—that "nothing less than the American free enterprise system" was at stake.⁵⁸ "When we lost the Rams [to Anaheim], we didn't cry," he said. "We did the red-blooded American thing. We went out and got ourselves a team. But they [the NFL] won't let us have it."⁵⁹ And he scoffed at the idea that the NFL was a single entity:

"They call themselves partners," Blecher said, "and that is simply ridiculous." As partners, why don't they share their profits? Sure, they share television revenues, but what about the rest of their profits? "Not only don't the teams share their wealth, they refuse to even tell each other how much money they make each season. And you call that a partnership?"⁶⁰

Patrick Lynch, the NFL's attorney, countered that the league was a single organization that would "dissolve into chaos" if its rules could be flouted by a single team like the Raiders.⁶¹ Relying on cartoon drawings, he compared the league's product—NFL football—to artisan pottery, and the twenty-eight member clubs to the potter, the seller, and the other men required to bring the pottery to market.⁶² "These are the agreements between the men to market the product," he told jurors. "They are working together to sell the product and they are working as a single unit.

56. Sports News, UNITED PRESS INT'L, May 1, 1981, LEXIS Job No. 126342115.

57. *Id.*

58. John F. Berry, *Big-Business Football in Dock as Raider-NFL Trial Opens; Raider-NFL Trial Starts in L.A.*, WASH. POST, May 19, 1981, at D1, LEXIS Job No. 126284280.

59. *Id.*

60. Rich Tosches, *Opening Arguments Begin in Raiders Trial*, UNITED PRESS INT'L, May 20, 1981, at 1-2, LEXIS Job No. 126284450.

61. *Id.*

62. *Id.*

That's what the NFL is. All twenty-eight teams in agreement to produce a certain product."⁶³

The first two live witnesses were Pete Rozelle, the league's long-time commissioner, and Eugene Klein, the owner of the San Diego Chargers.⁶⁴ Their testimony didn't seem to put the league's best foot forward. A reporter observed that Rozelle's "legendary smoothness" came across as "evasiveness" in questioning by Joe Alioto, the former San Francisco mayor, and lawyer for the Raiders.⁶⁵ And after four hours of strenuous testimony, Klein, then sixty, was hospitalized for a heart attack, but was later listed in satisfactory condition.⁶⁶

And then there was a controversial attempt by Rams' attorney Joseph Cotchett to impeach Al Davis using excerpts from a magazine article in which Davis expressed a childhood admiration for Adolf Hitler.⁶⁷ Harry called the excerpt "inflammatory and irrelevant" and ordered the jury to disregard it.⁶⁸

Two weeks into the trial, Harry asked the parties to present "mini-arguments" to the jury.⁶⁹ Instead of waiting until the end of the trial, he gave each side an hour and-a-half to summarize what they felt had been proved so far.⁷⁰ Harry had adopted this unusual practice before during lengthy and complex trials, because it helped the jury stay focused.⁷¹

A month later, with the trial still in full swing, Davis hosted a party for the L.A. press corps in the grand ballroom of the Beverly Hilton Hotel.⁷² Each guest was greeted at the door by Raiderettes cheerleaders in costume and invited to have their photograph taken while positioned between the club's two shiny Super Bowl trophies, which were protected by uniformed guards.⁷³ The parting gift was a silver and black ruffled garter bearing a metal logo of the club.⁷⁴ A sports writer who got one reported, "My wife threw mine out with the eggshells the next morning."⁷⁵

63. *Id.*

64. Joseph St. Amant, *Jury to Hear Mini-Arguments in Antitrust Case*, UNITED PRESS INT'L, May 30, 1981, at 1, LEXIS Job No. 126284619.

65. Amant, *supra* note 64, at 1.

66. *Id.*

67. Joseph St. Amant, *Hassle Over Hitler Reference*, UNITED PRESS INT'L, Jun. 18, 1981, at 1, LEXIS Job No. 126284688.

68. *Id.*

69. Amant, *supra* note 64.

70. *Id.*

71. *Id.*

72. Phil Elderkin, *Los Angeles Watching the Oakland Raiders—In Court*, CHRISTIAN SCI. MONITOR, Jun. 30, 1981, at 2, LEXIS Job No. 126284775.

73. *Id.*

74. *Id.*

75. *Id.*

After fifty-five days of testimony and thirteen days of deliberations, with the whole process spanning four months, the jury of seven men and three women, most of whom had little interest in professional football, were unable to reach the required unanimous verdict.⁷⁶ They deadlocked: eight votes went to the plaintiffs and two votes went to the defendants.⁷⁷ It turned out that one of the votes for the defendants, Thomas Gelker, had failed to disclose that his cousin, Bruce Gelker, once owned the Portland Storm of the long-defunct World Football League.⁷⁸ Davis went so far as to call Gelker a “plant”—an accusation hotly disputed by the NFL—but there was little evidence of this, and Gelker was not disqualified.⁷⁹ Reluctantly, Harry declared a mistrial, and scheduled a new trial to start in the fall of 1981.⁸⁰

2. *Second Liability Trial*

The Second Liability Trial, which lasted from April to May 1982, went a lot faster because Harry made the parties focus on the reasonableness of Rule 4.3 and imposed time limits on the testimony of witnesses, but chapter two of the Raiders saga generated plenty of drama of its own.

For example, the NFL filed a motion asking Harry to limit the number of courtroom reporters in attendance to five.⁸¹ “We don’t want the jurors to have a phalanx of reporters breathing down their necks as they did in the last trial,” Patrick Lynch, the league’s attorney complained.⁸² “The way the matter was handled during the first trial was fine,” Harry replied.⁸³ He denied the motion.⁸⁴

During jury selection, an unidentified woman placed a series of telephone calls alleging that a prospective juror had discussed the case with his family and was concealing a bias against the league.⁸⁵ The calls were

76. James J. Doyle, UNITED PRESS INT’L, July 30, 1981, at 1, LEXIS Job No. 126346118; Joan Goulding, UNITED PRESS INT’L, Aug. 15, 1981, at 1, LEXIS Job No. 126346479.

77. Joan Goulding, *The first phase of the bitter feud between the...*, UNITED PRESS INT’L (Aug. 15, 1981), <https://www.upi.com/Archives/1981/08/15/The-first-phase-of-the-bitter-feud-between-the/5834366696000/>.

78. Joan Goulding, UNITED PRESS INT’L, Aug. 13, 1981, at 1, LEXIS Job No. 126346936.

79. *Id.*

80. *Id.*; see also Domestic News, *Mistrial Declared in NFL-Oakland Antitrust Suit*, ASSOCIATED PRESS, Aug. 14, 1981, at 1, LEXIS Job No. 126347918.

81. Carolyn Skorneck, *Judge Refuses to Limit Number of Reporters*, ASSOCIATED PRESS, Mar. 8, 1982, at 1, LEXIS Job No. 126348447.

82. *Id.*

83. *Id.*

84. *Id.*

85. Sports News, UNITED PRESS INT’L, Mar. 23, 1982, at 1, LEXIS Job No. 126349116.

placed to the chambers of Judge Pregerson, the headquarters of the Rams, and the law offices of O'Melveny & Myers, where Lynch was a partner.⁸⁶ "I have a feeling that we're probably dealing with a crank caller and will never get to the bottom of this," Harry said, and Alioto agreed.⁸⁷ "There are two events that tend to bring out the nuthouse brigade," he said. "One is a full moon and the other is a major trial."⁸⁸

Once the jury was picked, Lynch complained that five of the six jurors were women.⁸⁹ "It would have been better to have more of a balance of men," he said.⁹⁰ He also got into a shouting match with Alioto over whether the NFL had investigated the backgrounds of the jurors in the First Liability Trial.⁹¹ Despite the complaints, the trial moved forward.

In the end, after just twenty-one days of testimony and only five and a half hours of deliberations, the jury returned a verdict for the plaintiffs in the Second Liability Trial.⁹² The news made the front page of the New York Times.⁹³ "I'm elated," a victorious Al Davis proclaimed.⁹⁴ "I knew it would happen, but it's no less exciting. We won it on credibility and the facts," Davis affirmed. "For fifteen years we've known that rule was illegal, and knocking it down like this won't hurt the NFL one bit. We'll still be a great league, but now our laws will conform to the laws of the United States."⁹⁵ Alioto called it a "smashing victory over a very tough and worthy opponent."⁹⁶ Blecher added that the swiftness of the verdict was no surprise.⁹⁷ "I think the toughest thing the jury had to do was pick a foreman," he said. "The NFL had no case. It wasn't even close."⁹⁸

A few weeks later, Harry issued an injunction barring the NFL from interfering with the Raiders' move from Oakland to Los Angeles,⁹⁹ and

86. *Id.*

87. *Id.*

88. *Id.*

89. Sports News, UNITED PRESS INT'L, Mar. 25, 1982, at 1, LEXIS Job No. 126349976.

90. *Id.*

91. *Id.*

92. Bart Barnes, *Hill: No Change in Sentiment on Antitrust*, WASH. POST, May 9, 1982, at 1, LEXIS Job No. 126350325.

93. Associated Press, *NFL Violated Law in Forbidding Team to Move, Jury Finds*, N.Y. TIMES, May 8, 1982, at 1, LEXIS Job No. 126350627 (Section 1, Page 1).

94. Rich Tosches, *Raiders Win Antitrust Suit*, UNITED PRESS INT'L, May 8, 1982, at 1, LEXIS Job No. 126350758.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Associated Press, *Raiders Again Beat N.F.L. in the Courts*, N.Y. TIMES (June 15, 1982), <https://www.nytimes.com/1982/06/15/sports/raid-ers-again-beat-nfl-in-the-courts.html>.

the die was cast. During what would become the strike-shortened 1982-83 season,¹⁰⁰ the club went on to win all four of its home games at the Coliseum.¹⁰¹ After cruising to an eight to one record, however, the Raiders lost to the Jets in the second round of the playoffs.¹⁰² But the next year, during a full-schedule 1983-84 season, the team would win six of their eight home games at the Coliseum.¹⁰³ After compiling a twelve-to-four record, the team marched through the playoffs and won Super Bowl XVIII.¹⁰⁴

3. Damages Trial

From September 1982 through May 1983, while the appeals of the Single-Entity Ruling and injunction were pending, the Damages Trial proceeded.¹⁰⁵ A huge verdict came back in favor of the plaintiffs: the Coliseum Commission was awarded almost \$14.6 million in antitrust damages (trebled from over \$4.8 million); the Raiders were awarded almost \$34.7 million in antitrust damages (trebled from nearly \$11.6 million); and the Raiders were awarded another almost \$11.6 million in damages for breach of the covenant of good faith and fair dealing under California state law.¹⁰⁶ Later, in 1986, the same Ninth Circuit panel that had affirmed the Single-Entity Ruling affirmed the Coliseum Commission's award by a unanimous vote, vacated and remanded for recalculation the Raiders' award by a two-to-one vote, and reversed the Raiders' good-faith-and-fair-dealing verdict by a unanimous vote.¹⁰⁷

100. Dan Flaherty, *1982 NFL Season*, SPORTS NOTEBOOK (Aug. 18, 2016), <https://www.thesportsnotebook.com/tag/1982-nfl-season/>.

101. *1982 Los Angeles Raiders Statistics & Players*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/rai/1982.htm> (last visited Oct. 10, 2020).

102. *Id.*

103. *1983 Los Angeles Raiders Statistics & Players*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/rai/1983.htm> (last visited Oct. 10, 2020).

104. *Id.*

105. L.A. Mem'l. Coliseum Com'n v. NFL, 791 F.2d 1356, 1359 (9th Cir. 1986).

106. *Id.*

107. *Id.* at 1375-76.

III. THE SINGLE-ENTITY RULING

The Single-Entity Ruling was issued by Harry in his capacity as a district judge sitting by designation¹⁰⁸—that is, as an overtime gig in addition to his regular job as a United States circuit judge, for which he received not a penny more in salary. (In 1979, when Harry was elevated from the U.S. District Court for the Central District of California to the U.S. Court of Appeals for the Ninth Circuit, he had kept and continued to manage several big, docket-busting cases, one of which was the Raiders Antitrust Litigation.¹⁰⁹) The Single-Entity Ruling addressed what would prove to be the pivotal question of law in the Raiders Antitrust Litigation: whether or not the NFL was a single economic entity incapable of conspiring with itself to violate the antitrust laws.¹¹⁰

Since 1890, Section 1 of the Sherman Antitrust Act has outlawed “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce.”¹¹¹ Section 1 is meant to enforce the First Commandment of antitrust law: the competitive market, not any artificial barrier erected by buyers or sellers, should determine the price of goods and services.¹¹² The Raiders and the Coliseum Commission had sued the NFL and its twenty-seven member teams on the theory that Rule 4.3, the league’s restrictive franchise relocation rule, was the means by which other franchise owners had engaged in an illegal contract, combination, or conspiracy to restrain the trade of offering NFL football to the Los Angeles market.¹¹³ Under Rule 4.3, the plaintiffs needed to persuade twenty-one clubs to approve the move from Oakland to L.A., but they failed to attract a single vote.¹¹⁴ No club owner showed any sign of budging. To win their lawsuit, the Raiders would have to prove that Rule 4.3 should be thrown out on the ground that it unreasonably restrained trade.¹¹⁵ But first, they had to show that the NFL was really twenty-eight separate

108. *L.A. Mem’l Coliseum Comm’n v. NFL*, 519 F. Supp. 581, 581 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff’d*, 726 F.2d 1381 (9th Cir. 1984); *see, e.g.*, 28 U.S.C. § 291 (1958).

109. *L.A. Mem’l Coliseum Comm’n v. NFL*, 519 F. Supp. at 582; Sam Roberts, *Harry Pregerson, Judge Guided by Conscience, Dies at 94*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/obituaries/harry-pregerson-dead-ninth-circuit-judge-guided-by-conscience.html>.

110. *L.A. Mem’l Coliseum Comm’n v. NFL*, 519 F. Supp. at 582.

111. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2004).

112. *See* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 6 (2d ed. 2006).

113. *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1385 (9th Cir. 1984).

114. *Id.*

115. *Id.*

entities capable of conspiring with each other rather than a single entity incapable of such a feat.¹¹⁶

In the spring of 1981, as the Second Liability Trial came to a close, the parties filed cross-motions for a directed verdict on the question whether the NFL must be considered a single entity for purposes of the Raiders Antitrust Litigation.¹¹⁷ The NFL and the other clubs, including the L.A. Rams, filed briefs asking Harry to adopt the single-entity defense and to take the case away from the jury; the Raiders and the Coliseum Commission filed briefs asking him to rule that the twenty-eight clubs were separate economic entities and to instruct the jury accordingly.¹¹⁸ Although Harry found the question to be “a close one,” he came to be convinced that “the undisputed facts preclude treating the NFL as a single entity for purposes of this lawsuit.”¹¹⁹

Harry began with what the record showed “[o]n its face”: that the NFL “certainly appears to be an association of separate business entities rather than one single enterprise.”¹²⁰

[The clubs] are separate legal entities: some corporations, some partnerships, and some sole proprietorships. No two clubs have a common owner. The clubs share a large part, but not all, of their revenues. They do not share their profits or losses. They are managed independently, each making its own decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators and the terms of their stadium leases. They do not exchange or share their accounting books and records.¹²¹

Citing longstanding precedents by the U.S. Supreme Court¹²² and the Ninth Circuit,¹²³ Harry observed that the single-entity defense had been rejected “in circumstances more favorable to that argument than those presented in this case.”¹²⁴ Even a parent company and its subsidiary had been held by the Supreme Court to be separate entities capable

116. *Id.*

117. L.A. Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 582 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

123. See *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976).

124. L.A. Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 582 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

of conspiring together to violate the antitrust laws, despite having common ownership.¹²⁵

Next, Harry took on the league's argument that the unitary or joint venture nature of the product it creates—namely, NFL football—necessarily implied that the league was a single entity. He quoted from the NFL's brief: "[T]he economic substance is that of a single firm selling a single product involving a necessary contribution from each member."¹²⁶ According to Harry, this argument suffered from at least three defects.

First, the NFL's argument, if accepted, "would prove too much."¹²⁷ If the league would have to be treated as a single entity for purposes of litigation attacking its franchise relocation restrictions, simply because the member clubs must cooperate in order to produce exhibitions in the form of football games, then it also would have to be treated as a single entity for purposes of litigation attacking its player acquisition restrictions.¹²⁸ As every student of sports law knows, however, player acquisition restrictions "have repeatedly been found to violate Section 1 [of the Sherman Antitrust Act]."¹²⁹ In fact, as early as 1957, the Supreme Court had declared the NFL and its member clubs to be subject to the federal antitrust laws—and implicitly, capable of conspiring among themselves to violate those laws—without regard for the unitary nature of the enterprise.¹³⁰

Second, organizations other than the NFL, whose product is just as unitary in nature, have been found to violate Section 1 of the Sherman Antitrust Act.¹³¹ The "clearest instance" of this was the case involving the Associated Press (AP).¹³² The AP, an incorporated association whose members were and are newspapers, pooled their resources to gather and distribute news that no individual paper could manage to do single-handedly.¹³³ The Supreme Court had no trouble finding the AP's by-laws, which prevented the competitors of member papers from

125. See *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 141-42 (1968).

126. *L.A. Mem'l Coliseum Comm'n*, 519 F. Supp. at 583 (quoting NFL's Opposition to Motion for Partial Summary Judgment at 3, *L.A. Mem'l Coliseum Comm'n*, 519 F. Supp. (No. 78-3523-HP)).

127. *Id.*

128. *Id.*

129. *Id.* (citing *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978)).

130. See *Radovich v. NFL*, 352 U.S. 445 (1957).

131. *L.A. Mem'l Coliseum Comm'n v. NFL*, 519 F. Supp. 581, 583 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

132. *Id.*; *Associated Press v. United States*, 326 U.S. 1 (1945). Harry offered a second, similar instance. See *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963) (making similar finding as to relationship between the famed stock exchange and its individual broker-members).

133. *L.A. Mem'l Coliseum Comm'n*, 519 F. Supp. at 583.

joining the association, restrained free trade.¹³⁴ Harry reasoned: “This was a product or service distinct from that of the member publishers, and one requiring the cooperation of all the members, none of whom had the facilities or resources to produce AP’s stream of worldwide news.”¹³⁵

Third, the NFL’s argument rested on a “false premise”—namely, that the individual clubs “are not separate business entities whose products have an independent value.”¹³⁶ (He might have added that, even within the same league, different franchises fetch different sale prices, depending on the good will, history, market, and win-loss record associated with the franchise.)¹³⁷ Just because it takes a “cooperative framework” to produce football games “does not show that each club can produce football games only as an NFL member.”¹³⁸ Harry explained that many NFL clubs, including the Raiders, used to operate as members of a rival football league: the old AFL (American Football League). “There is no conceptual reason why any NFL team could not decide to pull out and join a new league.”¹³⁹ Besides, sports fans “quite often wish to spend their money on the games of a particular team, not simply on ‘NFL football.’”¹⁴⁰

Therefore, Harry concluded, the NFL’s member teams “should be treated as separate business enterprises for purposes of this lawsuit.”¹⁴¹ He agreed with the league that its business structure “presupposes a degree of mutual cooperation perhaps unique to the world of professional sports,” but felt that “such unique features” were more relevant to “weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense.”¹⁴² Accordingly, Harry granted the plaintiff’s motion for a directed verdict rejecting the single entity defense and denied the defendants’ motion for a directed verdict accepting that defense.¹⁴³

134. *Id.*; *Associated Press*, 326 U.S. at 22-23.

135. *Id.*

136. *Id.* at 584.

137. See generally JON MORGAN, *GLORY FOR SALE: FANS, DOLLARS, AND THE NEW NFL* (1997); see also CHARLES C. EUCHNER, *PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM* 33 (1994) (discussing franchise movement in Major League Baseball).

138. L.A. Mem’l Coliseum Comm’n v. NFL, 519 F. Supp. 581, 584 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff’d*, 726 F.2d 1381 (9th Cir. 1984).

139. *Id.*

140. *Id.*

141. L.A. Mem’l Coliseum Comm’n v. NFL, 519 F. Supp. 581, 585 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff’d*, 726 F.2d 1381 (9th Cir. 1984).

142. *Id.*

143. *Id.*

On May 6, 1982, the jury was given instructions consistent with the Single-Entity Ruling and sent out to deliberate as to whether Rule 4.3 was an unreasonable restraint of trade.¹⁴⁴

On May 7, just a day later, the jury returned a verdict in favor of the Coliseum Commission and the Raiders.¹⁴⁵ It found the NFL and the other clubs liable under Section 1 of the Sherman Act.¹⁴⁶

On June 14, Harry entered judgment on the liability issues along with a permanent injunction barring the NFL and its other member clubs from interfering with the transfer of the Raiders franchise from Oakland to Los Angeles.¹⁴⁷

Finally, on July 24, 1981, Harry published his opinion directing a verdict in favor of the plaintiffs and laying out his rationale as summarized above.¹⁴⁸

The NFL appealed.¹⁴⁹ By a vote of two to one, the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment, including the Single-Entity Ruling and the permanent injunction barring the league from interfering with the club's move to L.A.¹⁵⁰ Writing for the majority, Judge J. Blaine Anderson, joined by Judge Dorothy Nelson, endorsed Harry's rationale and declared that it was consistent with decisions by the Second,¹⁵¹ Eighth,¹⁵² Ninth,¹⁵³ and D.C. Circuits,¹⁵⁴ rejecting the single-entity defense in the context of various NFL rules otherwise found to violate the antitrust laws, and with decisions by the Supreme Court¹⁵⁵ in analogous contexts.¹⁵⁶ Reaching the merits, the Ninth Circuit went on to affirm the jury's finding that Rule 4.3 constituted an unreasonable restraint of trade.¹⁵⁷

144. See L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1385-86 (9th Cir. 1984).

145. *Id.* at 1386.

146. *Id.*

147. *Id.*

148. L.A. Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 583 (C.D. Cal. 1981) (Pregerson, J.) (sitting by designation), *aff'd*, 726 F.2d 1381 (9th Cir. 1984).

149. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1382 (9th Cir. 1984).

150. *Id.* at 1382, 1384, 1401.

151. *Id.* at 1388; see N. Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982).

152. See Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), *overruled by* Eller v. Nat'l Football League Players Ass'n, 731 F.3d 752 (8th Cir. 2013).

153. See Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978).

154. See Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

155. Cf. Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) (holding common ownership of enterprise insufficient to preclude application of section 1 of Sherman Antitrust Act); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (same).

156. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1388 (9th Cir. 1984).

157. *Id.* at 1382.

Dissenting, Judge Spencer Williams, a district judge from Northern California who was sitting by designation,¹⁵⁸ would have adopted the NFL's single entity defense.¹⁵⁹ To Judge Williams, the "crucial criterion" was whether the league's "formally distinct member clubs compete in any economically meaningful sense in the marketplace."¹⁶⁰ He thought not. Judge Williams criticized Harry's Single-Entity Ruling for "ignoring the subtle, but yet more significant interdependency . . . and . . . indivisibility" of the twenty-eight clubs.¹⁶¹ Putting aside the "formalistic aspects" of the clubs' separate organizational and relational status,¹⁶² he concluded that the "profound interdependency" of the league and its member clubs "in the daily operation and strategic marketing of professional football" should have carried the day.¹⁶³

Shortly thereafter, all appeals of the judgment in the Second Liability Trial were exhausted when the Supreme Court denied review.¹⁶⁴

Of course, the Single-Entity Ruling attracted both defenders and skeptics.¹⁶⁵ Besides Judge Williams, who dissented from the Ninth Circuit's affirmance of Harry's ruling, some scholars have criticized the rejection of the single-entity defense by courts in general¹⁶⁶ and Harry's ruling in particular.¹⁶⁷

158. *Id.* at 1384.

159. *Id.* at 1401.

160. *Id.* at 1404 (Williams, J., dissenting).

161. *Id.* (Williams, J., dissenting).

162. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1404 (9th Cir. 1984).

163. *Id.* at 1405 (Williams, J., dissenting).

164. L.A. Mem'l Coliseum Comm'n v. NFL, 469 U.S. 990 (1984), *cert. denied*, 726 F.2d 1381 (9th Cir. 1984).

165. *Cf.*, e.g., Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L. J. 25, 34-35 (1991) (providing no comment directly on Single-Entity Ruling, but observing that a professional sports league's "seemingly odd mixture of competition and cooperation" is no different than "cooperating to produce an automobile").

166. *See*, e.g., Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23, 23-26 (1981) (cited by L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1388 (9th Cir. 1984)).

167. *See*, e.g., Gary R. Roberts, *The Evolving Confusion of Professional Sports, Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 962-75 (1988) (attacking Single-Entity Ruling and Harry's jury instructions); *see also*, e.g., Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 894 (1999) (arguing for federal legislation immunizing leagues from antitrust liability out of fear that, without economic cooperation, professional sports leagues would find it "impossible . . . to operate at all"); Katherine C. Leone, Note, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 477 (1997) (same).

IV. THE IMPACT OF THE SINGLE-ENTITY RULING

In at least three respects, Harry's rejection of the single-entity defense has had a tremendous impact on professional team sports in North America.

First, the Single-Entity Ruling has ushered in a new era of franchise movement, especially in the NFL. As noted above, in the forty years before the 1980 regular season, the NFL saw only four franchise relocations from one metropolitan area to another.¹⁶⁸ But in the forty years after the 1980 regular season, the league saw eleven franchise relocations.¹⁶⁹ These relocations involved the Raiders, who moved from Oakland to Los Angeles in 1982; the Colts, who moved from Baltimore to Indianapolis in 1984; the Cardinals, who moved from St. Louis to Phoenix in 1987; the Rams, who moved from Anaheim to St. Louis in 1995; the Raiders, who moved from Los Angeles back to Oakland in 1995; the Ravens, who moved from Cleveland to Baltimore and changed their name from the Browns in 1996; the Titans, who actually moved twice: from Houston to Memphis in 1997 and then to Nashville in 1998 and changed their name from the Oilers; the Rams, who moved from St. Louis back to Los Angeles in 2016; the Chargers, who moved from San Diego back to Los Angeles in 2017; and the Raiders, who moved from Oakland to Las Vegas in 2020.¹⁷⁰

These franchise movements were in response to the demand for NFL football in the newer metropolitan markets to which the teams relocated—and sometimes, demand for the same product in the older metropolitan markets from which those teams had decamped.¹⁷¹ As a result,

168. Jeff Kerr, *Las Vegas Raiders latest NFL franchise to change cities: Here's a look at all eleven who've done it*, CBS SPORTS (Feb. 4, 2020, 4:02 PM), <https://www.cbssports.com/nfl/news/las-vegas-raiders-latest-nfl-franchise-to-change-cities-heres-a-look-at-all-11-who-ve-done-it/#:~:text=Other%20NFL%20franchises%20to%20relocate,Chicago%20Cardinals%20move%20to%20St>.

169. Erik Spanberg, *Expansion and relocation: From new franchises to moves in the night*, SPORTS BUS. J. (Sept. 2, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/09/02/Teams-and-League/Expansion-and-Relocation.aspx>.

170. *Id.* Note: the Patriots in 1971 moved from Boston to Foxboro, Mass. (and changed their name to the New England Patriots) but remained in the Boston metropolitan area. *Team History*, PRO FOOTBALL HALL OF FAME, <https://www.profootballhof.com/teams/new-england-patriots/team-history/> (last visited Oct. 5, 2020).

171. See, e.g., Emily Caron, *When Did the Rams Move to Los Angeles?*, SPORTS ILLUSTRATED (Jan. 20, 2019), <https://www.si.com/nfl/2019/01/20/when-did-rams-move-los-angeles-franchise-history-locations>.

the total number of NFL franchises has grown from twenty-eight before the Single-Entity Ruling to thirty-two afterward.¹⁷²

And the more things stay the same, the more they change: of the eleven franchise relocations that have occurred in the past forty years, five have involved either the return of the franchise to its former metropolitan home (the Raiders back to Oakland in 1995, the Rams back to Los Angeles in 2016, and the Chargers back to Los Angeles in 2017) or the replacement of a franchise that had moved out of its metropolitan home (the Raiders replacing the Rams in Los Angeles in 1982 and the Rams replacing the Cardinals in St. Louis in 1995).¹⁷³ Not surprisingly, each of these moves affected the largest market for NFL football, California, which until the Raiders moved to Nevada, was the only state to host four teams.¹⁷⁴

Similarly, thanks in part to the Single-Entity Ruling, franchise movement restrictions have loosened in other major professional sports. For example, the NBA was unable to stop the Clippers from moving from San Diego to Los Angeles in 1984, even though they had failed to ask for or receive the league's permission.¹⁷⁵

Second, the Single-Entity Ruling has exposed to antitrust scrutiny a variety of anticompetitive practices other than franchise relocation policy. For example, in the NFL alone, the courts have rejected the league's repeated attempts to argue that its member clubs were incapable of conspiring among themselves in Sherman Act lawsuits challenging the following league policies or practices:

- A proposal to replace individual salary negotiations with a wage scale setting the price for all player services.¹⁷⁶ In rejecting the NFL's argument, the U.S. District Court for the District of Minnesota cited the Ninth Circuit's affirmance of Harry's Single-Entity Ruling.¹⁷⁷
- A resolution capping the salaries of development squad players at \$1,000 per week.¹⁷⁸

172. L.A. Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 583 (C.D. Cal. 1981); *NFL Teams by State 2020*, WORLD POPULATION REV., <https://worldpopulationreview.com/states/nfl-teams-by-state/> (last visited Oct. 5, 2020).

173. Spanberg, *supra* note 169.

174. *NFL Teams by State 2020*, *supra* note 172.

175. See *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562, 563-64 (9th Cir. 1987).

176. See *McNeil v. NFL*, 790 F. Supp. 871, 872, 875-76 (D. Minn. 1992).

177. See *id.* at 878-80 (citing L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (9th Cir. 1984)).

178. See *Brown v. Pro Football, Inc.*, No. CIV. A. 90-1071(REL), 1992 WL 88039 (D.D.C. Mar. 10, 1992), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

- A rule prohibiting cross-ownership of soccer and other professional sports franchises by the owners of NFL franchises.¹⁷⁹
- A rule favoring closely-held club ownership, and forbidding the sale of club shares to the public.¹⁸⁰ In rejecting the NFL's argument, the U.S. Court of Appeals for the First Circuit cited the Ninth Circuit's affirmance of Harry's Single-Entity Ruling.¹⁸¹

Harry's ultimate vindication came almost thirty years later, in *American Needle, Inc. v. National Football League*,¹⁸² in which the Supreme Court rejected the NFL's argument that it was immune from antitrust scrutiny insofar as the league, its franchises, and a separate entity they had created that was engaged in the business of marketing the clubs' intellectual property with apparel manufacturers.¹⁸³ Without citing the Single-Entity Ruling by name, the Court nevertheless embraced Harry's reasoning and result, and did so unanimously.¹⁸⁴

Third, the Single-Entity ruling has helped spawn new forms of sports ownership that were designed, among other things, to evade antitrust scrutiny by looking more like genuine parts of a single business entity.

For example, the investor-operators of Major League Soccer (MLS) are all financially invested in the same business entity: Major League Soccer, LLC; no traditional franchise owners are permitted.¹⁸⁵ As a result, they succeed or fail together. In exchange for an investment in the LLC, each investor-operator is entitled to operate one of the teams, receive a pro-rata share of the overall profits or losses, and share certain group revenues, such as television broadcast rights, league sponsorships, and online sales.¹⁸⁶ In effect, part of each club is owned by the league and, therefore, each of the other clubs. But each investor-operator gets to keep most local revenues, such as local broadcast rights, area

179. See *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1249-50 (2d Cir. 1982).

180. See *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994).

181. See *id.* at 1099-1100 (1st Cir. 1994) (citing *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1387-90 (9th Cir. 1984)).

182. See *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

183. *Am. Needle*, 560 U.S. at 199-200.

184. See *id.* at 185, 199-200.

185. Peter Galindo, *MLS' Single-Entity Structure Is the League's Biggest Obstacle*, BLEACHER REP. (Jan. 24, 2015), <https://bleacherreport.com/articles/2339627-mls-single-entity-structure-is-the-biggest-obstacle-for-the-league>.

186. Emma Parker, *A Match of Leagues—MLS v CSL*, DUKE UNIV. (2020), <https://sites.duke.edu/soccerpoliticsemmaparker/homepage/corporate-structure-revenue-and-expenditure-flow/>.

sponsorships, concessions and merchandise sold in the stadium, as well as parking fees.¹⁸⁷

If the NFL had been organized as the MLS actually is, then the league might have prevailed in Harry's Single-Entity Ruling.¹⁸⁸ In the case of professional team soccer, Harry's influence has been to encourage innovation in the structure of sports business ownership.

V. CONCLUSION

For a guy who thought sports were fun and liked to say, "Fun is bullshit," Harry Pregerson has had a significant impact on the application of antitrust law to major league team sports. His Single-Entity Ruling is likely to influence legal challenges to the franchise movement policy in the NFL and beyond for years to come.

187. See Isaac Krasny, *Unpacking the Major League Soccer Business Model*, MEDIUM (June 7, 2017), https://medium.com/@isaac_krasny/unpacking-the-major-league-soccer-business-model-827f4b784bcd.

188. See, e.g., *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58-59 (1st Cir. 2002) (considering "hybrid" nature of MLS business structure but concluding that single-entity defense "need not be answered definitively" in case at bar).