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PERSPECTIVE

National Football League tackles antitrust claims

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A group of Oakland Raiders fans demonstrates outside the team's headquarters in Oakland, Dec. 24, 2015.

Starting in the fall of 1966, and for most of the NFL seasons that followed, the Raiders played football in Oakland's Coliseum. (The team moved to Los Angeles from 1982 to 1994 before returning to Oakland.) After negotiations between the city and team failed to produce an agreement to finance a new stadium, the Raiders decided to move to Las Vegas where they could play in a new $1.9 billion stadium (financed by $750 million in public funds). The Raiders rejected a less lucrative proposal from Oakland, and the NFL — faced with a huge potential windfall in the form of a $378 million relocation payment from the Raiders — approved the Raiders' relocation request in 2017.

While the team ultimately moved to Las Vegas in January 2020, the divorce from Oakland was acrimonious. The city of Oakland sued the NFL, Raiders and other 31 football franchises under federal antitrust law. Critically, the city did not challenge the Raiders' unilateral decision to move from Oakland to Las Vegas under Section 2 of the Sherman Act, which outlaws the monopolization of trade or commerce among the states. The city's case instead focused on Section 1 of the Act, and centered on the NFL's relocation-and-expansion rule as a violation of that Section's prohibition on anticompetitive conduct. Under the rule, no team can join the NFL, nor can an existing team move cities, without assent from three-fourths of its member teams.

Oakland advanced two antitrust theories. First, the city argued that the NFL's collective decision to allow the Raiders to move and to deny Oakland a replacement franchise was tantamount to a group boycott. Second, the city argued that the NFL relocation-and-expansion rule allowed the NFL teams to constrain the supply of NFL teams — capping the number of franchises at 32 — which in turn drove up the prices cities had to pay to obtain and retain an NFL franchise. In so doing, Oakland sought to hold the NFL and its teams liable for concerted action under Section 1 of the Sherman Act — not under Section 2, which governs conduct by a single firm.

The incentives for that choice are obvious: If Oakland could demonstrate that the defendants

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had engaged in a per se violation of the law, the court would not need to consider any of the procompetitive reasons for the defendants' actions. And the burdens for challenging potentially anticompetitive agreements under Section 1 are otherwise generally less demanding than those for challenging unilateral business decisions under Section 2 (for example, Section 2 requires proof of actual or dangerously probable monopoly power). And it is notoriously difficult to prove that a company's unilateral refusal to deal with a particular customer or competitor is anticompetitive.

The case reached the 9th U.S. Circuit Court of Appeals, which rejected Oakland's claims. *City of Oakland v. Oakland Raiders*, 2021 DJDAR 12379 (Dec. 2, 2021). As the 9th Circuit's decision proves, attempts to shirk these burdens of proof by challenging a remote agreement carry their own risks.

First, the court first held that the alleged group boycott was not a group boycott at all. Carefully reviewing the alleged conduct, the court observed that only the Raiders decided to "boycott" Oakland by moving to Las Vegas. While other teams voted to support that decision, no new or existing team sought to play in Oakland. Therefore, the NFL's other 31 teams did not themselves refuse to sell anything to Oakland. As the 9th Circuit put it, "the other NFL teams simply supported the Raiders' refusal to deal with the City, but did not themselves refuse to do business with the City."

Next, the court concluded the city lacked statutory standing to pursue its price-fixing theory. The court recognized that the Raiders' move may have economically harmed Oakland, such as by reducing its tax revenue. But it deemed these injuries too remote and indirect to give rise to a viable claim. A more direct injury — that a new franchise would have sought to move to Oakland in a hypothetical world without the relocation-and-expansion rule — was "too speculative." And if Oakland was correct that the relocation-and-expansion rule had in fact driven up prices by artificially restricting the number of NFL teams, then Oakland wasn't a victim — as it had paid nothing to obtain a new team.

At both turns, the 9th Circuit parsed the alleged effects of the challenged agreement without conflating them with the effects that stemmed from the Raiders' unilateral choice to move. That is the way antitrust analysis is supposed to work. The distinctions between Section 1 and Section 2 of the Sherman Act recognize that unilateral and concerted conduct are and should be treated differently. Agreements among competitors are more likely to harm competition, and courts are better suited to ferreting out such conspiracies than second-guessing unilateral conduct. The 9th Circuit was therefore right to focus tightly on the theory of liability that Oakland chose to plead.

In observing that distinction, the 9th Circuit helps to arrest a trend by jilted customers and competitors who — upset with another's unilateral decision — bring suit under the guise of Section 1 by pointing to an adjacent agreement. Thus, the panel's decision in *City of Oakland* is a powerful and timely reminder that plaintiffs who attempt to shoehorn fundamentally unilateral decisions into concerted action cases do so at their own peril.

The 9th Circuit's decision also reminds practitioners about the importance of limiting antitrust claims to those who can establish statutory standing. As the antitrust laws and competition considerations take on increasing focus in the media, Congress, and the public discourse, too often they are being approached as a tool for all problems. *City of Oakland* illustrates that this is a mistake in certain cases. Not only must a litigant demonstrate antitrust injury — an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful — but also a direct injury to support antitrust standing. In this case, while the 9th Circuit found that economic loss stemming from the Raiders' move "adequately alleged ... injury," the indirectness of that injury proved dispositive to the city's price-fixing theory. Indeed, there is a compelling case that a "Hail Mary of speculation" like the one thrown by Oakland here even implicates Article III's lower standing threshold, as Judge Patrick Bumatay concluded in his concurrence.

At first blush, a decision about an NFL franchise's move from one city to another would seem to have few implications outside of sports leagues. But the 9th Circuit's decision in *City of Oakland* is instead a perceptive ruling whose careful analysis should provide a model for other courts faced with similar attempts to challenge fundamentally unilateral decisions under Section 1 of the Sherman Act or to broaden the ambit of the antitrust laws beyond their natural reach.