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## Major League Baseball and the Antitrust Rules: Where Are We Now

# MAJOR LEAGUE BASEBALL AND THE ANTITRUST RULES: WHERE ARE WE NOW???

*Harvey Gilmore, LL.M, J.D.<sup>1</sup>*

## INTRODUCTION

This essay will attempt to look into the history of professional baseball's antitrust exemption, which has forever been a source of controversy between players and owners. This essay will trace the genesis of the exemption, its evolution through the years, and come to the conclusion that the exemption will go on *ad infinitum*.

### 1) WHAT EXACTLY IS THE SHERMAN ANTITRUST ACT?

The Sherman Antitrust Act, 15 U.S.C.A. sec. 1 (as amended), is a federal statute first passed in 1890. The object of the statute was to level the playing field for all businesses, and oppose the prohibitive economic power concentrated in only a few large corporations at that time. The Act provides the following:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...<sup>2</sup>

It is this statute that has provided a thorn in the side of professional baseball players for over a century. Why is this the case? Because the teams that employ the players are *exempt* from the provisions of the Sherman Act.

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<sup>2</sup> 15 U.S.C. § 1 (1890).

## 2) THE SUPREME COURT'S FIRST STATEMENT ON THE SUBJECT

The first definitive Supreme Court statement on the applicability of the antitrust laws to professional baseball was *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.<sup>3</sup> The suit arose as a result of animosity between the plaintiff and the American and National Leagues. The plaintiff, a Baltimore professional baseball team, was a member of a professional baseball league, the Federal League. This league was separate from the American and National Leagues. It brought suit against the American and National Leagues, alleging that the leagues made a deliberate attempt to destroy the Federal League by purchasing players and franchises of the Federal League in violation of the federal antitrust laws.<sup>4</sup>

The Supreme Court's opinion reversed the trial court's award of treble damages to the Baltimore Federal League franchise. The Court also summarized the nature of the business of organized baseball. Justice Holmes, speaking for a unanimous court, stated that the clubs were "in different cities and for the most part, in different states."<sup>5</sup> Justice Holmes also noted that these teams played against one another in public exhibitions for money, with at least one of the teams having to cross state lines in order to compete in the exhibition. In other words, because professional baseball was set up in various cities, it was necessary for teams to travel from city to city (e.g., the Yankees traveling to Boston to play the Red Sox and vice versa) in order to play their games.

### a) Why professional baseball is not considered interstate commerce

The court held that professional baseball was *not* within the scope of the antitrust laws

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<sup>3</sup> Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

<sup>4</sup> *Id.* at 208.

<sup>5</sup> *Id.*

and that the business of staging such exhibitions was purely a state affair.<sup>6</sup>

Additionally, the court found that “the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.”<sup>7</sup> The court analogized professional ballplayers to lawyers who had to argue cases out of state. “To repeat the illustrations of the court below, a firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another state.”<sup>8</sup> The court also found that interstate commerce was not implicated because team transportation was “a mere incident, not the essential thing. That to which is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words.”<sup>9</sup>

### 3) CONGRESS’ CONTINUED ACQUIESCENCE

The next time the Supreme Court addressed the antitrust issue was in *Toolson v. New York Yankees*.<sup>10</sup> In *Toolson*, the plaintiffs brought a challenge against the existing reserve clause in all ballplayer contracts. Specifically, George Toolson, a Yankees pitcher, refused to report to the New York Yankees’ Binghamton farm club.<sup>11</sup> As a result, Toolson was blacklisted, and prevented from playing for any other baseball organization.<sup>12</sup> Toolson sued, alleging that

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<sup>6</sup> *Id.* at 208-09.

<sup>7</sup> *Id.* at 209.

<sup>8</sup> *Id.*

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

<sup>10</sup> *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953).

<sup>11</sup> *Toolson v. N.Y. Yankees, Inc.*, 101 F. Supp. 93, 93 (S.D. Cal. 1951), *cert. granted*, 345 U.S. 963 (1953).

<sup>12</sup> *Id.* at 94.

organized baseball violated the Sherman and Clayton Acts.<sup>13</sup> Specifically, Toolson contended that organized baseball constituted commerce and that radio and television broadcasting as well as the state of interstate advertising constituted interstate commerce.<sup>14</sup> Furthermore, he argued that the facts of his case were clearly distinguishable from *Federal Baseball* on the ground that professional baseball had become a more streamlined operation since *Federal Baseball* had been decided.<sup>15</sup>

In its per curiam opinion, the Supreme Court reaffirmed the proposition established by *Federal Baseball* that baseball was neither interstate commerce nor subject to the federal antitrust laws. The Court also pointed out that Congress had not acted since the *Federal Baseball* ruling, now more than 30 years old, to change the game's status. "Congress has had the ruling under consideration but has not seen fit to bring such businesses under these laws by legislation having prospective effect. The business has been thus left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation."<sup>16</sup> The Court was careful, however, to point out that the antitrust exemption was limited specifically to baseball. "Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."<sup>17</sup>

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<sup>13</sup> *Id.*

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

<sup>15</sup> H. Ward Classen, *Three Strikes and You're Out: An investigation of Professional Baseball's Antitrust Exemption*, 21 AKRON L. REV. 369, 379 (1988).

<sup>16</sup> *Toolson*, 346 U.S. at 357.

<sup>17</sup> *Id.* at 357-58.

However, unlike *Federal Baseball*, *Toolson* was not a unanimous opinion. Justice Burton, joined by Justice Reed, in dissent, was incredulous that professional baseball still retained its antitrust exempt status. He pointed out that the game had grown by leaps and bounds over the past 31 years, thanks to increased capital investments, advertising, and coast to coast broadcasting.<sup>18</sup>

Whatever may have been the situation when the *Federal Baseball* case was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce. In the light of organized baseball's well known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance of at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico, or Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United states and the Sherman Act . . . ."<sup>19</sup>

#### 4) THE "RESERVE" CLAUSE

Before free agency, the standard player's contract included a provision which allowed teams to retain players even if their contracts had expired. Once a player's contract expired, the team would put the player's name on a list of players who were off limits to other teams. Once the player was on his team's list, the team maintained the right of first refusal in determining whether the team wanted to sign the player to a new contract for the next season.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 357.

This was a one-way street because the player was not allowed to explore possibilities with other teams as long as he was on his original team's reserve list. This contractual provision was known, infamously, as the reserve clause.

a) The Antitrust Exemption and The Reserve Clause

The strongest player objection was that the reserve clause bound players to their teams in perpetuity, even if their contracts expired, they were forever precluded from freely offering their services to any team that might have been interested. This system bound a player to his team until he was traded or retired because the reserve clause was automatically renewed every year.

Baseball's employer - employee situation is *sui generis*. A player can sell his services to the club making the best offer only when he is a free agent - a status which he will have either when he is just breaking into baseball or when the club holding his contract has no further use for his services and is unable to sell him to any other club. In neither of these situations is his bargaining power likely to be great. At any other time, the player must accept the terms of the owner claiming his services or retire from the game. During the salary negotiations prior to the start of the season, the club is usually in the dominating position, and only if the player possesses such outstanding ability that the club would find it difficult to replace him, will he be able to force a satisfactory compromise. Otherwise, he must rely solely upon the owner's reluctance to sacrifice the investment represented by the athlete's original cost and present transfer value. In any event, the player cannot take advantage of the fact that there might be more generous club owners willing to make him a better offer. If his club is one of the less wealthy and less successful, he may go through his entire career without acquiring the fame or enumeration merited by his ability - and without ever sharing a World Series plum. If he is traded, he must work for his new team even though it may be in the hottest part of Texas. If he is with a good club which has a slightly better man at his position, but nevertheless can afford to retain him, he may warm the bench during the years when he should be developing - a misfortune which has ruined some potentially great players. In return for the player's placing his baseball fortune in the club's hands, the club promises only that it will pay him a stipulated salary for so much of the current season as it desires his services; on ten days' notice it can release him unconditionally and terminate its obligation to pay him a salary....Despite the vehemence of these criticisms, baseball's benevolent despotism enjoys a reign unhampered either by criminal prosecutions or by

revolts among its 'slaves'.<sup>20</sup>

b) Baseball's competitive balance (or lack thereof)

In the days before free agency, the team owners' favorite argument for the continuance of the reserve clause was that it was necessary to maintain the major leagues' competitive balance. Here is how balanced major league baseball competition was in those days. In the 44 baseball seasons between 1921 and 1964, the New York Yankees won 29 American League Pennants,<sup>21</sup> and 20 World Series Championships.<sup>22</sup> They were (and still are) the only team to win five straight World Series Championships (1949-1953).<sup>23</sup> They were (and still are) the only team to go to five consecutive World Series (1949-1953; 1960-1964).<sup>24</sup> They were (and still are) the only team to win four consecutive World Series Championships (1936-1939).<sup>25</sup> They are also the only team to win the World Series with back-to-back sweeps (1927-1928; 1938-1939).<sup>26</sup> It would be another 60 years before a team would score consecutive World Series sweeps. The 1998-1999 Yankees (them again) would accomplish that feat.

In that same span, the St. Louis Browns, Washington Senators, Boston Red Sox, Chicago

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<sup>20</sup> *Organized Baseball and the Law*, 46 YALE L.J. 1386, 1387-88 (1937).

<sup>21</sup> THE BASEBALL ENCYCLOPEDIA 315-477, 2860-2903. (Jeanine Bucek et al. eds., MacMillan 10th ed. 1996). The Yankees won the American League Championship in 1921, 1922, 1923, 1926, 1927, 1928, 1932, 1936, 1937, 1938, 1939, 1941, 1942, 1943, 1947, 1949, 1950, 1951, 1952, 1953, 1955, 1956, 1957, 1958, 1960, 1961, 1962, 1963, and 1964.

<sup>22</sup> *Id.* at 315-477, 2860-2903. The Yankees won the World Series in 1923, 1927, 1928, 1932, 1936, 1937, 1938, 1939, 1941, 1943, 1947, 1949, 1950, 1951, 1952, 1953, 1956, 1958, 1961 and 1962.

<sup>23</sup> *Id.* at 2888-2892.

<sup>24</sup> *Id.* at 2888-2892, 2899-2903.

<sup>25</sup> *Id.* at 2875-2878.

<sup>26</sup> *Id.* at 2866-2867, 2877-2878.

White Sox and Cleveland Indians won eight American League Pennants,<sup>27</sup> and two World Series Championships combined.<sup>28</sup> This is the competitive balance that owners fought long and hard to protect.

In that same time frame, Baseball Hall of Famer Ernie Banks was voted the Most Valuable Player in the National League for the 1958 and 1959 seasons.<sup>29</sup> His team, the Chicago Cubs, finished fifth in the 8-team National League both years.<sup>30</sup>

Similarly, Baseball Hall of Famer Ralph Kiner led the National League in home runs in seven consecutive seasons.<sup>31</sup> In the 8-team National League, his team, the Pittsburgh Pirates, finished dead last in three of those years, and next to last in two other seasons. During Kiner's 7-year run, the Pirates never finished higher than 4<sup>th</sup> place in the National League.<sup>32</sup> In fact, Kiner "had approached Pirates' General Manager Branch Rickey about a raise after Kiner had hit 47 home runs the prior season. Rickey's response was: 'we could have finished last *without* you.'"<sup>33</sup>

These are examples of two of the greatest players in the history of professional baseball who were forever doomed to playing their entire careers for teams whose collective abilities came nowhere near theirs. Another former player, former Yankee outfielder Bob Cerv once told

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<sup>27</sup> *Id.* at 326-456, 2863-2898. The Browns won the American League Championship in 1944. The Senators won the American League Championship in 1924, 1925, and 1933. The Red Sox won the American League Championship in 1946. The Indians won the American League Championship in 1948 and 1954. The White Sox won the American League Championship in 1959.

<sup>28</sup> *Id.* at 2863, 2887. The Senators won the World Series in 1924; The Indians won the World Series in 1948.

<sup>29</sup> *Id.* at 19.

<sup>30</sup> *Id.* at 451, 455.

<sup>31</sup> *Id.* at 1223.

<sup>32</sup> *Id.* at 406, 410, 413, 418, 422, 426, 430.

<sup>33</sup> Joseph A. Kohm, Jr., *Baseball's Antitrust Exemption: It's Going, Going...Gone!*, 20 NOVA L. Rev. 1231, 1242 n.81 (1996).

this story about the one-sidedness of contract negotiations: “I went in a lot of times, and, hell, they’d have an attorney there. They’d have a business manager. They’d have a general manager. They’d have the president. And there you sat by yourself. If you’d gone in with an attorney, you wouldn’t of [sic] had a job. So it was kinda one-sided.”<sup>34</sup>

#### 5) THE START OF THE FIGHT FOR FREE AGENCY

In the employer-employee arena, baseball’s reserve clause was not challenged again until 1970. After the 1969 baseball season, Curt Flood was traded from the St. Louis Cardinals, a perennial National League power, to the Philadelphia Phillies, then the league doormat. Flood had been the starting center fielder on the Cardinals’ World Series winning teams in 1964,<sup>35</sup> (against the Yankees) and 1967 (against the Red Sox),<sup>36</sup> and their National League Championship team in 1968 (defeated by the Tigers in that year’s World Series).<sup>37</sup> Even though he had no desire to play for the Phillies, Flood had no choice since his 1969 contract contained the typical reserve clause found in all standard contracts. That in turn enabled Philadelphia, as assignee of the St. Louis contract, to invoke the reserve clause to force Flood to play during the following season (and at a salary cut, no less). Flood never signed a contract to play in Philadelphia and objected to the trade. Baseball Commissioner Bowie Kuhn rejected Flood’s claim and informed him that the assignment and reserve clauses in his player contract were valid and he would play in Philadelphia. Flood then brought suit against the Commissioner.<sup>38</sup>

In his suit, Flood alleged that the reserve clause violated the Sherman Act, state antitrust

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<sup>34</sup> JOHN TULLIAS, *I’D RATHER BE A YANKEE* 147 (MacMillan 1986).

<sup>35</sup> THE BASEBALL ENCYCLOPEDIA, *supra* note 21, at 2903.

<sup>36</sup> *Id.* at 2906.

<sup>37</sup> *Id.* at 2907.

<sup>38</sup> Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), *cert. granted*, 407 U.S. 258 (1972).

laws, and the 13th Amendment of the U.S. Constitution outlawing involuntary servitude. The District Court in New York rejected the antitrust claims, citing and reaffirming baseball's exemption status from antitrust law. Flood eventually took his claims to the Supreme Court.<sup>39</sup> The Supreme Court once again entertained the question of whether baseball is subject to antitrust legislation. After reviewing the case history, the Supreme Court again reaffirmed baseball's exempt status (by a 5-3 count), citing several reasons for doing so. The court cited that (1) Congress had never altered baseball's status as defined by *Federal Baseball*; (2) the *Toolson* decision showed Congress continued acquiescence to baseball's exempt status; (3) a reluctance to overrule *Federal Baseball* retroactively; and (4) a desire that any change would be provided by legislation rather than by court decree. Justice Douglas, in dissent, pointed out that the Court's construction of interstate commerce had expanded significantly since *Federal Baseball* and it was painfully obvious that professional baseball in 1972 was definitely engaging in interstate commerce.

Also dissenting, Justice Marshall, joined by Justice Brennan, pointed out that Congress has definitely not tacitly approved the *Federal Baseball* and *Toolson* cases. He reasoned that if it had, *all* of the major professional sports would have had antitrust protection. "Has Congress acquiesced in our decisions in *Federal Baseball* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the court refused to act because

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<sup>39</sup> Flood v. Kuhn, 407 U.S. 258 (1972).

Congress had been silent. But the court may have read too much into this legislative inaction.”<sup>40</sup>

a) The Seitz Ruling and the Death of the Reserve Clause

At the end of the 1975 baseball season, the Major League Baseball Players Association (on behalf of pitchers Andy Messersmith and Dave McNally) filed a grievance against the team owners challenging the reserve clause. The matter was submitted to arbitration under the terms of the then existing collective bargaining agreement. In a stunning decision, arbitrator Peter Seitz resolved the problem of the reserve clause in the players’ favor. He ruled that once a player’s renewal year comes to an end, the player no longer has a contractual obligation to his team. In effect, since there is no longer a binding contract between the player and his team, he cannot be placed on his team’s reserve list. Consequently, a player was free to sign with whatever team he desired (*usually the highest bidder*). The Seitz decision was upheld on appeal.<sup>41</sup>

This proved to be a monumental victory for the players because they were given the same freedom of movement as any other employee. If a typical employee wants to get out of a given job situation, he could try to find another job that provides a higher salary, better working conditions, a change of scenery, etc. With a professional ballplayer, if he were in a bad work situation (losing team, not getting along with management, etc.), his only options were to endure the situation, or retire from the game. Now that the reserve system had been eliminated, players now had the freedom to pursue a job situation that gave them the maximum benefits (usually a much higher paycheck and the chance to go to the World Series with a contender).

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<sup>40</sup> *Id.* at 292.

<sup>41</sup> *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615 (8th Cir. 1976).

## b) The Economic Impact of the Current System

As mentioned previously, the Yankees' dominance from 1921-1964 flew in the face of the argument that the reserve clause was vital to maintaining the game's competitive balance. Since free agency now allows baseball players to offer his services to the highest bidder, baseball salaries have grown astronomically in the past 30 years.

Consequently, operating a baseball franchise has become a more expensive proposition. One of the sticking points that led to the 1994 work stoppage was that team owners alleged that the skyrocketing costs of baseball operations seriously threatened the continued viability of the game. The owners also alleged that the economic system as currently constructed undermined competitive balance (there's that argument again) because certain teams weren't on the same financial footing as certain others. In other words, the financial condition of certain "large market" teams (the Yankees, for example) was such that they could afford to pay top dollar to free agents, but certain "small market" teams (the Pirates and Royals, for example) could not compete either on the field or in the checkbook.

I see some logical flaws in that argument, however. The first logical flaw assumes that having the highest payroll or even being solvent guarantees a World Series win at the end of the season (more on that shortly). Another logical flaw is that a change in the game's economic structure does not necessarily guarantee that the lower echelon teams would have an equal chance of winning. The competitive balance argument also seems to suggest that a fairer economic system would give teams an equal chance of winning a championship.

There are 30 major league baseball teams as of the 2008 season. To carry the competitive balance argument to its logical conclusion, then each team should win the World

Series once every 30 years. However, the Yankees' 3 straight championships in 1998, 1999, and 2000 have already blasted that argument into oblivion, as have the multiple championships of the Florida Marlins (1997 and 2003) and the Boston Red Sox (2004 and 2007). If we are to have true competitive balance, then the Yankees should not win another World Series until the year 2030, the Marlins until 2033, and the Red Sox until 2037.

As to the financial argument, the so-called small market proponents conveniently forget to mention that the Yankees have been defeated in every postseason from 2001 through 2007 in spite of the fact that they had the highest payroll every single year.<sup>42</sup>

<b><u>Year</u></b>	<b><u>Yankees' Payroll</u></b>	<b><u>Postseason Opponent</u></b>	<b><u>Opponent's Payroll</u></b>
2001*	\$112,287,143	Arizona Diamondbacks	\$85,247,999
2002	\$125,928,583	Anaheim Angels	\$61,721,667
2003*	\$152,749,814	Florida Marlins	\$48,750,000
2004	\$184,193,950	Boston Red Sox	\$127,298,500
2005	\$208,306,817	Anaheim Angels	\$97,725,322
2006	\$194,663,079	Detroit Tigers	\$82,612,866
2007	\$189,639,045	Cleveland Indians	\$61,673,267

\* World Series Losses

If that isn't enough to poke a hole in the small market teams' alleged inability to put a competitive product on the field, here are three more items to consider:

1) The Diamondbacks, who beat the Yankees in the classic 2001 World Series, showed a net operating loss in their financial statements amounting to approximately \$44,358,000. The

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<sup>42</sup> USA Today Salaries Databases, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=9> (last visited May 20, 2009).

Milwaukee Brewers, who had a 68-94 record in 2001, finished with an operating profit in excess of \$9,000,000.<sup>43</sup>

2) During the 2005 season, the Yankees, who had a total payroll of \$208,306,817,<sup>44</sup> almost missed the postseason for the first time since 1993. At this same time, the San Diego Padres (a .500 team, I might add), who had a total payroll of \$63,290,833, comfortably won the National League Western Division title with a record of 82-80.<sup>45</sup>

3) The New York Mets, only one of three teams who had a payroll in excess of \$100 million in 2005 (the Yankees & Red Sox are the other two),<sup>46</sup> needed a late season surge to avoid a last place finish in the National League Eastern Division.<sup>47</sup>

#### 6) THE CONSTITUTION, THE ANTITRUST EXEMPTION AND FRANCHISE RELOCATION

While major league baseball took a hit on the reserve clause issue, its antitrust exemption was still solid in other areas. In 1965, the State of Wisconsin alleged that major league baseball violated Wisconsin antitrust law when the Braves moved from Milwaukee to Atlanta.<sup>48</sup> The state of Wisconsin claimed that major league baseball violated Wisconsin Statute sec. 133.01 when the owners approved the move. Section 133.01 stated: “Every contract or combination in

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<sup>43</sup> 2001 Team-by-Team Revenues and Expenses Forecast, <http://www.usatoday.com/sports/baseball/stories/2001-12-05-focus-expenses.htm>.

<sup>44</sup> New York Yankees Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=9> (last visited May 20, 2009).

<sup>45</sup> San Diego Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=28> (last visited May 20, 2009).

<sup>46</sup> New York Yankees Yearly Payrolls, *supra* note 44; Boston Red Sox Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=3> (last visited May 20, 2009).

<sup>47</sup> New York Mets Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=25> (last visited May 20, 2009).

<sup>48</sup> State v. Milwaukee Braves, Inc., 144 N.W.2d 1, 2 (Wis. 1966).

the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal.”<sup>49</sup>

The Wisconsin trial court summarized the statute as follows: “Every combination intended to restrain or prevent competition in the supply or price of any article or commodity... or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be ... sold in this state ... is hereby declared an illegal restraint of trade.”<sup>50</sup>

The state of Wisconsin alleged that the defendants acted in concert, and monopolized power over baseball. The state also alleged that major league baseball illegally terminated the playing of baseball in Milwaukee and illegally restrained and prevented various types of trade and commerce involved in baseball by moving out of Milwaukee.

In reviewing the trial court’s verdict favoring the state, the Wisconsin Supreme Court felt the dominant issue was whether the Supremacy Clause of the U.S. Constitution precluded the application of Wisconsin antitrust law. “The question to be decided under the commerce and supremacy clauses of the constitution of the United States is: ‘Does the presence and exercise of monopoly power arising out of the nature of the organization of baseball permit application of the state’s policy in this instance?’”<sup>51</sup> The court provided a two-step analysis on the issue. First, the court reviewed if there had been a violation of Wisconsin antitrust law. The court did find such a violation. “The substantial injury to business activity within Wisconsin caused by the defendant’s exercise of their monopoly power is clear, and we assume, at this point, that a

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<sup>49</sup> *Id.* at 9.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 12.

violation of Wisconsin law has occurred if our law can be applied.”<sup>52</sup> In addition, the court held that the activities of organized baseball were in fact interstate by their very nature. “It is evident that the activity of major league baseball, spread through eight states in the National League and nine states and the District of Columbia in the American League is interstate commerce. ... Not only are defendants engaged in interstate commerce which involves activity within Wisconsin, but enforcement of the antitrust provision of Wisconsin would directly affect defendants’ operations outside the state as well.”<sup>53</sup>

The Wisconsin Supreme Court also recognized that federal case law had stood for the proposition that baseball was in fact exempt from the federal antitrust laws. It then held that the Wisconsin statute could not be applied because decisions by the United States Supreme Court and the silence of Congress after those judicial decisions controlled over a state statute via the Supremacy Clause of the U.S. Constitution. In this situation, the need for a national uniformity in the realm of interstate commerce would supersede a state’s application of its own antitrust laws. “The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them the authority to make regulations affecting those phases of it which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”<sup>54</sup> The court went on to say: “We deem it unrealistic to interpret these decisions of the supreme court of the United States plus the silence of Congress as creating a mere vacuum in national

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<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.* at 11.

<sup>54</sup> *Id.* at 15-16.

policy, leaving the states free to regulate the membership of the baseball leagues.”<sup>55</sup>

As a result of the legislative inaction over the course of the 20<sup>th</sup> century, professional baseball has seen several franchise relocations:

**Athletics:** From Philadelphia to Kansas City after the 1954 season, then from Kansas City to Oakland after the 1967 season.

**Braves:** From Boston to Milwaukee after the 1952 season, then from Milwaukee to Atlanta after the 1965 season.

**Orioles:** From St. Louis (as the St. Louis Browns) to Baltimore (& renamed the Baltimore Orioles) after the 1953 season.

**Brewers:** From Seattle (as the Seattle Pilots) to Milwaukee (& renamed the Milwaukee Brewers) after the 1969 season.

**Twins:** From Washington (as the original Washington Senators) to Minnesota (& renamed the Minnesota Twins) after the 1960 season.

**Rangers:** From Washington (as the 2<sup>nd</sup> Washington Senators franchise) to Arlington, Texas (& renamed the Texas Rangers) after the 1971 season.

And, the most infamous of all:

**Dodgers:** From Brooklyn, NY to Los Angeles after the 1957 season.

**Giants:** From Manhattan, NY to San Francisco after the 1957 season.

a) Professional Football, Franchise Relocation, and the Antitrust Rules

An interesting contrast, however, shows how the federal antitrust laws have facilitated franchise movement in professional football. During the 1980 football season, the Oakland

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<sup>55</sup> *Id.* at 17-18.

Raiders announced plans to relocate to Los Angeles, where they would play their home games in the Los Angeles Memorial Coliseum. The National Football League (NFL) attempted to prohibit the move by pointing to a provision in its by-laws that required approval of at least 75 percent of the other owners.

Raiders' owner Al Davis responded by suing the league on antitrust grounds.<sup>56</sup> The Raiders would eventually win the antitrust lawsuits against the league and would also win an eminent domain lawsuit against the City of Oakland.<sup>57</sup> While the Raiders were in the midst of all of this litigation, they twice embarrassed the league by winning the Super Bowl after the 1980 season (their next to last in Oakland), and after the 1983 season (their second in Los Angeles). Ironically, the Raiders would leave Los Angeles and return to Oakland after the 1994 season. As a result of the Raiders' victory on antitrust grounds, the NFL has seen six franchise relocations in less than 25 years.

**Raiders:** From Oakland to Los Angeles after the 1981 season, then from Los Angeles back to Oakland after the 1994 season.

**Cardinals:** From St. Louis to Phoenix after the 1987 season.

**Titans:** From Houston (as the Houston Oilers) to Tennessee (and renamed the Tennessee Titans) after the 1996 season.

**Colts:** From Baltimore to Indianapolis after the 1983 season.

**Rams:** From Los Angeles to St. Louis after the 1994 season.

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<sup>56</sup> See *Los Angeles Memorial Coliseum Commission v. National Football League*, 72 F.2d 1381 (9th Cir. 1984); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League (Raiders II)*, 791 F.2d 1356 (9th Cir. 1986).

<sup>57</sup> See *Oakland v. Oakland Raiders ("Raiders I")*, 32 Cal. 3d 60 (Cal. 1982).

## 7) THE INFAMOUS 1994 WORK STOPPAGE

Then came August 1994, the start of baseball's ultimate meltdown and subsequent nuclear winter. Players and management disagreed vehemently over player salary caps and free agency. Management argued that protecting their economic viability was an absolute must for the continued survival of the game. This would take the form of a revenue sharing plan that included a cap on player salaries. The players argued that baseball's antitrust exemption prevented them from getting equal protection under the law. When negotiations broke down and reached the impasse stage, the owners tried to impose their salary cap and revenue sharing plan unilaterally. The players then began a labor strike against the team owners. Thus, the remainder of the 1994 season and the start of the 1995 season were irretrievably lost. The cancellation of the 1994 World Series marked the first time in 90 years that there were no World Series games being played by the respective American and National League champions. The strike also marked the first time in a century that there were no games played on Labor Day Weekend. The acrimonious situation ended early in 1995 when a federal court issued an injunction to the owners to reinstate the terms of the expired collective bargaining agreement. Two days later, the players ended their strike.

In 1995, when players and owners finally approved a new collective bargaining agreement, they also put in an interesting clause in the contract. Article 27 of the collective bargaining agreement provided that the players and management would jointly lobby Congress to pass a law that would extend the antitrust laws to professional baseball. This provision looks very promising in that players and owners appear be willing to build on a new era of cooperation. However, its appeal is only cosmetic, and wholly unrealistic, in my opinion. Unfortunately,

most fans, myself included, are convinced that there will never be any true cooperation between players and owners. Usually, they can barely agree to agree, and I just cannot see any cooperative effort to lobby Congress to repeal the antitrust exemption, considering that the exemption has been a sore point between the two sides for decades.

#### 8) WHERE DO WE GO FROM HERE?

As a result, the continued acrimony between players and owners left many fans (myself included) seeing both owners and players as greedy robber barons who could not care less about the average working person. These sentiments finally reached the ears of Congress, who finally attempted to address the antitrust situation after the 1994 debacle:

Since World War II, more than a dozen bills have been introduced to repeal baseball's antitrust exemption, but until 1994 none had made it out of committee. Some opposition has come from senators who are afraid their states will lose major league teams in franchise relocations. Other members of Congress who oppose lifting the exemption fear that the minor-league teams in their districts could suffer from the lawsuits that might result if players were not bound to an organization for six years. Without the financial backing of the big-league teams, many minor-league teams might fold.... [The 1994-95] baseball players' strike changed the climate in Congress, and in September [1994] Congress began hearings to examine the continuing viability of baseball's antitrust exemption. Testimony from both the owners' camp and the players' camp emphasized the illogic of continuing the exemption. Subcommittees in both chambers voted to recommend lifting the exemption by amending the Clayton Act to apply expressly to major league-baseball. However, after delaying tactics by opponents of the measures, neither bill [came] to a floor vote. A Senate committee again recommended partial repeal of the exemption in 1995, but the issue has [not come to] the Senate floor, [either].<sup>58</sup>

#### a) The Curt Flood Act of 1998

In October 1998, Congress passed Public Law 105-297, commonly known as the Curt

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<sup>58</sup> Larry C. Smith, *Beyond Peanuts and Cracker Jacks: The Implications of Lifting Baseball's Antitrust Exemption*, 67 U. COLO. L. REV. 113, 132-33 (1996).

Flood Act. This statute changed the antitrust rules for baseball players in one key respect: the statute places all baseball related labor relations under the federal antitrust laws. I believe if Curt Flood (who passed away in 1997) were alive to see the statute that bears his name, he would also see the statute as the final culmination of a baseball player's labor rights. Having said that, aside from this one major exception, baseball still has its antitrust exemption intact.

“It is the purpose of this legislation that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.”<sup>59</sup>

Eventually, the anti exemption fervor faded and now the situation is back to the status quo. Baseball still has its exemption and I seriously doubt that it will ever get yanked. As former Senator Slade Gorton (R - Wash) aptly pointed out, previous attempts at repealing the antitrust exemption failed, and future attempts will meet the same fate. “Why? Congressmen from big cities with rich teams - in some of the country's most populous states - would trample any threats to the exemption.”<sup>60</sup>

Senator Gorton also expressed his doubt that the Supreme Court would ever step in to remedy the situation, especially since it has not in the past seventy years. “The court is almost certain not to reverse its own precedents in this respect. Legislation to strip baseball of its exemption has been proposed for decades without ever coming close to passage.”<sup>61</sup>

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<sup>59</sup> Curt Flood Act of 1998, Pub. L. No. 105-297, 122 Stat. 2824 (1998) (codified as amended at 15 U.S.C. § 26b (2009)).

<sup>60</sup> Ron Judd, *Federal Muscle Won't Ground M's – Gorton Urges Cooperation of Corporations*, SEATTLE TIMES, Sept. 5, 1991, available at <http://community.seattletimes.nwsourc.com/archive/?date=19910905&slug=1303793>.

<sup>61</sup> *Id.*

b) Is the exemption really a good thing?

As mentioned previously, there are those who believe that the repeal of baseball's antitrust exemption would lead to serious calamity. "First, baseball's exemption is necessary to support the minor league system. Baseball, unlike professional football and basketball which taps its talent from the college ranks, develops its players through the minor league system. The minor league system, next to player salaries, is the most expensive aspect of major league baseball operations. Without the subsidies from their major league affiliates, the minor league system would cease to exist and major league baseball would lose its major source of quality players."<sup>62</sup>

The next major reason that is offered is that the antitrust exemption is necessary to keep teams from moving). In light of the examples of baseball franchise location I've previously mentioned, I find this reasoning to be flawed. Furthermore, it did not prevent the Dodgers from moving out of Brooklyn.

The second reason which makes it necessary to retain baseball's exemption is to control the movement of major league franchises. In support of this contention, the former president of the American League (Lee MacPhail), by way of analogy, describes how football franchises followed the lure of big money to new cities regardless of long-term repercussions. He concludes, as does this note, that the element which will bring an end to this situation is not a fundamental change in baseball's antitrust status, but rather a commitment by both the owners and the players to work together and make the requisite sacrifices necessary to keep the game strong.

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<sup>62</sup> *Id.*

While the above analysis is both relevant and interesting, nothing in that discussion will solve the recent problems in baseball. With the advent of collective bargaining under federal labor laws, the players and owners must, on their own, sit down at the bargaining table and resolve the issues which kept the umpires from shouting ‘play ball’ for more than seven months in 1994-95. Any hint by Congress to eliminate the antitrust exemption frustrates this reality.<sup>63</sup>

I seriously take issue with the football analogy offered by former A.L. President MacPhail. We need look no further than to 1957 when Walter O’Malley (to this day the most hated man in Brooklyn’s history) moved the Dodgers out of Brooklyn and into Los Angeles. He did it exactly so he could get big money from the City of Los Angeles. He also did it *in spite of* the mere detail that the Dodgers were one of the most profitable teams of that era. Furthermore, the Dodgers were a perennial contender throughout the 1940’s and the 1950’s, having won 7 National League Championships and the 1955 World Series.<sup>64</sup>

In that light, O’Malley (who was a tax attorney) was the last man to be pleading poverty. In my opinion, the antitrust exemption, in that situation, inflicted a major void from which Brooklyn has never fully recovered. And it never will. In addition, Walter O’Malley was also a key architect of the deal that sent the New York Giants from upper Manhattan to San Francisco, resulting in the New York metropolitan area losing two of its three teams.

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<sup>63</sup> *Id.*

<sup>64</sup> THE BASEBALL ENCYCLOPEDIA, *supra* note 21, at 386, 409, 417, 429, 432, 440, 443, 2894. The Dodgers won the National League Championship in 1941, 1947, 1949, 1952, 1953, 1955 and 1956.

c) Is repeal of the exemption good for fans?

Truth be told, I think that fans are largely indifferent when it comes to the antitrust exemption. This is for a number of reasons. First, there is a perception that professional baseball has passed its prime as the so called “national pastime”. In recent years, professional football and professional basketball have grown considerably to provide fans with an alternative to pro baseball. While it is true that the three major sports play at different points of the calendar year, attendance records and television ratings would suggest that professional baseball is not in the consciousness of the average fan as it once had been. Why is that the case? Especially with basketball and football, the marketing strategy is geared towards the younger “Generation X” consumer and virtually ignores the older die-hard fan base.

Secondly, with the advent of free agency, players now change teams quite regularly. In this day and age, fan loyalties tend to lie more with the team than any individual player. So, regardless of who arrives and who leaves, most fans will tend to root for the hometown team, whether it wins the World Series or finishes dead last every year.

Finally, as mentioned previously, operating a baseball team is much more expensive in this day and age. Like any other business, the costs of running a baseball team are passed on to the fans. How can a team afford to pay its multimillion dollar contracts? By increasing ticket prices, the cost of parking, the cost of merchandising, and the cost of concessions. The fans ultimately pay those increased expenses. Thus, for the aforementioned reasons, I believe that baseball fans will be in the exact same position whether or not baseball’s antitrust exemption is repealed.

d) Does repeal of the exemption help the relationship between the players and owners?

Now that the players have eliminated the reserve system, and have contract negotiations subject to the antitrust laws, are relations between players and owners any less adversarial? One would hope so. However, despite the players' gains over the last 30 plus years, the relationship between the players and owners remain pretty contentious. Why is that the case even in October 2008? As many see it, it is unlikely that collective bargaining will somehow rid the game of its ills. Since 1972, baseball has seen eight work stoppages and a World Series cancellation. Over the last 36 years, we've seen that the relations between players and owners have been generally adversarial, and sometimes even acrimonious. How many times have both sides engaged in a high stakes game of chicken, trying to get the other side to blink? The players have stonewalled any and all attempts by management to discuss a salary cap, and the players have dragged their feet regarding a tougher drug policy that includes steroid testing.

The end result has usually been that both sides take a slash and burn approach to negotiating, and do not come anywhere near the bargaining table until the game has been seriously damaged. The strikes of 1981 and 1994, and losing the 1994 World Series are perfect examples. The consensus of the average person is that players and owners are multimillionaires who cannot find it within themselves to share their very lucrative business interests.

In that light, a lot of people would love nothing more than to see baseball's antitrust exemption go away for good. However, the realists, or perhaps, cynics among us realize that if the exemption finally is repealed, it won't be anytime soon (if ever). "[T]he possibility that major league baseball's antitrust exemption might last forever does not seem far fetched at all."<sup>65</sup>

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<sup>65</sup> Eric C. Scheible, *No Runs. No Hits. One Error: Eliminating Major League Baseball's Antitrust Exemption Will Not Save the Game*, 73 U. DET. MERCY L. REV. 73, 102 (1995).

e) How can one sympathize with either the players or management?

Thanks to the economics of the game today, the combatants in baseball's labor relations are multimillionaires (players) on one side and billionaires (owners) on the other side. To the average working person, it is very difficult to be sympathetic to players OR owners when they are negotiating \$100 million contracts. In the eyes of the average working person, baseball's labor relations are between the same two parties: the bad guys vs. the *other* bad guys, neither of whom will ever have to worry about where their next meal is coming from, or making their next mortgage payment, among other things.

However, I find myself to be sympathetic to the players most of the time. Having read some of the accounts of how owners treated players in the days before free agency, I don't mind seeing today's owners paying for the "sins of the fathers", so to speak. In the days before free agency, many players had to get other jobs in the off-season in order to pay their bills. Here is another example of how management used the reserve system to their advantage at the player's expense.

In 1947, the Yankees were cruising toward the American League pennant, 12 games ahead of 2<sup>nd</sup> place Detroit with 2 weeks left in the regular season. At that point, Yankees' pitcher Allie Reynolds had won 19 games and was a virtual lock to win at least 20. The problem was, the Yankees didn't pitch him again until Game 2 of that year's World Series. The Yankees claimed that they needed Reynolds to be well rested for the upcoming World Series, but Reynolds knew better:

I was 19 and 8 in 1947 and there was still about two weeks to go before the World Series and you know I never started another game. See, they were great about keeping you from winning twenty because you could demand a lot more salary if you reached the magic number. I thought it was pretty chicken myself. Hell, they'd have a federal

investigation if they did that to a ballplayer today. They just said we're going to save you for the series and that was that. It comes under the heading of 'good business'.<sup>66</sup>

In my opinion, this typifies the reserve system that players fought so hard to overturn, and also leaves me with an automatic presumption of guilt against the owners. Thus, I have no problem with players (even multimillionaires) getting as much as they can. Why? Because owners still tend to consider players to be expendable, depreciable assets with a limited useful life.

#### 9) CONCLUSION

For the aforementioned reasons, it appears that professional baseball will maintain the status quo and its antitrust exemption. Frankly, if losing the 1994 World Series was not enough for Congress to repeal the exemption, then, unfortunately nothing will. This was also evident during the March 2005 Congressional hearings investigating steroid use in professional baseball. Several politicians started making noises about repealing the antitrust exemption if baseball did not clean up the game with a tougher anti-steroid policy.

While several members of Congress criticized the player's union for dragging its feet on the steroid issue, at that time there was still no steroid policy in place that had any teeth (of course, that was rectified to some extent in the current Collective Bargaining Agreement). And, its continued exemption gives professional baseball near immunity from the federal antitrust law. So, it would appear that the status quo remains intact.

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<sup>66</sup> TULLIAS, *supra* note 34, at 183, 184.

