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One Trilogy That Should Go *Without* a Sequel: Why the Baseball Antitrust Exemption Should Be Repealed

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ONE TRILOGY THAT SHOULD GO *WITHOUT* A SEQUEL: WHY THE BASEBALL ANTITRUST EXEMPTION SHOULD BE REPEALED

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I. INTRODUCTION

On May 29, 1922, Justice Holmes delivered an opinion that would change the world of baseball for decades to come. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, Holmes concluded that the business of professional baseball was not interstate commerce and, therefore, did not come within the reach of federal antitrust laws.[1] Hence, the baseball antitrust exemption was born, and even though it has been limited over the past eighty-eight years by other monumental decisions and congressional action, the fact remains today that Major League Baseball (MLB) is exempt from antitrust regulation.[2]

Justice Holmes's decision was based upon a separation of the actual exhibition of the baseball game itself and the business side of the sport.[3] In the years since the *Federal Baseball* decision, technology has developed, and the exhibition side of baseball has become increasingly dependent on the business side, often bringing the antitrust exemption under attack.[4] Nonetheless, Holmes's decision has been upheld every time.[5] However, the door does appear to have been left open just a crack, despite the exemption being upheld. In *Gardella v. Chandler*[6] and *Henderson Broadcasting Corp. v.*

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1. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922).

2. *See generally id.*; Toolson v. N.Y. Yankees, 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972); Application of the Antitrust Laws to Professional Major League Baseball Act, 15 U.S.C.A. § 26b (2010).

3. *Fed. Baseball*, 259 U.S. at 208-09.

4. *See Flood*, 407 U.S. 258, 272-73 (1972).

5. *Id.* at 285.

6. Gardella v. Chandler, 172 F.2d 402, 404 (2d Cir. 1949).

Houston Sports Ass'n,[7] the approach of the respective courts was to distinguish the cases before them from the situation in *Federal Baseball* in an attempt to reach a different outcome. Despite these and similar decisions, the MLB antitrust exemption has stood strong. In light of recent developments within the industry, the question remains whether this will be the case for much longer.

In 2007, MLB entered into a five-year deal with StubHub, Inc. (StubHub), making the website the exclusive online secondary ticket seller of the league.[8] Although the deal does not mandate that clubs use StubHub, if they do not use that specific site, they are then prohibited from reselling their tickets online.[9] The deal has dire consequences for other online ticket resellers, such as Ticketmaster, that had previously contracted with clubs to handle their ticket reselling needs.[10] With arguably such severe potential restraints on trade, an analysis of the possible antitrust implications is appropriate. This article sets out to do just that.

First, the antitrust exemption will be examined so as to define its purposes and analyze the reasons behind its development. Second, the article will look to various cases and congressional measures in order to analyze how changes in the business of baseball that have occurred since the days of *Federal Baseball* have affected how the antitrust issue is approached. Finally, in light of developments made within the baseball industry, this article will explore whether the MLB-StubHub deal is likely to be seen as taking the antitrust exemption too far. This could be the proverbial straw that breaks the camel's back. In other words, an in-depth antitrust analysis of the StubHub situation may finally persuade either Congress or the Supreme Court to make the first move and repeal the baseball antitrust exemption.

A. The History of Antitrust Regulation

In 1890, Congress passed the Sherman Antitrust Act (Sherman Act) with the purpose of promoting competition and protecting consumers from anticompetitive practices in interstate commerce.[11] The Sherman Act was

7. Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 270-71 (S.D. Tex. 1982).

8. Rachel Konrad, *StubHub, MLB Enter Ticket Resale Pact*, USATODAY.COM, Aug. 2, 2007, http://www.usatoday.com/money/economy/2007-08-02-2406372049_x.htm.

9. *Id.*

10. Brad Stone & Matt Richtel, *Baseball Gets Into Resale of Tickets*, NYTIMES.COM, Aug. 1, 2007, http://www.nytimes.com/2007/08/02/business/02tickets.html

11. Jarod Gonzalez, Note, *Antitrust Law: A Long Time Coming - United States Supreme Court Adopts the "Rule of Reason" Test for Vertical Maximum Price Fixing Cases in State Oil Co. v. Khan*, 52 OKLA. L. REV. 645, 645 (1999).

born out of a need to regulate those companies with a majority of the economic power and prevent the abuse of such power.[12] Looking at the statutory language itself, as well as the history of its development, will aid the analysis of how the statute is applied to sports, specifically MLB.

Through sections one and two, the Sherman Act makes illegal those collective actions that unreasonably restrain trade, as well as monopolization and attempted monopolization.[13] Specifically, section one reads:

> 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 hereby 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, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[14]

Thus, to bring a successful claim under section one, the claimant must show that there exists (1) concerted action that (2) unreasonably restrains (3) interstate commerce.[15] When a court is faced with a question as to whether an unreasonable restraint has been placed on trade or commerce, it can choose to undertake one or both of two methods.[16]

The first is the "rule of reason" method.[17] Under this method, a court undergoes an in-depth analysis of the questioned concerted action.[18] Most agreements and contracts involve such convoluted provisions that a clear restraint on competition is difficult to find.[19] As such, the Supreme Court held that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is

12. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U.L. REV. 125, 126-27 (2002).

13. MATTHEW MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, & PROBLEMS, 238-39 (2d ed. 2009).

14. Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (2010).

15. Anderson, *supra* note 12, at 128.

16. *See id.*

17. *Id.* at 128-29.

18. *Id.*

19. *See id.*

such as may suppress or even destroy competition."[20] Once the plaintiff successfully shows that there has been a restraint on trade and that the restraint has had an anticompetitive effect, the defendant must then demonstrate that there are actually pro-competitive reasons for said restraint.[21] The plaintiff will likely be successful if he or she can then show that the restraint imposed by the defendant is too harsh or that it is not reasonably necessary to accomplish the sought after pro-competitive effects.[22]

The second method is the "per se" method, which provides for a more expedient approach.[23] The Supreme Court said "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[24]

Agreements that involve price fixing or market allocation are typically those to which courts will apply the per se analysis because of the clearly anticompetitive consequences.[25] The Supreme Court cautions, however, "a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged."[26] Also, this per se analysis method has been deemed inappropriate for use in analyzing claims brought under section two of the Sherman Act.[27]

Section two of the Sherman Antitrust Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the

20. Bd. of Trade v. U.S., 246 U.S. 231, 238 (1918).

21. Anderson, *supra* note 12, at 130.

22. *Id.*

23. *Id.* at 129.

24. N. Pac. Ry. Co. v. U.S., 356 U.S. 1, 5 (1958).

25. JONATHAN M. JACOBSON, ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 47-48 (6th ed. 2007).

26. Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332, 349 n.19 (1982).

27. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).

discretion of the court.[28]

There are certain agreements that are more unilateral and involve a single entity, and therefore, "such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."[29] Unilateral activity does not pose as much of a risk of anti-competitiveness as concerted activity, and as such, the rule of reason has been deemed a much more appropriate method of analysis for section two claims.[30]

This decreased threat of anti-competitiveness associated with unilateral activity stems from the requirement for single entities to maintain a certain level of internal cohesiveness to properly function.[31] Congress did not want to discourage these entities with potential antitrust claims; thus, a plaintiff bringing a claim under section two must show that there is a threat of *actual* monopolization.[32] However, having monopoly power does not necessarily mean that the entity is in violation of antitrust laws.[33] The plaintiff has to further prove that said monopoly power was obtained through "improper[] or predatory means."[34]

The difficulty involved in proving the section two elements, as well as a history of unsuccessful section two challenges to league conduct,[35] makes scrutiny under section two comparatively preferable to sports leagues than that under section one.[36] Subsequently, sports leagues often argue that they are single entities "incapable of conspiring or agreeing with [themselves]," and therefore, they are not subject to scrutiny under section one.[37]

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28. Sherman Antitrust Act of 1890, 15 U.S.C. § 2 (2010).

29. *Copperweld*, 467 U.S. at 768.

30. *Id.*

31. *See id.* at 767-69.

32. *Id.* at 767.

33. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979).

34. Anderson, *supra* note 12, at 128 n.32.

35. *See* Mid-South Grizzlies v. Nat'l Football League, 720 F.2d 772, 781-87 (3d Cir. 1983) (finding that plaintiffs did not show actual or potential injury to competition resulting from the rejection of their application for a professional football franchise); Am. Football League v. Nat'l Football League, 323 F.2d 124, 130-34 (4th Cir. 1963) (finding that defendants did not have the power to impede formation of plaintiffs' league); S.F. Seals, Ltd. v. Nat'l Hockey League, 379 F. Supp. 966, 971-72 (D.C. Cal. 1974) (denying plaintiffs' motion for summary judgment due to lack of standing).

36. *See* Anderson, *supra* note 12, at 137 n.112.

37. *Id.* at 131.

B. The Single Entity Defense

In *Copperweld Corp. v. Independence Tube Corp.*, the petitioner successfully argued that its conduct was justified through the single entity defense.[38] The Supreme Court determined that a corporation and its wholly owned subsidiary were incapable of conspiring with each other, rendering the application of section one of the Sherman Act inappropriate.[39] Thus, when American Needle, Inc. (American Needle) sued the National Football League (NFL) in 2008 for various antitrust violations, the NFL subsequently relied on this *Copperweld* decision in arguing that the League was similarly immune from liability.[40]

In *American Needle, Inc. v. National Football League*, the defendant league had granted licenses to numerous vendors, including the plaintiff, to manufacture headwear.[41] American Needle had held its license for over twenty years when, in 2000, NFL Properties solicited bids from its multiple headwear vendors for an exclusive license.[42] Reebok won the bidding war and the other vendors' licenses were, therefore, not renewed.[43] American Needle sued the NFL alleging that the individual NFL teams had conspired with NFL Properties in awarding the exclusive license to Reebok, thereby violating section one of the Sherman Act.[44] The plaintiffs also brought a section two claim, alleging that the NFL teams were trying to monopolize the licensing and wholesale product markets.[45] The NFL defendants responded to the plaintiffs' claims by filing a motion for summary judgment.[46] The NFL argued it was immune from section one liability pursuant to the *Copperweld* decision.[47] More specifically, the defendants contended "they functioned as a single entity when collectively promoting NFL football by licensing the NFL teams' intellectual property, and were thus immune from liability under [section one]."[48] The district court determined that the defendants were, in fact, acting as a single economic unit and concluded that "they have so

38. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776-77 (1984).

39. *Id.* at 777.

40. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 738 (7th Cir. 2008).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 739.

integrated their operations that they should be deemed to be a single entity."[49] The defendants' summary judgment motion was also granted as to the section two claim because, as a single entity, they could "collectively license their intellectual property . . . 'without running afoul of the antitrust laws.'"[50] On appeal, the Seventh Circuit affirmed the district court's decision, and in 2009, the Supreme Court granted American Needle's petition for writ of certiorari.[51] Finally, on May 24, 2010, American Needle's efforts prevailed, as the Supreme Court reversed the lower courts' decision and concluded that the actions of the individual NFL teams and NFL Properties constituted concerted action.[52] Although the defendants' arguments were at one point convincing, the Court ultimately decided that "[t]hirty-two teams operating independently through the vehicle of the [NFL Properties] are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from [NFL Properties's] financial well-being."[53]

As exemplified by this *American Needle* case, courts continue to apply the *Copperweld* approach only to situations involving entities that "share a complete unity of interest and purpose, or when one firm exercises complete control over the other."[54] As such, the traditional, more established sports leagues typically fail in attempting to be viewed as a single entity.[55] Although the NFL in *American Needle* argued otherwise, it is typically the case that "sports leagues raise numerous difficult antitrust questions . . . . The very concept of a league involving separate business entities (teams) requires concerted behavior among them and the exclusion of outsiders."[56] In taking notice of these surrounding antitrust issues, some newer leagues, including Major League Soccer, the Women's National Basketball Association, and the American Basketball League,[57] have made a conscious decision to try to form themselves as single-entities from the very beginning.[58] Unfortunately, this approach still fails to completely avoid antitrust challenges, as players

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49. Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007), *aff'd, sub. nom.*, Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (2009).

50. *Am. Needle, Inc.*, 538 F.3d at 740.

51. *Am. Needle, Inc.*, 129 S. Ct. at 2859.

[52] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2215 (2010).

[53] *Id.*

[54] Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 35 (1991).

[55] Anderson, *supra* note 12, at 132.

[56] U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1372 (2d Cir. 1988).

[57] Anderson, *supra* note 12, at n.60.

[58] *Id.* at 132.

continue to challenge league conduct under the antitrust laws.[59]

C. *Antitrust Exemptions*

Besides the single entity defense, another way a party avoids being subject to antitrust regulation is if its industry has been exempted from antitrust scrutiny.[60] "[W]here the federal, state, and local governments have adopted economic or social policies that conflict with free and open competition, accommodations [have been] made between the demands of the antitrust laws and the constraints of those other goals."[61] These accommodations usually come in the form of an exemption, and an important vehicle for implementing these exemptions is the Clayton Act.[62]

Section six of the Clayton Act explicitly states that "[t]he labor of a human being is not a commodity or article of commerce."[63] Thus, because it would not make sense to allow employers to rely on antitrust law to deny rights granted by labor law, the Clayton Act effectively provides labor unions with immunity from antitrust liability.[64] This means that, when a union collectively bargains over "issues of wages, hours, and conditions of employment as well as strikes, picketing and boycotts of employers," it is not violating the antitrust laws.[65] The courts expanded upon this statutory exemption, which protects only unilateral conduct, when they created the nonstatutory exemption to protect the terms of the collective bargaining agreement involved.[66] While Congress chose to provide the labor market and certain other industries with antitrust immunity, the Supreme Court, through a trilogy of landmark decisions, chose to do the same with professional baseball.[67]

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[59] *See, e.g.*, Fraser v. Major League Soccer, 180 F.R.D. 178 (D. Mass. 1998).

60. *See* Anderson, *supra* note 12, at 133.

61. ABA, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1069 (4th ed. 1997).

62. Clayton Act, 15 U.S.C. §§ 12-27, 29, 52-53 (2010); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 21-22, 26-29 (1986).

63. Clayton Act, 15 U.S.C. § 17 (2010).

64. MITTEN, *supra* note 13, at 437.

65. *Id.*

66. *Id.*

67. *See generally* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200; Toolson v. N.Y. Yankees, 101 F. Supp. 93 (S.D. Cal. 1951); Flood v. Kuhn, 407 U.S. 258 (1972).

D. The Great Trilogy Gives Birth to the Baseball Antitrust Exemption

Although the amount of case law involving baseball and the antitrust exemption is almost overwhelming, the creation of the exemption itself can be narrowed down to three major decisions that came to be known as the "trilogy."[68]

The first case of this trilogy was *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[69] In 1922, the Federal Baseball Club of Baltimore brought an antitrust suit against the National League of Professional Baseball Clubs and the American League of Professional Baseball Clubs.[70] The plaintiff argued that the defendants had conspired to monopolize the business of baseball by purchasing all the other clubs in the plaintiff's former league, thereby inducing those clubs to leave that league.[71] Justice Holmes stated that the business of baseball was to be kept separate from the actual exhibition of the game itself, which was entirely a state affair.[72] Although it was true that, in order for the baseball games to take place, traveling between states was necessary, "the fact that in order to give the exhibitions the Leagues [had to] induce free persons to cross state lines and [had to] arrange and pay for their doing so [was] not enough to change the character of the business."[73] The Court concluded that human effort was not a subject of commerce, and it was not transformed into such simply due to incidental travel among the States.[74] The defendants' conduct was determined not to be within the coverage of the Sherman Act,[75] and thus, the baseball antitrust exemption was born.[76]

The Supreme Court sought to reevaluate its *Federal Baseball* holding nearly thirty years later in the second part of the trilogy, *Toolson v. New York Yankees*.[77] In 1951, the plaintiff alleged that the defendants, as a result of their monopolistic practices, had deprived him of his livelihood.[78] The Newark International Baseball Club had assigned his contract to the

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68. Anderson, *supra* note 12, at 133-35.

69. *See generally Fed. Baseball*, 259 U.S. at 200.

70. *Id.* at 207.

71. *Id.*

72. *Id.* at 208.

73. *Id.* at 208-09.

74. *Id.* at 209.

75. *Id.* at 208.

76. *See id.*

77. *See generally* Toolson vs. N.Y. Yankees, 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd*, 346 U.S. 356 (1953).

78. *Id.* at 93.

Binghamton Exhibition Company, Inc., and when the plaintiff refused to go to the new club, he was deemed ineligible and was forbidden from playing professional baseball.[79] Although the Supreme Court acknowledged that the *Federal Baseball* decision had been made thirty years prior to the case at hand, the Court also pointed out that the baseball industry had been allowed to develop all these years under the understanding that it was exempt from the antitrust laws and that Congress "[had] not seen fit to bring such business under [the antitrust laws] by legislation . . ." [80] If the industry had changed enough to now warrant the antitrust laws applicable, then Congress should be the entity to make such change through legislation.[81]

The Supreme Court had yet another chance to reassess the legal status of professional baseball in *Flood v. Kuhn*.[82] Curt Flood had been traded to the Philadelphia Phillies without his consent and subsequently brought an antitrust suit against, among others, the Commissioner of Baseball, Bowie Kuhn.[83] He alleged that professional baseball's reserve clause was unfair and violated the federal antitrust laws.[84] Justice Blackmun conceded in the opinion that "[p]rofessional baseball [was] a business and it [was] engaged in interstate commerce" and that "*Federal Baseball* and *Toolson* [had] become an aberration confined to baseball."[85] However, he also admitted that because of the retroactivity concerns, the Court had been reluctant to make any changes and reiterated that, if changes did in fact need to be made, Congress was to do so through legislation.[86] This final case of the trilogy upheld the 1922 holding of *Federal Baseball* and, thus, established and solidified what is now known as the baseball antitrust exemption.

E. The Antitrust Exemption Stands Strong

After the Supreme Court established that it was unwilling to tamper with precedent, other courts followed in its path. The appellant in *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.* argued that "the conditions of restraint in professional baseball [were] now more aggravated than at the times of [*Federal Baseball*] . . . and [*Toolson*]."[87] The Court of

79. *Id.*

80. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953).

81. *Id.*

82. *See generally* Flood v. Kuhn, 407 U.S. 258 (1972).

83. *Id.* at 265.

84. *Id.* at 265-66.

85. *Id.* at 282.

86. *Id.* at 283-84.

87. Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc., 282 F.2d 680, 680 (9th Cir.

Appeals for the Ninth Circuit simply stated that the Supreme Court was still waiting on Congress to bring professional baseball within the gamut of federal antitrust regulation.[88]

Undergoing a much more thorough analysis, the Supreme Court of Wisconsin took on its own antitrust suit in 1966.[89] After the Boston Braves moved to Milwaukee in 1953, attendance at the then newly constructed County Stadium skyrocketed.[90] At the end of the 1964 season, the board of directors decided it wanted to transfer the team to Atlanta, and after this became public news, attendance dropped along with the team's performance on the field.[91] The State of Wisconsin sued the Milwaukee Braves, alleging that they, along with other members of the National League, had created a monopoly and had "intended to and would restrain and prevent various types of trade and commerce involved in major league baseball in Milwaukee."[92] The court again acknowledged the "long continued reliance on *Federal Baseball* and the policy reasoning of the [S]upreme [C]ourt that any change should be brought about by legislation."[93] Thus, the court concluded that, because of the exemption from the federal antitrust laws, the state antitrust laws could also not be applied to the defendants' conduct.[94]

Although a significant amount of case law demonstrates a reluctance to disturb the baseball exemption, many courts have attempted to avoid applying the exemption by reanalyzing the trilogy's holdings and focusing on the developments of baseball since 1922. One such case was that of *Gardella v. Chandler*.[95]

Appellant played professional baseball for the New York Giants, and while under contract, he also played professional baseball in Mexico, thereby violating the reserve clause from his initial contract.[96] He was barred from playing professional baseball and subsequently sued the Commissioner of Baseball for alleged violations of the antitrust laws.[97] The district court granted the defendant's motion to dismiss on the grounds that neither party

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1960).

88. *Id.*

89. *See generally* State v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis. 1966).

90. *Id.* at 2.

91. *Id.*

92. *Id.*

93. *Id.* at 14.

94. *Id.* at 18.

95. *See generally* Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949).

96. *Id.* at 261-62.

97. *Id.*

was engaged in interstate trade or commerce.[98] In reversing that decision, Judge Frank agreed with the holding in *Federal Baseball* that mere travel was insufficient to establish "interstate commerce" but concluded that "here there [was] substantial interstate commerce of a sort not considered by the Court in the [*Federal Baseball*] case."[99] He pointed out that the communication of the games "by radio and television [was] in no way a means, incidental or otherwise, of performing the intra-state activities (the local playings of the games)."[100] In *Federal Baseball*, "the traveling was but a means to the end of playing games which themselves took place intra-state; here the games themselves, because of the radio and television, [were], so to speak, played interstate as well as intra-state."[101] Thus, he determined that the defendant's conduct should come under the coverage of the Sherman Act, and the court remanded the case back to the district court for adjudication.[102]

Gardella v. Chandler demonstrated how technology's developing relationship with professional baseball was slowly beginning to weaken the argument for applying the antitrust exemption.[103] Another such case was that of *Henderson Broadcasting Corp. v. Houston Sports Ass'n.*[104] In that case, the plaintiff radio station brought an antitrust suit after the defendant, Houston Sports Association, owner of the Houston Astros baseball club, cancelled its contract with the plaintiff and allegedly conspired with the defendant radio station, KENR, to control the radio market.[105] The ultimate question was whether radio broadcasting was "so much a part of baseball that it, as well as baseball, is exempt from the antitrust laws."[106] Questioning the Supreme Court's reasoning behind upholding the exemption, Judge McDonald stated that it "would seem to be that the broadcasting is not central enough to the 'unique characteristics and needs' of baseball which the exemption was created to protect, to affect that exemption."[107] Broadcasting is not as integral to the sport as the players and umpires, but despite this, Judge McDonald admitted that the more reasonable interpretation of the exemption is that it is

98. *Id.* at 263.

99. Gardella v. Chandler, 172 F.2d 402, 411 (2d Cir. 1949).

100. *Id.* at 411.

101. *Id.*

102. *Id.* at 414-15.

103. *See generally id.*

104. *See generally* Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263 (S.D. Tex. 1982).

105. *Id.* at 264.

106. *Id.* at 268.

107. *Id.* at 268-69.

an aberration.[108] "[C]hanges in the economics of the sport even since *Toolson*, especially the increasing importance of revenues from interstate television broadcasts, make baseball's immunity from the antitrust laws more anomlous [sic] than ever."[109] The defendants in this case made no argument to extend the exemption, and as such, their motion to dismiss for lack of jurisdiction was denied.[110] Although this court acknowledged the limits of the baseball exemption, the fact is that the exemption itself remained relatively unscathed, ready to be utilized.

F. Time to Step Up to the Plate

With all these subsequent limitations and the willing acknowledgment that baseball has changed since *Federal Baseball*, it is hard to understand why the exemption still remains. From the relevant case law the answer appears to be quite clear: neither Congress nor the Supreme Court wants to make the first move.

In 1957, fifteen years before *Flood*, the Supreme Court, in fact, admitted the error made in its *Federal Baseball* decision.[111] In *Radovich v. National Football League*, the petitioner football player alleged that the respondent football league and its club members had conspired to monopolize and control organized professional football in violation of the Sherman Act.[112] The respondents argued that the exemption established in *Federal Baseball* was applicable to all team sports, but the Court, here, did not agree.[113] The Court emphasized language from the baseball antitrust cases and concluded that the exemption's application was limited to baseball.[114] Even that is now suspect.[115] Questioning its own rationale in *Federal Baseball*, the Court stated that the ruling was "unrealistic, inconsistent, [and] illogical . . . ."[116] The Court admitted that, if it were deciding the *Federal Baseball* case here for the first time, the outcome would have been different.[117] Although it was deemed inapplicable in this case, the exemption nevertheless remained

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108. *Id.* at 269.

109. *Id.* at 271(quoting Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970)).

110. *Id.* at 271-72.

111. *See* Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957).

112. *Id.* at 446-47.

113. *Id.* at 447-48.

114. *Id.* at 451-52.

115. *Id.* at 452.

116. *Id.*

117. *Id.*

intact.[118]

Five years prior to *Radovich*, before *Toolson* reached the Supreme Court, several bills came before Congress that proposed to completely exempt professional baseball, football, basketball, and hockey from antitrust regulation.[119] The House Subcommittee on the Study of Monopoly Power conducted detailed hearings discussing these bills and stated in its report that the bills had been introduced "by friends of baseball because they feared that the continued existence of organized baseball as America's national pastime was in substantial danger by the threat of impending litigation."[120] In this 1952 House Subcommittee Report No. 2002, entitled "Organized Baseball," the Subcommittee concluded that to extend the exemption in such a manner would "no longer require competition in any facet of business activity of any sport enterprise."[121] In *Henderson Broadcasting Corp.*, Judge McDonald pointed out that, through this report, Congress had explicitly "recognized that professional organized sports are involved in extraneous business activities" and that "an extension of the baseball exemption to other activities as well as to other sports would contravene the federal antitrust laws."[122] Seeing as "[t]he Subcommittee recommended against enactment of legislation on baseball, pending judicial interpretation of *Federal Baseball*," Congress refused to extend the exemption to other activities.[123]

While Congress awaited judicial interpretation, the Supreme Court awaited Congressional action. In *Flood v. Kuhn*, Justice Blackmun noted that "*Federal Baseball* and *Toolson* [had] become an aberration confined to baseball."[124] Also, "[s]ince *Toolson* [had been decided,] more than 50 bills [had] been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball."[125] However, none had been enacted, and it was determined that Congress, through its silence, demonstrated no such intention to subject baseball to antitrust regulation.[126] Congress had knowingly allowed the exemption to survive for years, so the Court's stance became one of "positive inaction."[127] Therefore, Justice

118. *Id.*

119. Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209, 215 (1983).

120. H. R. REP. NO. 82-2002, at 1 (1952).

121. *Id.* at 230.

122. Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 269 (S.D. Tex. 1982).

123. *Id.*

124. Flood v. Kuhn, 407 U.S. 258, 282 (1972).

125. *Id.* at 281.

126. *Id.* at 283.

127. *Id.* at 283-284.

Blackmun concluded that "what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action."[128]

Congress had another chance in 1993 when a bill was introduced to the Senate entitled the Professional Baseball Antitrust Reform Act of 1993.[129] Senator Metzenbaum said that "it [was] in the best interest of the public, the fans, and the sport of baseball" to remove the exemption and that was exactly what the Reform Act was supposed to do.[130] Unfortunately, in 1994, the bill was defeated by a Senate Judiciary Committee vote of 7-10.[131]

Although it appeared that professional baseball would forever be chained to the holdings of the trilogy, to appease both the players association and club owners, Congress enacted The Curt Flood Act of 1998.[132] The Curt Flood Act provides MLB players with the same type of antitrust remedies as other professional athletes,[133] thereby limiting the scope of the once completely impenetrable force known as the antitrust exemption.[134] However, section (b) of the Curt Flood Act explicitly states that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a)."[135] In other words, if the questionable conduct does not involve the "employment of major league baseball players to play baseball at the major league level,"[136] then the antitrust exemption still applies.[137]

The baseball antitrust exemption and its supporting cases have been so frequently recognized as inconsistent and illogical that it is inevitable that either the Supreme Court or Congress is going to have to step up to the plate

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128. *Id.* at 285.

129. Kathleen L. Turland, Note, *Major League Baseball and Antitrust: Bottom of the Ninth, Bases Loaded, Two Outs, Full Count and Congress Takes a Swing*, 45 SYRACUSE L. REV. 1329, 1363 (1995).

130. Professional Baseball Antitrust Reform Act of 1993, 139 CONG. REC. S2416 (daily ed. March 4, 1993)(statement of Sen. Metzenbaum).

131. KENNETH M. JENNINGS, SWINGS AND MISSES: MORIBUND LABOR RELATIONS IN PROFESSIONAL BASEBALL 89 (1997).

132. Roger I. Abrams, *The Curt Flood Act: Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 313 (1999).

133. The Curt Flood Act, 15 U.S.C. § 26b(a) (2010).

134. Andrew E. Borteck, Note, *The Faux Fix, Why a Repeal of Major League Baseball's Antitrust Exemption Would Not Solve its Severe Competitive Balance Problems*, 25 CARDOZO L. REV. 1069, 1081 n.68 (2004).

135. 15 U.S.C. at § 26b(b).

136. *Id.* § 26b(a).

137. Borteck, *supra* note 134, at 1081.

and confront the issue head-on.[138] Congress has made numerous attempts to lift the exemption or at least limit its application, yet it still has been reluctant to enact a law without further clarification from the Supreme Court of the exact scope of the exemption.[139] Subsequently, it appears that another *Federal Baseball*-type of judicial analysis is called for.

In 1957, it was determined that the status of professional baseball had changed since 1922,[140] so it is logical to assume that, after another fifty years, the status of professional baseball has changed exponentially. In light of the technological advances and various contractual maneuvers made by MLB clubs, specifically the recent ticket reselling deal struck between MLB and StubHub, such an analysis is necessary, as it now appears unlikely that one could successfully argue that professional baseball is not interstate commerce.

G. Getting into the Game of Ticket Scalping

Ticket scalping, also known as ticket reselling, is defined as:

> [T]he process of legitimately purchasing a ticket (or large numbers of tickets) from a primary seller such as an off-site box office, the arena or venue, or the team or league office and then reselling the tickets on the street for more money. The intent is to profit from the difference in price.[141]

The practice of ticket scalping is one that has been criticized for years.[142] Opponents of the practice argue that it not only obstructs those who wish to attend sporting events from having equal access to tickets but, also, that it invades the legitimate interest the sports team or league has in regulating ticket sales and controlling business activity.[143] In an attempt to curb such issues associated with ticket scalping, many states have adopted laws regulating the practice.[144] Nevertheless, the ticket scalping industry is a tremendously lucrative one.[145] It has been roughly estimated that "the scalping industry

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138. *See* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 769 (1987).

139. *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972); Henderson Broad. Corp. v. Houston Sports Ass'n , 541 F. Supp. 263, 269 (S.D. Tex. 1982); JENNINGS, *supra* note 131, at 89.

140. *See* Radovich v. NFL, 352 U.S. 445, 452 (1957).

141. ADAM EPSTEIN, SPORTS LAW 95 (2003).

142. DOYICE COTTEN & JOHN T. WOLOHAN, LAW FOR RECREATION AND SPORT MANAGERS 273 (3d ed. 2003).

143. *Id.*

144. *Id.*

145. Jonathan Bell, Comment, *Ticket Scalping: Same Old Problem with a Brand New Twist*, 18

cumulatively nets between $2 and $14 billion annually.... By comparison, Ticketmaster, the world's largest primary ticket seller, sold 119 million tickets valued at $6 billion in 2005."[146]

Although it may carry with it some negative implications, the profitability of ticket scalping has made the practice more or less unavoidable.[147] Regardless of state regulations, promoters have realized that getting involved in ticket scalping, or ticket reselling, may be a way of bringing in excess profits.[148] A convenient conduit for this has frequently been the Internet, especially when coupled with other technological advances.[149] In fact, "[w]hile the Internet has helped many sectors of the economy grow in ways that were consistent with their pre-Internet model, the proliferation of online ticket resale markets has changed the dynamic of how tickets to events are distributed, especially for the most popular events."[150]

H. The MLB-StubHub Agreement

In August of 2007, MLB and StubHub, the ticket-reselling subsidiary of eBay Inc., entered into a five-year agreement by which StubHub became MLB's exclusive source for secondary ticket sales.[151] Under the agreement, all individual MLB team websites, as well as the MLB.com website itself, link those who wish to "sell their tickets or buy tickets from other fans to Stubhub.com."[152] With both parties sharing in revenue, the essence of the deal is that "[b]uyers at StubHub.com pay a 10 percent fee, while sellers are charged a 15 percent commission. If a baseball ticket sells for $100, the buyer pays $110 and the seller pockets $85, so $25 would go to StubHub and the baseball teams."[153] The agreement does not necessarily mandate that all thirty MLB teams utilize StubHub for their secondary ticket sales; however, if they abstain, they are subsequently precluded from reselling their tickets online.[154]

Although the possibility of additional revenue would appear to be enough to attract the franchises to the deal, the problem is that many clubs already

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LOY. CONSUMER L. REV. 435, 439 (2006).

146. *Id.* at 439-40.

147. *Id.* at 451-52.

148. *Id.*

149. *Id.* at 452.

150. Clark P. Kirkman, Note, *Who Needs Tickets? Examining Problems in the Growing Online Ticket Resale Industry*, 61 FED. COMM. L. J. 739, 741 (2008-09).

151. Konrad, *supra* note 8.

152. Stone & Richtel, *supra* note 10.

153. Konrad, *supra* note 8.

154. *Id.*

have contracts with other online secondary ticket sellers, such as Ticketmaster.[155] Although MLB executives have tried to assuage Ticketmaster's worries by claiming that no existing contracts would be breached, Ticketmaster has "been known to resort to the courts when the company believes its contracts are being violated."[156]

In July 2007, the company sued the NBA's Cleveland Cavaliers for "offering season ticket holders another place to sell their tickets online."[157] Unsurprisingly, the Cavaliers retaliated and brought an antitrust suit, claiming that Ticketmaster was engaging in monopolistic practices.[158] The court's analysis never reached the merits of the antitrust claim for certain reasons involving contract interpretation;[159] however, the fact that this suit was brought should come as a warning for MLB.

Although currently protected by the baseball antitrust exemption, MLB might be faced with antitrust issues in the future. Just as American Needle, Inc. claimed that it was allegedly damaged by the NFL's granting of an exclusive license to Reebok, Ticketmaster, or any other online ticket reseller, might allege that MLB and its teams violated the antitrust laws by entering into an exclusive agreement with StubHub. Further, it may attempt to propose a reanalysis of the *Federal Baseball* holding, and given the technological developments since 1922, such a reanalysis may be just what baseball needs.

I. What Would the Analysis Look Like?

Although concerted action was ultimately deemed to exist, when the Supreme Court agreed to hear the *American Needle* case, the possibility that the NFL might succeed in its single-entity defense became very real. As such, MLB and its teams would most likely attempt to use this avenue of defense should they be faced with an antitrust claim as a result of their agreement with StubHub. While this would effectively evade scrutiny under section one of the Sherman Act, section two challenges could still arise.

American Needle, Inc. alleged that the NFL defendants, through their exclusive license with Reebok, were attempting to monopolize the licensing and wholesale product markets.[160] Similarly, if the Supreme Court were to entertain the idea of an antitrust exemption reanalysis, Ticketmaster would

155. Stone & Richtel, *supra* note 10.

156. *Id.*

157. *Id.*

158. *Id.*; Cavaliers Operating Co. v. Ticketmaster, Nos. 07CV2317 and 08CV240, 2008 U.S. Dist. LEXIS 93112. *12 (N.D. Ohio 2008).

159. *Cavaliers Operating Co.*, at *27 n.14.

160. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 738 (7th Cir. 2008).

allege that MLB, in making StubHub its exclusive online ticket reseller, was attempting to monopolize professional baseball's ticket market in violation of section two.

To successfully bring a claim under section two of the Sherman Act, the plaintiff must not show only that there is a threat of actual monopolization[161] but also that said monopolistic power was obtained through "improper or predatory means."[162] Similar to the claims brought by the plaintiffs in *Federal Baseball*, Ticketmaster would allege that the defendants conspired to induce all the MLB clubs to exclusively use StubHub for online secondary ticket sales and that, in turn, Ticketmaster was significantly damaged.[163] In support of its claims and quite possibly demonstrating "improper or predatory means," Ticketmaster could point to the fact that, if a MLB team chooses not to participate in the agreement, the club is then precluded from reselling its tickets online altogether.[164] In *Federal Baseball*, the plaintiff's demise was not due to inadequacies in its claims but rather the fact that the Court of Appeals determined that baseball did not come within the antitrust laws.[165] Thus, the Supreme Court would similarly entertain Ticketmaster's claims and begin its analysis by determining whether the business of baseball now sufficiently falls within antitrust regulation.

J. Baseball: It Ain't What it Used to Be

Were the Court to reassess the antitrust exemption, the chances of it coming to the same conclusion are slim to none. Although the actual game of baseball may not have changed that much since *Federal Baseball*, the sport as a whole has become entirely different. Taking into consideration the technological advances and developments within the business of baseball since 1922, a reexamination of the baseball antitrust exemption, especially in light of the MLB-StubHub deal, may finally give the Supreme Court enough of a reason to lift the exemption and expose baseball to the same antitrust regulations to which every other professional sport has been subject.

Another reason that the StubHub deal may be cause for concern is that it appears to go against what the antitrust exemption seeks to prevent. Proponents of the antitrust exemption frequently base their arguments on the

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161. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69 (1984).

162. Anderson, *supra* note 12, at 128 n.32.

163. *See* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207-08 (1922).

164. *See* Konrad, *supra* note 8.

165. *See Federal Baseball*, 259 U.S. at 207-08.

need for competitive balance.[166] For instance, the Eighth Circuit Court of Appeals stated that professional sports leagues have a "strong and unique interest in maintaining competitive balance among its teams."[167] That interest arises from a need to maintain fan appeal and, more importantly, profitability.[168] If the outcome of a sporting event becomes predictable, fans will lose interest and, subsequently, profits will decrease; thus, "professional sports leagues require special treatment under the antitrust laws . . . . An antitrust exception . . . is necessary to create the on-the-field competition that draws fans."[169]

At first glance, this argument appears to open the doors for another Justice Holmes-type assertion that the exhibition of the game of baseball is separate from the business aspects of the sport.[170] However, even back in 1949, Judge Learned Hand alluded to the fact that baseball could no longer be separated from its interstate features as they were no longer "merely incident" to the business.[171] Then in 1970, in *Salerno v. American League of Professional Baseball Clubs*, it was further acknowledged that "changes in the economics of the sport even since *Toolson*, especially the increasing importance of revenues from interstate television broadcasts, make baseball's immunity from the antitrust laws more anomalous than ever."[172]

Nowadays, the ultimate goal of all professional sports leagues is to "attract as many people as possible to pay money to attend games . . . ,"[173] something that is quite difficult to do without taking advantage of available television and radio broadcasts or online ticket services.[174] The increasing number of games played and the significant amount of emphasis placed on revenues from the Internet, television, and radio has consequently brought about a rise in the potential for section two claims.[175] With this in mind, it becomes increasingly

166. Salil K. Mehra & T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J.1499, 1500 (2006).

167. Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. 1976).

168. Mehra & Zuercher, *supra* note 166, at 1500.

169. *Id.*

170. Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922).

171. Gardella v. Chandler, 172 F.2d 402, 407-08 (2d Cir. 1949).

172. Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970).

173. Ivy Ross Rivello, Note, *Sports Broadcasting in an Era of Technology: Superstations, Pay-Per-View, and Antitrust Implications*, 47 DRAKE L. REV. 177, 182 (1998) (quoting N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249 (2d. Cir 1982)).

174. *See id.*; *but also see* Bell, *supra* note 145, at 439-40 (explaining that the business of online ticket sales is extremely lucrative).

175. Rosenbaum, *supra* note 138, at 797.

more appropriate to say that baseball, as all other professional sports, is sufficiently involved in interstate commerce, and as such, were the MLB-StubHub deal to spawn another Supreme Court antitrust exemption analysis, the exemption would be repealed.

II. CONCLUSION

The antitrust exemption has long, deep roots within professional baseball. *Federal Baseball* ultimately paved the way by separating the actual game of baseball from all other business aspects, making it extremely difficult for future plaintiffs to bring antitrust claims. Although many have tried, courts have refused to repeal the exemption, stating that such a change needs to be made at the legislative level. Interestingly enough, Congress responds with similar inaction, not wanting to "rock the boat" if the courts have continued to find justification for upholding the exemption for this long. However, one would be naïve to think that the sport side of professional baseball could still be separated from the business side in the way it was in 1922. With new technological advances emerging almost every day, baseball revenues have become more and more dependent on utilizing these various methods. Those franchises that choose not to utilize these methods for one reason or another often get left behind, losing out on opportunities to expand their fan base.

With the online ticket selling and reselling industry impacting all professional sports, regulation is imperative. Ultimately, this should require antitrust regulation across the board. Professional baseball can no longer be divided into sport and business, and as such, especially with the materialization of MLB's deal with StubHub, a repeal of the antitrust exemption should be considered. Judge Friendly very blatantly demonstrated his disapproval of the antitrust exemption when he stated that "[w]e freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes's happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'"[176] With this acknowledgement of the impropriety of the exemption, especially taken in light of all the developments in baseball since the years of the antitrust exemption's trilogy of cases, lifting the exemption could be the only way Congress and the courts can hold on to the competitive balance upon which all sports rely to be successful.

176. *Salerno*, 429 F.2d at 1005 (quoting Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957)).