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Topps Gets Exclusive License, Leaving Upper Deck on the Bench: An Analysis of Major League Baseball's Antitrust Exemption in the Modern Era

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TOPPS GETS EXCLUSIVE LICENSE, LEAVING UPPER DECK ON THE BENCH: AN ANALYSIS OF MAJOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION IN THE MODERN ERA

I. INTRODUCTION

Baseball is “America’s pastime.” Like most things with such a long history, the game has certainly seen its fair share of minor changes, but the basic rules have remained largely unchanged. Simply put, it is still “three strikes, and you’re out!”

Major League Baseball’s (MLB or Major League) antitrust exemption has a similarly long and steady history. Since its inception in 1922,¹ the MLB antitrust exemption has been challenged numerous times. Just as the rules of the game have slightly changed throughout its history while still remaining pretty much the same, so too has the exemption been slightly altered, specifically through Congress’ enactment of the Curt Flood Act.² However, the U.S. Supreme Court has consistently reaffirmed the existence of the exemption and has seemingly left it to Congress to narrow the exemption’s scope.³ Thus, as it stands today, MLB still retains its broad exemption from the federal antitrust laws.

In 2009, MLB entered into a licensing agreement with the Topps baseball card company, granting the company exclusive rights to the use of MLB trademarks on baseball cards.⁴ Thus, Upper Deck, a former Major League Baseball Properties’ (MLBP) licensee, was no longer able to legally use these marks.⁵ Similar MLB licensing deals have been challenged in the past,⁶ but

1. *See generally* Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200 (1922).

2. *See* Curt Flood Act of 1998, 15 U.S.C. § 26b(a) (2011).

3. *See generally* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); *see also* Flood v. Kuhn, 407 U.S. 258 (1972).

4. Tom Singer, *MLB Announces Exclusive Deal with Topps: Move Designed to Streamline, Stimulate Trading-Card Market*, MLB.COM (Aug. 6, 2009), http://mlb.mlb.com/news/article.jsp?ymd=20090806&content_id=6276188&vkey=news_mlb&fext=.jsp&c_id=mlb.

5. *MLB Props., Inc. v. The Upper Deck Co.*, No.10 Civ. 732, *3–5 (S.D.N.Y. Mar. 11, 2010), *available at* <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv00732/>

the antitrust exemption has not been scrutinized in this particular context. In light of the National Football League's (NFL) recent unsuccessful attempt to employ the single-entity defense in a similar licensing context in *American Needle, Inc. v. National Football League*,⁷ some commentators argued that the licensing deal with Topps represented a unique opportunity for a challenge to MLB's antitrust exemption.⁸ Although Upper Deck did not bring such a challenge, this Comment uses this licensing deal as a basis for analyzing the exemption in the modern era.

Part II of this Comment provides a history of MLB's antitrust exemption and its challenges and explains that the heart of modern challenges to the exemption relate to the nature and extent of its scope. Part III describes the *American Needle* case and the single-entity argument employed by the NFL. Part IV discusses MLB's exclusive license deal with Topps and why Upper Deck may have missed an opportunity to challenge MLB's antitrust exemption in light of *American Needle*. This section also asserts that were the exemption challenged in the intellectual property and licensing contexts, MLB could use many of the NFL's failed single-entity arguments to explain how its actions are covered under the scope of MLB's exemption as it exists today.

II. HISTORY OF MLB'S ANTITRUST EXEMPTION

To fully appreciate the breadth of MLB's antitrust exemption, it is first necessary to examine its origins and history. Typically, the Sherman Act, a federal antitrust law, serves as one of the primary ways to regulate MLB and other professional sports. However, MLB is almost entirely exempt from the purview of the Sherman Act. This exemption stems from a trio of Supreme Court cases that form the "Baseball Trilogy," as well as a long history of lower court judicial decisions and legislative actions.

A. *Sherman Act*

One fundamental economic principle is that a free, open, and competitive market should generally result in a market that is the most beneficial for all

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6. See, e.g., *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008).

7. See generally 130 S. Ct. 2201 (2010).

8. See J. Gordon Hylton, *Does Baseball's Antitrust Immunity Extend to Baseball Card Contracts?*, MARQ. UNIV. L. SCH. FAC. BLOG (Aug. 14, 2009), <http://law.marquette.edu/facultyblog/2009/08/14/does-baseballs-antitrust-immunity-extend-to-baseball-card-contracts/>; see also Matt Straquadine, *Baseball Card Contract Raises Antitrust Concerns*, THE AM L. DAILY (Aug. 10, 2009), <http://amlawdaily.typepad.com/amlawdaily/2009/08/topps-baseball-cards.html>.

parties involved.⁹ Specifically, when competitive forces govern the availability and price of a given product in a competitive market, it should “yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress”¹⁰ With these concepts in mind, as well as a growing concern regarding anticompetitive activity from dominant firms, Congress enacted the Sherman Act in 1890¹¹ “to preserve a competitive marketplace and protect consumer welfare.”¹²

Section One of the Sherman Act prohibits “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States”¹³ The focus of Section One is on agreements between two or more competitors that unreasonably restrain trade. In order to demonstrate a violation of Section One, the plaintiff must show evidence of “(1) concerted action that (2) unreasonably restrains (3) interstate commerce.”¹⁴

To determine whether a given restraint is one that unreasonably restrains trade, courts take one of two approaches. A rule of reason analysis consists of an in-depth, multi-step burden-shifting test.¹⁵ The plaintiff must show the anticompetitive effects of a given restraint.¹⁶ If successful, the burden shifts to the defendant to proffer procompetitive justifications for the restraint.¹⁷ Finally, the burden shifts back to the plaintiff to show that notwithstanding these procompetitive justifications, the same objectives could have been achieved through less restrictive means.¹⁸ The other approach, the *per se* analysis, condemns the challenged practices as unreasonable restraints of trade without any elaborate inquiries into the particular circumstances because of their facially clear anticompetitive effect.¹⁹ Typically, actions of professional sports leagues are analyzed under the rule of reason approach because the Supreme Court has recognized that the sports industry is one “in which horizontal restraints on competition are essential if the product is to be

9. ROBERT PITOFSKY ET AL., *TRADE REGULATION: CASES AND MATERIALS* 1, 2 (6th ed. 2010).

10. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

11. PITOFSKY, *supra* note 9, at 1.

12. MATTHEW MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 421 (2d ed. 2009).

13. Sherman Act, 15 U.S.C. § 1 (2011).

14. Brittany Van Roo, *One Trilogy That Should Go Without a Sequel: Why the Baseball Antitrust Exemption Should Be Repealed*, 21 MARQ. SPORTS L. REV. 381, 383 (2010).

15. *See Clarett v. NFL*, 306 F. Supp. 2d 379, 405 (S.D.N.Y. 2004).

16. *Id.*

17. *Id.*

18. *Id.* at 405–06.

19. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984).

available at all,”²⁰ and these restraints may actually enhance competition.²¹

B. The “Baseball Trilogy”

Generally, the Sherman Act represents “one of the primary bodies of public law used to regulate professional sports.”²² For the most part, MLB has been entirely exempt from the purview of the antitrust laws. The history of this exemption can be traced through three primary Supreme Court cases, known as the “Baseball Trilogy.”²³

MLB’s antitrust exemption was judicially created in 1922 in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.²⁴ The plaintiff alleged that the defendants had conspired to monopolize the business of baseball by buying or inducing the Federal League clubs to leave their league.²⁵ In this landmark decision, the Supreme Court held that MLB was not subject to the antitrust laws because it was not engaged in interstate commerce.²⁶ In his oft-quoted line, Justice Holmes famously stated, “[t]he business is giving exhibitions of base ball, which are purely state affairs.”²⁷

More than thirty years later, the Supreme Court had an opportunity to revisit the exemption. In *Toolson v. New York Yankees, Inc.*,²⁸ the Court noted that “[t]he business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation,” and that if the exemption was to be repealed, it was a task for Congress rather than the judiciary.²⁹ Thus, the Court affirmed the exemption.

Finally, in 1972, faced again with a challenge to MLB’s reserve system, the Court in *Flood v. Kuhn*³⁰ reaffirmed baseball’s exemption from the Sherman Act’s regulatory scheme.³¹ The Court recognized that the exemption is an anomaly because “[p]rofessional baseball is a business and it is engaged

20. *Id.* at 101.

21. *Id.* at 102.

22. MITTEN, *supra* note 12, at 421.

23. PETER A. CARFAGNA, SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA’S THREE “MAJOR LEAGUES” 34 (2009).

24. *See generally* 259 U.S. 200.

25. *Id.* at 207–08.

26. *Id.* at 208.

27. *Id.*

28. *See generally* 346 U.S. 356.

29. *Id.* at 357.

30. *See generally* 407 U.S. 258.

31. *Id.* at 285.

in interstate commerce,”³² but noted the long history of the exemption and that “there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.”³³ As in *Toolson*, the Court again insisted that any inconsistency should be remedied legislatively rather than by the Court, given Congress’ “positive inaction” allowing the decision to stand for so long.³⁴

C. Lower Court and Legislative Challenges

Following *Flood*, the actions of both the courts and Congress demonstrate the continued intent to retain what is typically understood to be an exemption that is broad in scope.³⁵ Through the years, the MLB exemption has faced numerous challenges. Though some construe the exemption as applicable to a broader range of activities than others, the decisions of the lower courts are evidence of a general reluctance to narrow MLB’s broad antitrust exemption.

1. Lower Court Challenges

Antitrust suits against MLB have been brought under a variety of different situations, with these suits generally arising in cases regarding MLB’s reserve clause³⁶ or regarding issues of franchise relocation.³⁷ Some courts, such as the one in *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.*,³⁸ have taken the same course of action as the Supreme Court did in *Toolson*, and simply acknowledged the existence of the exemption and the fact that it is an anomaly. Following *stare decisis*, these courts leave it to Congress to take any action regarding the exemption.³⁹ Other courts have taken more in-depth approaches.

For instance, in *Gardella v. Chandler*,⁴⁰ an antitrust suit regarding a challenge to MLB’s reserve clause taking place in 1949, before *Toolson* and well before *Flood*, the Second Circuit refused to blindly follow the reasoning set out in *Federal Baseball*.⁴¹ Although the court agreed with the general

32. *Id.* at 282.

33. *Id.* at 284.

34. *Id.* at 283–84.

35. *See, e.g.*, *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978); *see also* 15 U.S.C. § 26b.

36. *See, e.g.*, *Flood*, 407 U.S. 258.

37. *See, e.g.*, *Wisconsin v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966).

38. *See generally* 282 F.2d 680 (9th Cir. 1960).

39. *Id.* at 680.

40. *See generally* 172 F.2d 402 (2d Cir. 1949).

41. *See generally id.*

holding in *Federal Baseball*, it focused on substantial advances in technology since the time of that landmark decision in 1922.⁴² Specifically, the *Gardella* court felt that the exemption was simply inapplicable due to the rise of radio and television that changed what was once a purely intrastate affair into a clearly interstate affair.⁴³ Thus, the court remanded the case back to the lower court to decide the issues under the Sherman Act.⁴⁴ After *Gardella*, the Supreme Court acknowledged this same shift of baseball from an intrastate to an obviously interstate affair, making the exemption an anomaly, but the Court has yet to take the next step and allow for analysis under the Sherman Act. Instead, the Court has left it to Congress to decide to take action regarding the exemption.⁴⁵

In an early franchise-relocation case, the Supreme Court of Wisconsin took a vastly different approach to that taken in *Gardella*.⁴⁶ Following the announcement of the Milwaukee Braves' relocation to Atlanta and the subsequent decline in team performance and attendance, the State of Wisconsin brought an antitrust suit against the Milwaukee Braves under state antitrust laws.⁴⁷ Unlike the suit in *Gardella*, which took place before *Toolson*, this suit was filed shortly after *Toolson*. Following the U.S. Supreme Court's lead, the Wisconsin Supreme Court deferred to Congress to alter the exemption, and thus did not allow the plaintiff to circumvent the exemption through the use of state antitrust laws.⁴⁸

Although *Flood* reaffirmed the continued existence of MLB's exemption,⁴⁹ in the opinion, the U.S. Supreme Court referred only to the MLB reserve system.⁵⁰ Thus, judicial challenges following *Flood* have not been concerned with the exemption's existence. Instead, the modern focus is on the scope of the exemption, with plaintiffs often arguing that, based on *Flood*, the exemption only applies to the reserve system and not to any other aspects of the business of baseball.⁵¹ As the Supreme Court has been silent on the issue of the MLB exemption since *Flood* in 1972, the question of its scope has an extensive history of its own and is an ongoing battle.

42. *Id.* at 411.

43. *Id.*

44. *Id.* at 415.

45. *See generally Flood*, 407 U.S. 258.

46. *See generally Milwaukee Braves*, 144 N.W.2d 1.

47. *See generally id.*

48. *Id.* at 18.

49. *See generally Flood*, 407 U.S. 258.

50. *Id.* at 259, 282.

51. *See Finley*, 569 F.2d at 540.

For instance, in *Henderson Broadcasting Corp. v. Houston Sports Ass'n*,⁵² the Southern District of Texas took a narrow view of MLB's exemption.⁵³ In this case, the defendant cancelled the plaintiff's contract to broadcast Houston Astros games.⁵⁴ The plaintiff alleged that horizontal restraints were imposed on the greater Houston radio market through various anticompetitive acts of the defendant relating to the cancellation of the broadcasting contract.⁵⁵ Relying on *Gardella* and *Flood*, the court framed the issue as whether "radio broadcasting is so much a part of baseball that it, as well as baseball, is exempt from the antitrust laws."⁵⁶ In denying the defendant's motion to dismiss based on the MLB antitrust exemption, the court stated, "[t]he issue in the case is not baseball but a distinct and separate industry, broadcasting The reserve clause and other 'unique characteristics and needs' of the game have no bearing at all on the questions presented."⁵⁷

Similarly, in holding that no preemption of state antitrust laws existed due to MLB's federal antitrust exemption, the Southern District of New York in *Postema v. National League of Professional Baseball Clubs*⁵⁸ determined that, like broadcasting, relationships with non-players were not unique characteristics or needs of the game deserving of an exemption from the federal antitrust laws.⁵⁹ Specifically, "[a]nti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability."⁶⁰

Arguably, the most unique lower court decision is a case regarding a franchise relocation decision, *Piazza v. Major League Baseball*.⁶¹ In *Piazza*, the plaintiffs claimed federal antitrust violations regarding MLB's alleged efforts to prevent the plaintiffs from purchasing the San Francisco Giants and relocating the franchise to Tampa, Florida.⁶² The court undertook a comprehensive stare decisis analysis and concluded that many courts improperly applied the doctrine of stare decisis by focusing purely on the

52. See generally 541 F. Supp. 263 (S.D. Tex. 1982).

53. See generally *id.*

54. *Id.* at 264.

55. *Id.*

56. *Id.* at 268.

57. *Id.* at 271.

58. See generally 799 F. Supp. 1475 (S.D.N.Y. 1992).

59. *Id.* at 1489.

60. *Id.*

61. See generally 831 F. Supp. 420 (E.D. Pa. 1993).

62. *Id.* at 421.

result in *Flood* rather than focusing on its reasoning.⁶³ Following this reasoning, the defendant's arguments were dismissed, as the court held that the concept of stare decisis, when properly applied, required an extremely narrow view of MLB's exemption, limited purely to the reserve clause, the "reasoning" within the stare decisis analysis.⁶⁴ Finding this interesting and unique standard to be the correct form of analysis, some other lower courts followed suit.⁶⁵

However, even the judge in *Piazza* recognized that other lower courts had refused to follow such a narrow reading of *Flood*, and, thus, undertook an alternative analysis under the assumption that the exemption extended beyond the reserve clause.⁶⁶ The Eastern District of Pennsylvania addressed the question of whether the market for ownership interests in baseball franchises was central to the unique characteristics and needs of baseball exhibitions.⁶⁷ Although the court would have refused to grant the defendant's motion to dismiss based on the exemption under this reasoning as well, it did recognize that franchise relocation decisions could potentially relate to matters of league structure, an area generally considered to be a unique characteristic and need of the game.⁶⁸ Regardless, many lower courts reference *Piazza* for the aforementioned, very narrow stare decisis reasoning rather than for this alternative analysis.⁶⁹

But, many lower courts have refused to frame the scope of MLB's antitrust exemption in such a narrow light. For instance, in *Charles O. Finley & Co. v. Kuhn*,⁷⁰ a case exemplifying a broad interpretation of the exemption's scope, the Seventh Circuit looked to the "Baseball Trilogy" for guidance and found it clear from those cases that the entire "business of baseball" is exempt from the federal antitrust laws.⁷¹ The *Finley* court, like the courts in favor of a narrow scope for the exemption, noted the specific references to the reserve clause scattered throughout the reasoning in *Flood*.⁷² However, unlike those courts that concluded that these references supported a

63. *Id.* at 438.

64. *Id.*

65. *See, e.g.*, *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994).

66. *Piazza*, 831 F. Supp. at 438–39.

67. *Id.* at 440.

68. *Id.* at 441.

69. *See, e.g.*, *Butterworth*, 644 So. 2d at 1023–24.

70. *See generally* 569 F.2d 527.

71. *Id.* at 541.

72. *Id.* at 540–41.

narrow scope,⁷³ the court explained that the Supreme Court decisions indicated an overall intent “to exempt the business of baseball . . . [and not merely a] particular facet of that business, from the federal antitrust laws.”⁷⁴

Regardless of the persuasiveness of *Piazza*, many lower courts have chosen to follow the reasoning in *Finley* and have employed a broad interpretation of the scope of MLB’s exemption.⁷⁵ For instance, the courts in *New Orleans Pelicans Baseball, Inc. v. National Ass’n of Professional Baseball Leagues*,⁷⁶ *McCoy v. Major League Baseball*,⁷⁷ and *Minnesota Twins Partnership v. Minnesota*⁷⁸ all denounced the reasoning in *Piazza*, with one court describing it as going against the “great weight of authority” that recognizes the scope of the exemption as the “business of baseball.”⁷⁹ In *Minnesota Twins Partnership*, the Minnesota Supreme Court further explained that the court in *Piazza* simply tried to make sense of the anomaly but in the process chose to ignore the key concept in *Flood*.⁸⁰ That is, “the Supreme Court [in its reaffirmation of the exemption,] had no intention of overruling *Federal Baseball* or *Toolson* despite acknowledging that professional baseball involves interstate commerce.”⁸¹ As one lower court stated, the “Supreme Court should retain the exclusive privilege of overruling its own decisions.”⁸²

Similarly, *Major League Baseball v. Butterworth*⁸³ is a case involving franchise contraction where MLB had announced a decision to contract two clubs, from thirty to twenty-eight.⁸⁴ Applying the standard of determining whether the challenged action was part of the “business of baseball,” the Northern District of Florida held that contraction is included as part of the exempt actions under the business as a whole.⁸⁵ The court explained that “[i]t is difficult to conceive of a decision more integral to the business of major

73. *See, e.g., Piazza*, 831 F. Supp. 420.

74. *Finley*, 569 F.2d at 541.

75. *See, e.g., New Orleans Pelicans Baseball, Inc. v. Nat’l Ass’n of Prof’l Baseball Leagues*, No. 93-253, 1994 U.S. Dist. LEXIS 21468 (E.D. La. 1994).

76. *See generally id.*

77. *See generally* 911 F. Supp. 454 (W.D. Wash. 1995).

78. *See generally* 592 N.W.2d 847 (Minn. 1999).

79. *See, e.g., McCoy*, 911 F. Supp. at 457.

80. *Minn. Twins P’ship*, 592 N.W.2d at 855–56.

81. *Id.* at 856.

82. *McCoy*, 911 F. Supp. at 457 (quoting *Salerno v. Am. League of Prof’l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970)).

83. *See generally* 181 F. Supp. 2d 1316 (N.D. Fla. 2001).

84. *Id.* at 1318.

85. *Id.* at 1331–32.

league baseball than the number of clubs that will be allowed to compete.”⁸⁶ The court again noted that the Supreme Court explicitly declined to overrule *Federal Baseball* and that *Flood*, in light of the obvious anomaly of the continued existence of the exemption, “was a ruling not about whether the antitrust exemption should be terminated but about who should make that decision.”⁸⁷ As explained before, the intent expressed in *Flood* is that this change should be congressional, rather than judicial, in nature.

2. The Curt Flood Act

As far as any “significant” congressional action regarding the MLB exemption, only one important action has occurred. In 1998, Congress enacted the Curt Flood Act, which specifically directs that MLB is now subject to the antitrust laws for acts “affecting employment of major league baseball players to play baseball at the major league level . . . to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws” in other professional sports.⁸⁸ That is, MLB players have the same rights as players in other professional sports to sue regarding employment terms.

Although this statute technically narrowed MLB’s broad exemption to a certain extent, in reality, the Curt Flood Act has little actual effect due to the statutory and nonstatutory labor exemptions.⁸⁹ These exemptions effectively work together to immunize the other professional sports leagues from antitrust liability for actions that occur as part of the collective bargaining process between the multiemployer bargaining units and the players’ associations.⁹⁰ Given the Supreme Court’s broad interpretation of the collective bargaining process,⁹¹ players’ associations must decertify before seeking any antitrust remedies.⁹² Thus, although the Curt Flood Act technically narrows MLB’s broad antitrust exemption and opens MLB up to antitrust liability for labor and employment issues, the risk of liability is minimal.

Significantly, Congress could have narrowed the scope of MLB’s antitrust exemption even more; however, as evidenced by the Curt Flood Act’s narrow reach, it chose not to do so.⁹³ Instead, Congress expressed its intent that the

86. *Id.* at 1332.

87. *Id.* at 1331.

88. 15 U.S.C. § 26b(a).

89. See MITTEN, *supra* note 12, at 436–80.

90. *Id.* at 437, 470–71.

91. *Id.* at 470; see generally *Brown v. Pro Football, Inc.* 518 U.S. 231 (1996).

92. MITTEN, *supra* note 12, at 470–71.

93. See 15 U.S.C. § 26b.

exemption should continue to apply to other components of the business of baseball.⁹⁴ For example, the Curt Flood Act does not provide Minor League Baseball (MiLB or Minor League) players with any antitrust remedies, and, likewise, it does not apply to any other component of MiLB.⁹⁵ Similarly, the statute explicitly excludes

acts . . . or agreements . . . relating to or affecting franchise expansion, location or relocation, . . . ownership issues, . . . [and] the *marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively.*⁹⁶

Thus, the Curt Flood Act would not apply to the actions of MLBP in granting an exclusive license to Topps for the use of MLB intellectual property on baseball cards.

Given the “Baseball Trilogy,” combined with the many lower-court interpretations and the explicit language in the Curt Flood Act, it is clear that the MLB exemption should be considered broad in scope and apply to more than the reserve clause.

III. AMERICAN NEEDLE

Notwithstanding this fairly clear intent, in light of the Supreme Court’s recent decision in *American Needle*, some have urged that the licensing issue with Upper Deck may have been a unique opportunity to bring yet another challenge to MLB’s broad exemption.⁹⁷ Although the NFL does not benefit from an antitrust exemption, the comparison between the Upper Deck situation and that in *American Needle* makes sense for at least two reasons. First, the factual circumstances in each case are substantially similar. Second, the NFL and NFL Properties (NFLP) relied on the single-entity defense throughout the *American Needle* litigation.⁹⁸ Many of the arguments and justifications proffered in support of this single-entity defense would likely be very similar to those MLB would employ if arguing in support of the inclusion of intellectual property and licensing agreements in the broad scope of MLB’s antitrust exemption.

94. 15 U.S.C. § 26b(b)–(d).

95. 15 U.S.C. § 26b(b)(1).

96. 15 U.S.C. § 26b(3) (emphasis added).

97. See Hylton, *supra* note 8; see also Straquadine, *supra* note 8.

98. See generally *Am. Needle*, 130 S. Ct. 2201.

The *American Needle* case arose when NFLP altered its long practice of granting nonexclusive licenses for use of the NFL's intellectual property to vendors.⁹⁹ American Needle had previously received such nonexclusive licenses for use on headwear but was no longer able to make and sell items containing the NFL trademarks after NFLP granted Reebok an exclusive ten-year license.¹⁰⁰ American Needle then sued, alleging violations of the Sherman Act.¹⁰¹ In response, the NFL argued that it was a single-entity immune from scrutiny under the Sherman Act.¹⁰²

The single-entity defense refers to situations where Section One violations are alleged, but defendants claim that they are not capable of engaging in a “contract, combination . . . or conspiracy” because they are actually a single enterprise acting for the sole benefit of an overarching corporation.¹⁰³ For instance, in *Copperweld Corp. v. Independence Tube Corp.*,¹⁰⁴ the Supreme Court concluded that a corporation “and its wholly owned subsidiary . . . are incapable of conspiring with one another for purposes of [Section One] of the Sherman Act”¹⁰⁵ because of the functional relationship between the parent corporation, as the sole source of economic power, and its wholly owned subsidiary’s “complete unity of interest.”¹⁰⁶ This relationship is distinguished from a pure joint venture where there are multiple parent corporations acting together for a specific purpose that remain distinct and separate entities subject to Section One scrutiny.¹⁰⁷

Using the reasoning from *Copperweld*, the NFL urged that it was a single-entity in regard to the licensing of intellectual property by NFLP.¹⁰⁸ The Northern District of Illinois granted summary judgment, concluding that with regard to “the facet of their operations respecting exploitation of intellectual property rights, the NFL and its [thirty-two] teams . . . have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose.”¹⁰⁹ Although acknowledging that there

99. *Id.* at 2207.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (quoting 15 U.S.C. § 1).

104. *See generally id.*

105. *Id.* at 777.

106. *Id.* at 771.

107. *See* Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 737–38, 743–44 (2010).

108. *Am. Needle*, 130 S. Ct. at 2207.

109. *Id.* (quoting *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (N.D.

may be aspects of NFL operations that should be classified as a joint venture, limiting its analysis to the licensing of teams' intellectual property through NFLP, the Seventh Circuit affirmed the district court's conclusion that the NFL was acting as a single-entity in this context.¹¹⁰ In a somewhat bizarre twist, with support from other professional sports such as the National Basketball Association and National Hockey League in the form of amicus briefs, the NFL supported the plaintiff's petition for certiorari in the hopes that the Supreme Court would affirm the NFL's single-entity status, and, therefore, provide the NFL and other professional sports organizations with increased protection from antitrust liability.¹¹¹

In its brief before the Supreme Court, the NFL provided justifications for the single-entity application in this licensing context, both echoing the lower courts' reasoning and expanding on it.¹¹² Specifically, the NFL's argument at its most basic level was that "each club's economic value derives from its membership in the NFL and its role in the production of NFL Football."¹¹³ Intellectual property of the NFL and its clubs is integral to this collective production of NFL football, as "the competition on the field features the clubs' names, the logos that adorn the players' uniforms, the uniform designs, and each club's official colors."¹¹⁴

The NFL explained further that "[t]he clubs' intellectual property derives its value from the production of NFL football. Consumers buy hats, shirts, and other goods bearing club marks . . . not because those symbols have intrinsic value or independent appeal, but rather because they represent affiliation with an NFL team."¹¹⁵ Recognizing this economic reality, the NFL formed NFLP to serve as a centralized outlet for managing and marketing the NFL's intellectual property.¹¹⁶ According to the NFL, NFLP serves as the "single driver" of the teams' 'promotional vehicle,' "pursuing the common interests of the whole."¹¹⁷

Unfortunately for the NFL and many other professional sports leagues, the Supreme Court reversed the lower court's decisions on the sole issue of "whether the alleged activity by the NFL respondents 'must be viewed as that

III. 2007)).

110. *Id.*

111. McCann, *supra* note 107, at 735.

112. *See generally* Brief for Appellee-Respondent, *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010).

113. *Id.* at **14.

114. *Id.* at **15.

115. *Id.*

116. *Id.* at **16 (citation omitted).

117. *Am. Needle*, 130 S. Ct. at 2213 (citing *Copperweld*, 467 U.S. at 770).

of a single enterprise for purposes of [Section One]” applicability.¹¹⁸ The Court held that the centralized activities and control regarding NFL intellectual property and licensing through the NFLP were not those of a single-entity, and thus remanded the case to be evaluated on the merits of the Sherman Act claim.¹¹⁹

Because of the antitrust exemption, MLB currently has no need to attempt to defend an antitrust violation using the single-entity defense. Therefore, the specific reasons for the Supreme Court’s refusal in the *American Needle* case to characterize the NFL as a single-entity in the licensing and marketing of intellectual property are not particularly relevant to MLB. Notwithstanding this fact and the ultimate failure of the NFL’s justifications in support of its single-entity defense, those same justifications could play an integral role in a future challenge to MLB’s antitrust exemption in the licensing and promotional context. To fully comprehend this alternative use for the NFL’s single-entity defense, justifications for retention of MLB’s exemption in other contexts should be examined.

IV. MLB LICENSING AND THE ANTITRUST EXEMPTION

Although the existence and scope of MLB’s exemption have been challenged in a variety of contexts, it has not yet been directly at issue in any judicial challenge to an exclusive licensing agreement. To be clear, MLB licensing arrangements have previously been the subject of an antitrust suit.¹²⁰ Notably, though, the MLB exemption itself has not been at issue because MLB successfully defended the suit under a rule of reason analysis rather than defending it based on its exemption from the purview of the antitrust laws.¹²¹

Some attorneys and commentators opined that Upper Deck might respond to the trademark infringement suit filed against it by bringing an antitrust suit against MLB with the possibility that MLB’s exemption would be at issue.¹²² In light of the Supreme Court’s refusal in *American Needle* to award the NFL with single-entity status and its concomitant protection from antitrust liability, some believed that courts might also be willing to narrow the scope of or remove MLB’s broad antitrust exemption if it was similarly challenged in the licensing context.¹²³

118. *Id.* at 2208 (citation omitted).

119. *Id.* at 2212–17.

120. *See generally* *Salvino*, 542 F.3d 290.

121. *See generally id.*

122. *See* Hylton, *supra* note 8; *see also* Straquadine, *supra* note 8.

123. *See* Hylton, *supra* note 8; *see also* Straquadine, *supra* note 8.

The Upper Deck licensing situation is MLB's version of *American Needle*.¹²⁴ Similar to the centralized licensing functions of NFLP, MLBP serves as "the exclusive worldwide agent for licensing the use of all names, logos, trademarks, . . . and other intellectual property owned or controlled by the MLB Clubs, MLB's Office of the Commissioner . . . and MLBP . . . on retail products."¹²⁵ Much like NFLP with regard to the headwear at issue in *American Needle*, MLBP generally granted nonexclusive licenses for the use of its logos and other marks on baseball cards.¹²⁶ However, in 2009, MLBP entered into an exclusive agreement with Topps, a baseball card company, granting the company exclusive rights to the use of MLB trademarks on baseball cards.¹²⁷ Therefore, Upper Deck, Topps' long-time competitor and former MLBP licensee, was no longer able to legally use these marks.¹²⁸ Subsequently, Upper Deck produced cards with clearly visible MLB logos on the players' uniforms that resulted in a trademark infringement suit filed by MLBP and a subsequent consent judgment in favor of MLBP.¹²⁹

Notwithstanding the arguably favorable holding in *American Needle*, had Upper Deck brought an antitrust challenge, or if a similar challenge in the licensing and intellectual property context were to arise, the existence of MLB's exemption would more than likely remain unchanged. Instead, as evidenced by the numerous aforementioned challenges to MLB's exemption, it would be the *scope* of the exemption that would be at issue.¹³⁰ Both the history of the exemption and the importance of intellectual property to the existence of MLB as an entertainment product support the notion that MLBP's licensing and promotional activities would fall well within the scope of the exemption.

A. Retention of the MLB Antitrust Exemption

Although the scope of the exemption should be the focus, an overview of the arguments proffered in support of the exemption's existence helps provide context for an analysis of the exemption in the modern era. The court in *Piazza* attempted to undermine the *stare decisis* argument.¹³¹ Notwithstanding this fact, an argument in support of the exemption must necessarily start with

124. McCann, *supra* note 107, at 772.

125. *Salvino*, 542 F.3d at 294.

126. *See Singer*, *supra* note 4.

127. *Id.*

128. *The Upper Deck Co.*, No.10 Civ. 732, at *4–5.

129. *See generally id.*

130. *See e.g., Finley*, 569 F.2d 527.

131. *Piazza*, 831 F. Supp. at 437–38.

stare decisis because of the long history of the exemption and the stare decisis-based reasoning in *Toolson* and *Flood*.¹³² It is no small fact that the exemption has been consistently reaffirmed, and 2012 will mark the ninetieth year of the MLB antitrust exemption's existence.¹³³ Those not in favor of MLB's exemption could potentially turn to *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹³⁴ a recent case where the Supreme Court strayed from the stare decisis principle in the antitrust arena in overturning *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, a decision that had been upheld for almost 100 years.¹³⁵ In overturning *Dr. Miles Medical*, the Court ruled that the reasons upon which *Dr. Miles Medical* originally relied no longer existed.¹³⁶ Similarly, MLB's exemption originally rested on the idea that MLB was not engaged in interstate commerce, but the Court has since recognized that this reason for the exemption no longer exists because MLB is now clearly engaged in interstate commerce.¹³⁷

Even though it is true that the Court overturned *Dr. Miles Medical*, important distinctions exist between the *Dr. Miles Medical* situation and the MLB antitrust exemption. Unlike the decision in *Leegin*, which relaxed the standard of review used in the vertical price fixing context,¹³⁸ the removal of MLB's exemption would subject MLB to more antitrust liability rather than less, and it remains unclear as to whether removal of the exemption would actually promote any of the interests the antitrust laws exist to protect.¹³⁹ More importantly, the Court has explicitly expressed a desire to leave it to Congress to remove MLB's exemption if it so chooses.¹⁴⁰

Additional arguments in support of the exemption's continued existence specifically relate to franchise issues and protection of the Minor League system. The key notion is that as a result of the antitrust exemption, MLB has structured itself in a certain way and removal of the exemption would

132. See generally *Toolson*, 346 U.S. 356; *Flood*, 407 U.S. 258.

133. See generally *Fed. Baseball Club*, 259 U.S. 200; see also *Toolson*, 346 U.S. 356; *Flood*, 407 U.S. 258.

134. See generally 551 U.S. 877 (2007).

135. See generally *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), overruled by *Leegin*, 551 U.S. 877.

136. *Leegin*, 551 U.S. at 889.

137. *Flood*, 407 U.S. at 282.

138. See generally *Leegin*, 551 U.S. at 877.

139. See generally Andrew E. Bortecck, 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 (2004); see also Clark C. Griffith, *BACKTALK: Good Reason for Baseball's Antitrust Exemption*, N.Y. TIMES, Jan. 17, 1993, § 8, at 9.

140. See e.g., *Flood*, 407 U.S. 258.

fundamentally alter the game as we know it. Regarding franchise location and ownership issues, the basic argument is that “[i]f MLB were to lose its antitrust exemption, it could no longer prevent teams from moving to more lucrative markets that happen to be claimed by another team.”¹⁴¹ Eventually, it would no longer be profitable for a large market city to add another team.¹⁴² This could lead to the elimination of some franchises, a decrease in quality of play, and a decrease in the cultural significance of the game.¹⁴³

Critics often claim that other professional sports leagues function just fine without an antitrust exemption, but this argument is weakened because of baseball’s unique Minor League system.¹⁴⁴ The current Minor League reserve system incentivizes Major League clubs to subsidize the Minor League clubs and player development and can exist in its current form only because of the antitrust exemption.¹⁴⁵ Without these subsidies, there would be “severe economic hardships for many minor league clubs,” which would eventually affect both the Minor and Major League structures.¹⁴⁶ If the exemption was removed, some Minor League clubs would be able to survive and even thrive without the Major League, but this would certainly not be the case for a substantial amount of these teams, thus resulting in the elimination of some Minor League clubs that are so vital to, and beloved by, many small communities throughout the country.¹⁴⁷

Indeed, the arguments in favor of the retention of the MLB exemption are strong, regardless of the many counterarguments that can be made. However, the existence of the exemption does not cut at the heart of the modern issues regarding MLB’s exemption. Today, the real issue is the nature and extent of the scope of the exemption.

141. Bruce Johnson, *Why Baseball’s Antitrust Exemption Must Go*, in *STEE-RIKE FOUR! WHAT’S WRONG WITH THE BUSINESS OF BASEBALL?* 140 (Daniel R. Marburger ed., 1997).

142. See Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 *MINN. L. REV.* 904, 915–17 (2011); see also William F. Shughart II, *Preserve Baseball’s Antitrust Exemption, or, Why the Senators Are out of Their League*, in *STEE-RIKE FOUR! WHAT’S WRONG WITH THE BUSINESS OF BASEBALL?* 143 (Daniel R. Marburger ed., 1997); Borteck, *supra* note 139, at 1109.

143. See Shughart, *supra* note 142, at 153–54; see also JEROLD J. DUQUETTE, *REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST* 16 (1999); Griffith, *supra* note 139.

144. See Stanley M. Brand & Andrew J. Giorgione, *The Effect of Baseball’s Antitrust Exemption and Contraction on its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 *VILL. SPORTS & ENT. L.J.* 49, 58–60 (2003).

145. DUQUETTE, *supra* note 143, at 122; see also Brand & Giorgione, *supra* note 144, at 50–52.

146. DUQUETTE, *supra* note 143, at 122; see also Brand & Giorgione, *supra* note 144, at 50–52.

147. DUQUETTE, *supra* note 143, at 123.

B. Intellectual Property Licensing as Exempt from the Sherman Act

Although some lower courts have looked to *Flood* as exemplifying a very narrow scope of the exemption, limited just to actions involving MLB's reserve clause,¹⁴⁸ the explicit language used in the Curt Flood Act, combined with the overall judicial history regarding the scope of the exemption, demonstrates that it is proper to characterize the exemption broadly rather than narrowly. Under this broad characterization, the actions of MLBP regarding licensing and intellectual property decisions must necessarily be included as part of the exemption.

As the Court expressed in *Flood*, any changes regarding the exemption should be congressional in nature, rather than judicial.¹⁴⁹ The Curt Flood Act represents the only significant related congressional action and, importantly, narrowed the exemption only insofar as MLB is now subject to antitrust scrutiny in the labor arena in the same way other professional sports leagues are subject to scrutiny regarding employment terms.¹⁵⁰ However, Congress specifically chose not to narrow the exemption even further than what is effectively a nominal narrowing due to the statutory and nonstatutory labor exemptions. In fact, with the specific language used in the Curt Flood Act, Congress expressed its intention that the exemption should continue to apply to many components of the business of baseball.¹⁵¹ Of particular relevance here, is that the statute explicitly does not apply to MLB's actions regarding "the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively" through MLBP.¹⁵²

The standard under the "Baseball Trilogy" is that MLB's exemption applies to the entire "business of baseball."¹⁵³ Thus, assuming that the exemption will continue to exist in some form unless Congress removes it completely, the key question in any antitrust suit against MLB will necessarily be whether the challenged action is included as part of the "business of baseball." As the court in *Henderson Broadcasting* expressed, to determine if a challenged action is included as part of the "business of baseball," a court must decide whether the action is a "unique characteristic[]" or "need[]" of

148. See, e.g., *Piazza*, 831 F. Supp. 420.

149. *Flood*, 407 U.S. at 283–84.

150. See MITTEN, *supra* note 12, at 436–80.

151. See 15 U.S.C. § 26b(b)(1)–(3).

152. *Id.* § 26b(b)(3).

153. *Finley*, 569 F.2d at 541.

the game.”¹⁵⁴ It is here that the previously articulated NFL arguments in support of the single-entity defense in *American Needle* become relevant to MLB. Although the NFL’s arguments eventually failed as justifications for status as a single-entity, MLB need not attempt to categorize MLBP as a single-entity because it benefits from the exemption. Rather, the NFL’s failed justifications precisely relate to why marketing, licensing, and promotion of MLB’s intellectual property most certainly falls within the “business of baseball.”

Just like the NFL urged that “[t]he intellectual property of the NFL and its member clubs . . . is an integral part of NFL Football,”¹⁵⁵ so, too, is the intellectual property of MLB an integral part of the MLB product. Identical to reasoning expressed in the NFL’s brief in support of its single-entity defense, the production of MLB requires “the collective deployment” of intellectual property featured on the field such as “clubs’ names, the logos that adorn the players’ uniforms, the uniform designs, and each club’s official colors.”¹⁵⁶ As expressed in *Flood*, baseball is a business.¹⁵⁷ In addition to the use of intellectual property on the field specifically, the business of MLB as a whole is the “production and promotion of [teams’] joint *entertainment* product,”¹⁵⁸ which necessarily involves the licensing and marketing of intellectual property so as to better compete against other entertainment products as a business concerned with profits and losses.

The entertainment value is directly related to continued fan interest in the league, which, in turn, directly affects a league’s profits, losses, and revenues. Continued fan interest in MLB and other professional sports is attributed to the uncertain outcome inherent in athletic competitions, a characteristic distinct from other forms of entertainment.¹⁵⁹ In recognition of the importance of an uncertain outcome, professional sports leagues employ a variety of tactics to maintain and increase the competitive balance in their respective leagues in an attempt to ensure that small market teams have a reasonable opportunity to compete with large market teams such that this uncertain outcome is not lost.¹⁶⁰ For instance, both the NFL and MLB “engage in extensive revenue and cost sharing . . . in an effort to enhance the ability of their product to

154. *Henderson Broad.*, 541 F. Supp. at 271.

155. Brief for Appellee-Respondent, *supra* note 112, at **14.

156. *See id.* at **15.

157. *Flood*, 407 U.S. at 282.

158. *See* Brief for Appellee-Respondent, *supra* note 112, at **14 (emphasis added).

159. MITTEN, *supra* note 12, at 401–02.

160. *See id.* at 401–02, 515–16.

compete against other forms of entertainment.”¹⁶¹ Because this competitive balance is necessary to ensure an uncertain outcome, it follows that the licensing and promotion of MLB’s intellectual property through MLBP is also a need of the game.

Revenues generated by MLBP through its licensing agreements represent a portion of shared revenues and, thus, contribute to the pool of money distributed to all MLB teams to achieve the necessary competitive balance to enhance the entertainment value of the MLB product.¹⁶² In *Henderson Broadcasting*, the court held that broadcasting of MLB games was not part of the “business of baseball” as a unique characteristic or need of the game because it was an entirely “distinct and separate industry.”¹⁶³ This decision simply does not hold true when it comes to actions of MLBP in licensing and promoting intellectual property, especially given the wide use of MLB intellectual property on the field as part of team logos and colors. Similarly, the court in *Postema* held that the challenged actions were not unique characteristics or needs of the game because they “in no way enhance[d] its vitality or viability.”¹⁶⁴ The exact opposite is true of MLB’s intellectual property. The licensing and promotion of that intellectual property, quite literally, enhances the viability of MLB at a very minimum because of the importance of competitive balance and the fact that the MLB clubs share the revenues of MLBP. Thus, were the exemption directly at issue in an antitrust challenge to the licensing and promotional activities of MLBP, these activities should be exempt as part of the “business of baseball.”

V. CONCLUSION

There is no doubt that the licensing and promotion of MLB’s intellectual property is a distinct need of the game and is, therefore, included as part of the “business of baseball.” Thus, it should be exempt from the purview of the federal antitrust laws.

MLB’s antitrust exemption can be traced back almost ninety years to the landmark decision in *Federal Baseball*. Since then, the Supreme Court has reaffirmed the exemption, and Congress has not yet taken any action to remove it. Today, the exemption is an anomaly. However, given the Court’s express intent to leave it to Congress to remove the exemption, and Congress’ explicit language in the Curt Flood Act limiting the statute’s reach, the

161. See Brief for Appellee-Respondent, *supra* note 112, at **11.

162. *Salvino*, 542 F.3d at 294.

163. *Henderson Broad.*, 541 F. Supp. at 271.

164. *Postema*, 799 F. Supp. at 1489 (emphasis added).

exemption will continue to exist in some form for at least the foreseeable future. Thus, courts in the modern era are faced with the task of defining the scope of the exemption.

As previously explained, the issue of the exemption's scope is more properly characterized as a determination of how to properly define the "business of baseball." Although some lower courts have interpreted *Flood* to limit the scope of the exemption under the "business of baseball" to situations involving MLB's reserve clause, the "great weight" of authority recognizes that the exemption applies to the "business of baseball" as a whole.¹⁶⁵ Upper Deck did not file an antitrust suit against MLB, but there will surely be another licensing situation in the future that might give rise to a challenge to MLB's antitrust exemption. There is no way of knowing for sure just how a court would rule on this issue because the exemption has not been an issue in such a context. However, MLB can employ the NFL's single-entity arguments from the *American Needle* case to demonstrate that intellectual property is part of the "business of baseball" as a vital need of the game. As such, the licensing and promotion of MLB and its member clubs through MLBPA is integral to the production of MLB and should be exempt from the purview of the federal antitrust laws.

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165. See *McCoy*, 911 F. Supp. at 457.