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From the Minor League Perspective

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A BRIEF APPRAISAL OF THE CURT FLOOD ACT OF 1998 FROM THE MINOR LEAGUE PERSPECTIVE

GARY R. ROBERTS

In late 1998, as the Congressional session was nearing adjournment, the House of Representatives unanimously passed the Curt Flood Act of 1998 ("the Act"). Since the Act had earlier been passed unanimously by voice vote in the Senate, it immediately went to the White House where President Clinton signed it into law. The unanimous passage in both houses of Congress masked years of sometimes bitter wrangling among various groups and individuals over the language of such legislation, but the unanimity with which it passed also probably quite accurately suggests that the Act is likely to have no great significance in shaping the structure or conduct of professional baseball in the years ahead.

I. PRELUDE TO THE ACT’S PASSAGE

Ever since 1953 when in Toolson v. New York Yankees the Supreme Court reaffirmed Justice Holmes’ 1922 Federal Baseball decision that first recognized that baseball was neither commerce nor interstate, it has seemed like a biannual ritual for at least one congressman or senator to propose a bill that would either wholly or partially bring the business of professional baseball within the scope of the Sherman and Clayton Antitrust Acts. Such efforts seemed to increase in both number and rhetorical levels after Justice Blackmun’s famous 1972 opinion for a 7-2 majority in Flood v. Kuhn that once again held that the business of baseball was not covered by the antitrust laws. However, even though some congressmen and senators were able occasionally to convene committee hearings on the merits of repealing what has come to be known as the "baseball exemption" (which I have always believed was more

5. The most notable pre-1994 congressional hearings on the baseball exemption were convened in 1992 by Ohio Senator Howard Metzenbaum, Chairman of the Judiciary Committee’s
properly called an antitrust "exclusion"\(^6\), proposed legislation to do so never made it out of committee or was thought by most to have any serious chance of passage— that is until a bitter strike by players resulted in canceling the 1994 World Series.

In 1994, public and congressional feelings toward the national past-time reached an all time low. Not only did the bitter strike wipe out one of the most exciting seasons ever and scuttle the World Series for the first time in modern history, but several other troubling aspects of the baseball business were receiving a lot of public attention and scorn. Two events in 1992 that had triggered the Metzenbaum Hearings\(^7\) also increased the public and political interest in pursuing a legislative response to the baseball antitrust exclusion. Commissioner Fay Vincent had been forced to resign his office in August of 1992, and the owners had indefinitely turned the management of Major League Baseball (MLB) over to one of their own, Milwaukee Brewers owner Allan "Bud" Selig, as the chairman of the MLB Executive Council, rather than hire a new commissioner who might use his historical power to act "in the best interests of baseball" in a way that could compromise the owners' upcoming labor negotiations.\(^8\) Also, in 1992 the National League owners had refused to approve the sale of the San Francisco Giants to an investor group that was going to move the team's home games to St. Petersburg, Florida,\(^9\) an event which not only outraged congressmen and senators from Florida (although did not seem to bother many politicians in Northern California), but also brought attention to the growing practice of teams in all

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\(^6\) My view is that an exemption is an express provision or an inherent implication in a statute that carves out something for special treatment from an otherwise law of general application. Baseball's antitrust immunity, on the other hand, was the result of the courts interpreting the language of the Sherman Act as not covering the activity of staging professional baseball games. Thus baseball is not "exempt" from the antitrust laws, but rather is simply not covered (i.e., is "excluded") by the law as written in the first place.

\(^7\) See supra note 5.


\(^9\) This event is described in Piazza v. Major League Baseball, 831 F. Supp. 420, 422-23 (E.D. Pa. 1993).
sports, particularly football, of using the ability to relocate teams to extract huge concessions from local communities. Furthermore, MLB had just entered a new television arrangement that for the first time would not have all post-season playoff games shown on free national television, an event that triggered fears in many that significant bleeding of games from free TV over to pay-per-view would soon occur. Thus, for several reasons, by late 1994, antitrust law and sports, and particularly baseball’s antitrust exclusion, were in Congress’ crosshairs.

Although legislation that would have lifted the baseball antitrust exclusion only for labor market restraints did pass the House Judiciary Committee in the Fall of 1994, the first time such legislation had ever made it out of committee, it died without making it to the floor of the House when the 103rd Congress adjourned in November. There was substantial support for the view that it would be inappropriate for Congress to pass this type of legislation in the middle of a strike and labor dispute, but there were many who also believed that once the strike was resolved, Congress would move quickly to pass similar legislation. My own view at the time was that once the strike was settled and a new bargaining agreement was entered into, the public’s, and thus Congress’ interest in baseball’s antitrust status would soon fall off the radar screen. Also, the new Congress that convened in January of 1995 was for the first time in decades controlled on both sides of the Capitol by Republicans who would likely have less enthusiasm for attacking baseball’s status quo. New Speaker Newt Gingrich and new Judiciary Committee Chair Henry Hyde did not seem likely to lead any charge for abolishing the baseball antitrust exclusion.

The strike finally ended just in time for the start of the 1995 baseball season (albeit three weeks late), but only after a district judge in New York had ruled in a Section 10(j) preliminary injunction proceeding\(^\text{10}\) that the NLRB had a reasonable probability of successfully arguing that the owners had committed unfair labor practices (ULPs) by unilaterally abolishing salary arbitration and by making unilateral changes to the free agency system.\(^\text{11}\) After this ruling, the players voted to end their strike, and in the wake of the ULP ruling the owners were apparently sufficiently fearful of potential legal liability to abandon plans to lock the players out and start the season with temporary replacement players. However, no bargaining agreement was in sight, and Major League

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Baseball was played in both 1995 and 1996 without a collective bargaining agreement, under the terms of the expired agreement. In the meantime, driven by a surprising degree of interest by new Senate Judiciary Committee Chairman Orrin Hatch, that Committee approved in 1996 a bill very similar to the one passed out of the House Judiciary Committee in 1994, but it too died in that presidential election year without ever coming to a vote in the full Senate.

In December 1996, the two sides finally reached a new bargaining agreement (CBA). The terms of the new agreement were made public in early 1997, and to most outside observers’ surprise, it contained an Article 28 on the second to last page of the 108 page document, which provided:

**ARTICLE XXVIII—Antitrust**
The Clubs and the Association will jointly request and cooperate in lobbying Congress to pass a law that will clarify that Major League Baseball Players are covered under the antitrust laws (i.e., that Major League Players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of that bill does not change the application of the antitrust laws in any other context or with respect to any other person or entity. . . .

In short, the owners and players made the extraordinary commitment in a CBA to cooperate in seeking congressional passage of a bill lifting the antitrust immunity for baseball, but only to the extent that it would permit suits by Major League players.

**II. THE ENACTMENT OF THE CURT FLOOD ACT**

When Congress became aware of the unusual provision in the CBA under which both sides would cooperate in getting the historic immunity lifted as it applied to major league players, Senate Judiciary Committee Chairman Orrin Hatch and ranking Committee Democrat Patrick Leahy saw a marvelous political opportunity—to take credit for passing a bill similar to ones that had failed every year for decades without any significant opposition or political risk. With the owners and players union both supporting the legislation, and consumer groups unlikely to oppose it, who could object to or slow down its inevitable passage? Thus, Senators
Hatch and Leahy quickly introduced S.53, the Curt Flood Act of 1997, which contained language that seemed to do exactly what Article XXVIII of the baseball CBA had called for—a lifting of the antitrust immunity for baseball, but only to the extent that baseball’s rules affected Major League players. It was very brief.

A BILL

To require the general application of the antitrust laws to major league baseball, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Curt Flood Act of 1997’.

SECTION 2. APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding at the end the following new section:

SEC. 27. (a) Subject to subsection (b), the antitrust laws shall apply to the business of professional major league baseball.

(b) Nothing in this section shall be construed to affect—

(1) the applicability or nonapplicability of the antitrust laws to the amateur draft of professional baseball, the minor league reserve clause, the agreement between professional major league baseball teams and teams of the National Association of Baseball, commonly known as the ‘Professional Baseball Agreement’, or any other matter relating to the minor leagues;

(2) the applicability or nonapplicability of the antitrust laws to any restraint by professional baseball on franchise relocation; or


The expectation of smooth sailing for this bill was almost immediately dashed. Senators Hatch and Leahy had overlooked the one constituency that over the years had been the most effective opponent of any attempts to repeal the baseball antitrust exclusion—the baseball minor leagues. And because the National Association of Professional
Baseball Leagues (the umbrella organization of the 17 minor leagues affiliated with the major leagues) contains roughly 175 domestic teams located in almost as many congressional districts, most with local owners and deep roots in their respective communities, the NAPBL's political influence in Congress, and especially in the House of Representatives, is substantial. Indeed, the political judgment of many involved in the process was that given the strong support for minor league baseball of House Judiciary Committee Chairman Henry Hyde and many other members of that Committee, there was virtually no chance of any bill affecting baseball's antitrust exclusion ever getting to the House floor without the support of the NAPBL.\(^\text{13}\)

Because the NAPBL was not a party to the CBA in which the union and Major League owners had committed to cooperate in passing such legislation, it had no obvious reason or incentive to support any bill that would weaken the antitrust exclusion for baseball. Even if the bill would not directly affect the legal status of the minor leagues, to the extent it affected the legal status of the major leagues and thereby caused major league teams to have to spend more money on compensating major league players or defending lawsuits, the minor leagues would be adversely affected because the major leagues would probably not be able to provide as much subsidy to their minor league affiliates. (Indeed, there was some suspicion that one of the MLBPA's ultimate objectives was financially to starve and eventually to shrink the minor leagues so that the major leagues would spend less money on player development and more on compensating the union's members who were already on major league rosters.) Thus, unless the legislation provided some benefit for the minor leagues, there was no reason why the NAPBL would want to give the crucial support the Act needed to be passed.

When looking at the original draft of the bill proposed by Senators Hatch and Leahy, it might appear that subsection (b)(1) would give the minor leagues all that they could hope for. But the NAPBL did not feel

\(^{13}\) In the interests of full disclosure, I should reveal that I was engaged to advise the NAPBL on antitrust issues and how the minor leagues' antitrust status might be affected by any proposed bill. This was a very interesting endeavor as dozens of different drafts and modifications were put forth and dissected by people representing the Judiciary Committee staff, various individual senators and congressmen, the Major Leagues, the Major League Baseball Players Association, the NAPBL, the Justice Department, and others. With sometimes lengthy interludes while the Senate Judiciary Committee focussed its attention on other matters of national significance, the process involved innumerable phone calls and meetings involving two or more of the interested groups. Often patience ran thin, but each time, after the tempers cooled, everyone came back to the perceived political reality that no bill stood a chance without the support of the NAPBL.
that way. They were concerned that a judge with an inclination to construe the *Federal Baseball* holding narrowly vis-à-vis the minor leagues could easily reason that the Act was an invitation to the courts to reconsider *Federal Baseball* and *Flood*, and/or that because antitrust exemptions are to be construed narrowly, only those matters covered by the literal language of the Act in exactly the form as they existed on the date the Act was enacted would continue to be protected under *Federal Baseball*/*Flood* (if they were at all anyway). Thus, the NAPBL saw the Act as a potential source of great mischief for it, and certainly nothing of benefit sufficient to warrant throwing its support behind the bill.

As detailed below, what finally emerged from the long, rancorous, and difficult process is the Curt Flood Act of 1998, which contains several provisions that certainly provide substantial legal aid and comfort to the NAPBL in its effort to protect itself from the coverage of the antitrust laws.

**A. The Scope of Activity Covered**

The operative provision in the Act is in Section 3(a) [which will become 15 U.S.C. § 27(a)], which provides that:

... the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in other professional sports business affecting interstate commerce.

This language is certainly much more precise and convoluted than the language in the original bill which merely said that "the antitrust laws shall apply to the business of professional major league baseball," subject to enumerated exceptions. This was done so that the protection for the minor leagues (as well as the major leagues with respect to nonplayer matters) would not be left simply to the exceptions, but would also occur in the operative language itself. Thus, a good argument can be made that even in the operative language, the minor leagues (and major leagues in nonplayer matters) are clearly protected.

This protection occurs in two ways. First, because antitrust liability for baseball will not be triggered unless it involves the behavior of "persons in the business of organized professional major league baseball," rules adopted or conduct engaged in solely by those engaged in the business of minor league baseball would be outside the coverage. But this,
while obviously limiting, was by itself still insufficient. The language does not cover only behavior that is exclusively engaged in by persons in the business of major league baseball, and thus if any involved person is in the business of major league baseball, that rule or conduct would satisfy this element and extend liability to all persons involved. And because of the close relationship the NAPBL and all of its teams has with the major leagues, a plaintiff could argue that virtually everything the minor leagues does involves the major leagues and thus persons engaged in the business of major league baseball.

Second, the challenged rule or conduct had to "directly relat[e] to or affect[ ] employment of major league baseball players to play baseball at the major league level." Again, this was comforting for the minor leagues. Everyone involved in the negotiations believed that the only reasonable interpretation of this language, especially given the requirement that the rule or conduct had to relate "directly" to major league employment, would exclude from the Act's coverage not only everything associated with minor league baseball, but also everything associated with major league baseball except direct player restraints. Thus, ownership rules and decisions, franchise relocation decisions (like that involving the Giants only a few years earlier), television rules and practices, and trademark and logo licensing (and particularly Major League Baseball Properties that had recently been the target of a suit against MLB by the Yankees and adidas) would all be outside the scope of the Act. But again, the NAPBL was concerned that while the vast majority of judges would read this language in the limiting way it was intended, there was still wiggle room for those few judges with an agenda to apply the antitrust laws to the minor leagues or these other major league activities.

Finally, it is worth noting that the minor leagues were also concerned that the major leagues not be subjected to antitrust litigation and risk beyond the narrow scope of purely major league labor market matters. Because of the minor leagues' close and ongoing relationship with the major leagues, and with each NAPBL team having a direct contractual relationship with a major league team, any substantial burden placed on the major leagues because of unintended overreaching by plaintiffs and courts on a wide range of nonplayer matters would likely have a negative "trickle-down" effect on the financial health of the minor leagues. Thus, most of the protections written into the language of the Act at the behest of the minor leagues, including the limitations written into the operative language of section 3(a) itself, also were designed to, and did, have the
effect of protecting the major leagues from antitrust exposure for all nonplayer matters previously protected by Federal Baseball/Flood.

B. The Major Qualification

While the NAPBL was confident that section 3(a) of the Act as it finally emerged would not be interpreted as lifting the Federal Baseball exclusion on any minor league rules or activity (or major league rules or conduct involving franchise location, ownership, broadcasting, or intellectual property rights or licensing), there remained a pervasive fear that some judges hostile to the exclusion would still use the new Act as an invitation to reconsider Federal Baseball. Since Justice Blackmun had argued in Flood that the courts should not overturn or reconsider the Federal Baseball exclusion in part because Congress has not acted to change it, continued congressional inaction had given comfort to those in the business of baseball. But the fear in 1998 was that if Congress expressly lifted the exclusion as it applied to major league player restraints and then said nothing about everything else, it might be interpreted by some judges as Congress having wiped the slate clean on everything else which thus opened the door for judicial reconsideration from scratch of the entire exclusion/exemption issue. This seemed like a very strained and unlikely interpretation, but even if there was a remote chance of it happening the NAPBL wanted to foreclose it.

The minor leagues also had a greater and more specific concern. The line between major and minor league employment terms is sometimes hazy. Perhaps the best example is compensation paid by one major league team to another for the loss of a free agent. A longtime feature of the collective bargaining agreement between MLB and the major league players is that a club losing a free agent player must receive an amateur draft choice from the club that signs the player. Since the amateur draft is a means of selecting players for "entry level" employment in the minor leagues, it seems clear that it is a "term or condition" of minor league employment. However, a 1992 decision by grievance arbitrator George Nicholau had held that the Major Leagues could not unilaterally change the amateur draft by increasing the length of time that the drafting club has the exclusive right to sign the drafted "entry level" player. Instead, the arbitrator held that any such change needed to be negotiated with the union. The union's argument was that increasing the term of a club's exclusive right to sign an entering minor league player made

each draft choice more valuable, thereby increasing the cost to and thus the reluctance of a major league club to part with the draft choice, thereby in turn making the club less willing to sign a major league free agent player, and thereby impairing player mobility. It was this example of the complex interrelationship between major and minor league employment terms that drove the minor leagues to insist that any change in the antitrust exclusion be expressly and repeatedly stated to preserve the exclusion of minor league employment terms from the reach of the antitrust laws.

Perhaps the near paranoic concern of the minor leagues about an individual judge using the new Act as support for applying the antitrust laws to rules or conduct that Congress clearly did not intend to bring into antitrust play was fueled by the extraordinary efforts to which Judge Padova in Philadelphia had gone in *Piazza v. Major League Baseball* to find that the historic exclusion only protected the major league "reserve system" from antitrust attack, and that everything else was subject to antitrust law to the same extent as in all other sports.15 This decision might be dismissed as the bizarre and aberrational effort of one Italian-American judge to give redress to two fellow Italian-American plaintiffs whom some National League owners had allegedly defamed in connection with their purported efforts to buy a part interest in the San Francisco Giants.16 Indeed, in the two federal court cases to raise the baseball exclusion issue since 1993 (keeping in mind that antitrust cases are exclusively within the jurisdiction of the federal courts), both district judges expressly rejected the *Piazza* holding and applied the exclusion to the broad business of baseball.17


16. This decision flew in the face of numerous previous lower court decisions that had held the exclusion applicable to a broad range of activities within the generic rubric of "the business of baseball." Most notable among these decisions was *Finley v. Kuhn*, 569 F.2d 527 (7th Cir. 1978) (applying the exclusion to the exercise of the commissioner's authority to act in "the best interests of baseball"), and *Portland Baseball Club v. Kuhn*, 491 F.2d 1101 (9th Cir. 1974) (applying the exclusion to the minor league territorial rules). It is noteworthy, however, that the courts have drawn limits to the exclusion in holding that it does not apply in a number of contexts involving agreements between baseball entities and third parties that impact on a commercial market other than one involving the production or direct sale of baseball games. See *Fleer v. Topps Chewing Gum*, 658 F.2d 139 (3d Cir. 1981) (involving the market for the sale of baseball trading cards); *Henderson Broadcasting Corp. v. Houston Sports Ass'n (Houston Astros)*, 541 F. Supp. 263 (S.D. Tex. 1982) (involving the radio sports broadcasting market); *Twin City Sportservice Inc. v. Charles O. Finley & Co. (Oakland Athletics)*, 365 F. Supp. 235 (N.D. Cal. 1972), rev'd on other grounds, 512 F.2d 1264 (9th Cir. 1975) (involving the stadium concessions market).

17. See *McCoy v. Major League Baseball*, 911 F. Supp. 454 (W.D. Wash. 1995) (dismissing an antitrust claim by a class of Seattle Mariners fans who were left with no games to watch
However, three state courts have since held that *Piazza* is likely correct and antitrust laws probably do apply to the decisions of Major League Baseball involving franchise relocation. Two of these decisions came in the context of authorizing state attorneys general to conduct civil investigations against Major League Baseball for possible antitrust violations, and the third allowed a state antitrust action against MLB. With this recent history, the minor leagues were anxious to avoid giving any more ammunition to other Judge Padovas who might use the new Act for unintended purposes.

Thus, section 3(b) of the Act provides 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). This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league players to play baseball at the major league level, including but not limited to [six categories].

Two things are significant about this language. First, until very late in the process, the various drafts of the bill led into the laundry list of unaffected rules or conduct by simply saying, in varying forms, that the bill did not apply to the various categories. At one of the later meetings, the NAPBL proposed changing the language to say that the Act did not "create, permit or imply" a valid cause of action against any other conduct than defined in subsection (a). This was thought to close the door more firmly on any future argument that the Act somehow opened the door for, or gave any impetus to, courts to revisit the historic exclusion in any context other than major league employment. Thus, this language was added and is in the Act as finally enacted.

Second, the use of the phrase "changing the application of the antitrust laws . . ." was thought by the NAPBL to be very significant. The

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NAPBL’s concerns that have been described earlier led it to propose this language which strongly implies that Congress recognized that all rules and conduct not expressly covered in the Act’s operative language were already, and would continue to be, immune from antitrust enforcement. Early drafts, indeed the initial bill recited earlier in this article, had provided that the Act “shall not be construed to affect . . . the applicability or nonapplicability” of antitrust law to noncovered rules and conduct. This totally neutral language was thought by the NAPBL to give no recognition to the fact that the federal courts (except for Judge Padova in *Piazza*) had uniformly recognized an immunity from antitrust for a wide range of activity. Since the involved senators and Committee staff had consistently told the NAPBL that they did not want to do anything to cause antitrust law to be applied to the minor leagues, or to non-labor market matters in the major leagues, such total neutrality in the language was insufficient.

Thus, someone proposed that the language be modified to say that the Act does not “change” existing law. Since the purpose of the Act is to “change” the law as it applies to the major league labor market by making heretofore immune restraints now not immune, a statement that the Act does not “change” anything else thus creates an implication that Congress recognized that the historic *Federal Baseball/Flood* exclusion does still cover and immunize a wide range of conduct, including specifically those things listed in the six paragraphs in subsection (b). Accordingly, while the Act would not expressly create an exemption for those matters, it would create a strong basis for arguing in future cases that Congress focused on the entire scope of the *Federal Baseball* exclusion and decided to lift the antitrust immunity only for the major league labor market. This would thus strengthen the legal claim that *Federal Baseball* still applies to all noncovered rules and conduct because Congress recognized it did and chose not to “change” it, and Justice Blackmun’s principle in *Flood* that congressional nonintervention is a ground for preserving the exclusion would still apply. For the NAPBL, this was the next best thing to an express exemption.

**C. Exceptions from Coverage**

Section 3(b) not only provides a generic statement to the effect that only the matters directly affecting major league employment as stated in Section 3(a) are governed by antitrust law pursuant to the Act, it also list six specific categories of other types of conduct on which the Act does not intend to lift the *Federal Baseball/Flood* immunity. Subsection 1 makes clear that all of the player rules governing the drafting of players
and the player-team contractual relationships are still covered by the immunity. As noted above, the concern was that because minor league (NAPBL) players are actually drafted and are under contract to a major league organization, it could be argued that the language of Section 3(a) lifting the immunity for matters "directly relating to or affecting employment of major league baseball players to play baseball at the major league level" might somehow be interpreted to include minor league player rules and practices. This subsection makes clear that it does not.

Subsection 2 provides a blanket protection of the minor leagues, including their relationship with the major leagues and major league teams and "any other matter relating to organized professional baseball's minor leagues."

Subsection 3 provides blanket protection for a wide variety of non-player rules and practices in both the major and minor leagues, including all matters dealing with franchise ownership or location, the Office of the Commissioner, the marketing or sales of baseball games in any manner, and the licensing of intellectual property rights. The last of these was the most interesting. When the laundry list of matters not affected by Section 3(a) was first drafted, it did not include the licensing of intellectual property rights. When it was suggested that it do so, there was reluctance to include this because of the then pending litigation in Tampa brought by the Yankees and adidas against Major League Baseball Properties. The concern was that courts would be likely to interpret the Act as recognizing that the matters included in the laundry list were in fact exempt under Federal Baseball/Flood, and Congress did not want to make such an expression on a matter in dispute in current litigation. Once that case was settled, however, those involved were willing to include this in subsection 3. As noted before, this arguably now gives additional force to an argument that trademark and logo licensing arrangements such as those currently underpinning Major League Baseball Properties are immune from antitrust enforcement under Federal Baseball/Flood.

Subsection 4 merely states that the antitrust exemption expressly provided in the Sports Broadcasting Act of 1961 remains in effect for baseball. What is most interesting about this subsection, however, is what it does not say. While most would presumably interpret Section 3(a)'s operative language applying antitrust law to major league player practices would not implicitly repeal the Sports Broadcasting Act (SBA), thus making the sale of pooled television rights of the teams in a league

for "sponsored telecasting" exempt, the more interesting question is whether other types of restrictions on the telecasting or the sale of broadcasting rights not covered by the SBA were immune from antitrust under *Federal Baseball/Flood*. Subsection 4 says nothing about these. However, it is quite likely that a court will interpret such restrictions as falling within subsection 3's language that retains the status quo for "the marketing or sales of the entertainment product of organized professional baseball" as well as for "the licensing of intellectual property rights."

Subsection 5 simply makes clear that the Act does not affect the antitrust status of rules affecting umpires or other nonplayer employees of baseball organizations, including managers and coaches.

Subsection 6, while tucked away at the end of the laundry list and superficially appearing to be quite innocuous, is in fact a very significant provision. It provides that the Act does not apply antitrust law to "any conduct, acts, practices, or agreement of persons not in the business of organized professional major league baseball." Thus, not only does the operative language of Section 3(a) apply only to rules and conduct directly affecting major league employment, this subsection limits that to rules and conduct of "persons in the business of organized professional major league baseball." This is yet an additional protection for the minor leagues because it means that even if persons engaged in the business of minor league baseball engage in conduct that affects major league employment, that conduct is not affected by the Act. In other words, while the operative language of Section 3(a) does not cover certain conduct, regardless of who engages in it, subsection 6 goes further and insulates certain defendants (i.e., everyone except the major leagues) from having any of their conduct subject to antitrust scrutiny.

There is, however, arguably some ambiguity about how the Act will apply to conduct affecting major league employment involving persons in both the minor and major leagues. A plaintiff could argue that if any person involved in major league baseball is involved, the conduct would fall within the scope of the Act and the antitrust immunity would not protect anyone involved in it. That, however, is contrary to the understanding and expectations of those involved in drafting this language. Subsection 6 was intended to mean, and presumably will be interpreted, so that only the major league team could be sued because the conduct of the minor league team is not covered. That this is so can be gleaned from the use of the term "directly" and the additional gloss provided by subsection (d)(2).
D. The Standing Limitation

One of the most intriguing, and potentially mischievous, provisions of the Act is Section 3(c) which proclaims that “[o]nly a major league baseball player has standing to sue under this section.” This language was added well into the process as yet another concession to the minor leagues, which were still concerned about a judge who might interpret the Act much more broadly than intended by Congress or by the parties involved in drafting the bill’s language. No matter how aggressively a judge might be tempted to interpret the operative language of the Act to apply antitrust law to the minor leagues (or major league non-player matters), the risk of exposure would be greatly reduced for the NAPBL and MLB if only major league players could bring the lawsuits. This is, of course, what Section 3(c) intends to do—limit previously barred antitrust suits against either minor or major league baseball leagues or teams to those brought by major league players.  

The potential difficulty with this provision is that when Section 3(c) says that “only a major league player has standing to sue under this section” (i.e., the new 15 U.S.C. § 27 which codifies the Curt Flood Act), it creates confusion because the Act does not create a cause of action to sue. Sections 1 and 2 of the Sherman Act, 22 Sections 2, 3, and 7 of the Clayton Act, 23 and Section 5 of the Federal Trade Commission Act 24 establish the major substantive provisions of the antitrust laws, and Section 4 of the Sherman Act, 25 Sections 4, 4a and 16 of the Clayton Act, 26 and Section 5 of the Federal Trade Commission Act 27 create standing for the Justice Department, the FTC, and qualifying private plaintiffs to bring actions for damages or injunctive relief against alleged antitrust violators. The Curt Flood Act neither creates substantive antitrust law nor grants standing to anyone to sue under any substantive antitrust provisions. The Act merely expands the definitional scope of the “interstate commerce” element in each of the various substantive antitrust sections to include the business of baseball as it affects the major league labor

21. There was then extensive quibbling over how to define a “major league player,” which was finally resolved in the second sentence of subsection 3(c) with its four categories of persons who would fall within the definition. While these categories are filled with nuances arising out of hypothetical cases put forth by those involved, none appear to be of any great analytical significance.


market—i.e., it lifts the Federal Baseball/Flood immunity—but it does not create any substantive rights. Thus, the literal language of Section 3(c) of the Curt Flood Act giving only major league players standing to sue “under this section” does not make sense because nobody has standing to sue under “this section.”

There are two possible ways to interpret this somewhat baffling language. The first is that it only allows major league players (as defined in Section 3(c)’s second sentence) to bring antitrust suits against a major or minor league team or organization. The difficulty with this interpretation, however, is that the Act would thus deny standing to some plaintiffs who would have had standing to sue a baseball organization even without passage of the Act—i.e., a plaintiff whose cause of action would not have been defeated by the Federal Baseball/Flood immunity. A baseball defendant would have a hard time convincing any court that the intent of any of those involved in drafting or voting for the Act was to deny antitrust standing to parties who would have had a valid cause of action and standing to bring it without any regard for or reference to the Act.

The second and clearly more reasonable way to interpret Section 3(c) is that it denies antitrust standing to any plaintiff other than major league players who must rely in any way on the Act as a basis for defeating a Federal Baseball/Flood defense. This is quite a peculiar addition to civil procedure doctrine in that it in effect deprives standing to plaintiffs not based on any aspect of their case as it is set forth in their complaint at the time suit is filed, but rather based on an argument they may make during the case. The scenario would be that a non-major league player files an antitrust suit against a baseball organization. The defendant would then either move to dismiss under Rule 12(b)(6) or include in its answer an affirmative defense based on Federal Baseball/Flood. At this point, if the plaintiff countered the motion to dismiss by relying on the provisions of the Curt Flood Act, it would trigger Section 3(c).

But what would the effect of that be? Would it then mean that, as Section 3(c) says, plaintiff would not have “standing to sue” to bring the antitrust claim (which is what lacking “standing to sue” typically means) and the cause of action would be dismissed, or would it merely mean that plaintiff would not be permitted to argue the Curt Flood Act as a basis for defeating a Federal Baseball/Flood defense (which would be a novel and perverse use of the concept of “standing”). If the former, the mere raising of the Curt Flood Act as an argument would cause the entire cause of action to be dismissed (i.e., the plaintiff lacked “standing to sue”), even if there was also a legitimate argument that the historic baseball immunity did not apply. If the latter, the plaintiff would merely be...
deprived of the right to raise a particular argument, but would not be deprived of the right to pursue the claim if an independent way around the Federal Baseball/Flood defense were accepted by the court.

While the second approach might arguably be more likely in keeping with the intent many of those involved in the process would have had if they had thought about it, that is not what the statutory language says and it is not consistent with depriving the plaintiff of "standing to sue." This second approach really would only deprive the plaintiff of the legal "right to argue" something. To adopt the second approach and merely deprive a nonmajor league player plaintiff of the "right to argue" the Curt Flood Act would require courts to ignore the plain meaning of the statute, adopt an interpretation wholly at odds with the concept of standing to sue, and fly in the face of basic principles of statutory construction. As Justice Frankfurter expounded in a famous speech to the New York Bar in 1947:

[T]he purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be embedded in the statute, even if a specific manifestation was not thought of . . . .

Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature.

Recognizing the limitations on the age-old "Plain Meaning" canon of statutory interpretation, it would nonetheless be near impossible for a court to interpret section (b)(3)'s provision that only "a major league player has standing to sue under this section" as merely barring a non-major league player plaintiff from being able to argue that the Act lifts the Federal Baseball immunity without doing violence to the clear and plain meaning of the expression "standing to sue." Thus, it would appear that this section dictates that if any nonmajor league player plaintiff raises the Curt Flood Act in response to a Federal Baseball/Flood-based

29. Id. at 543.
motion by a baseball defendant to dismiss an antitrust claim, that antitrust claim would have to be immediately dismissed, not only because of *Federal Baseball/Flood*, but because the plaintiff would lack "standing to sue."

Interestingly, this limitation on standing also has significant and novel implications for the Antitrust Division of the Justice Department. The Justice Department has always had standing to bring suit against any violation of the antitrust laws.\(^3\) Section 3(c), by denying standing (whatever that means) to everyone except major league players, leaves the Antitrust Division without standing to bring some kinds of actions against baseball organizations. Even under the narrowest interpretation of Section 3(c), only major league players have the right to raise the Curt Flood Act as a counter to a baseball defendant's assertion of the *Federal Baseball/Flood* immunity as a defense. Thus, Section 3(c) will deprive the Justice Department (and presumably, although not as certainly, the FTC\(^2\)) from being able to sue a baseball organization for something that was immune from attack prior to the Curt Flood Act and which the Act now exposes to private antitrust enforcement by major league players. Major league players have standing to bring such suits, but the Justice Department and (presumably) the FTC do not. That is indeed an unprecedented and unique twist in American antitrust law.

E. The "Interpretive" Provisions

Section 3(d) of the Act contains five subsections, each of which is designed to clarify language in the earlier sections or to give guidance for the interpretation of those sections. As with so many provisions earlier in the Act, most of what is contained in these provisions is there to protect the NAPBL from having an overreaching judge use the Act to bring minor leagues rules or conduct within the scope of antitrust law.

a. Subsection 1. Subsection 1 merely defines "person" as being virtually any type of human or legal entity, including every baseball team or league no matter how organized. It also specifically states that the NAPBL and its leagues and teams are not "in the business of organized


\(^2\) Because the FTC has authority under section 5 of the FTC Act to challenge "unfair methods of competition," which the Supreme Court has held includes conduct beyond that which is actionable as violative of antitrust law, see FTC v. Sperry & Hutchinson, 405 U.S. 233 (1972), it is arguable that the FTC has always had jurisdiction and authority to challenge the rules and conduct of baseball that were immune from antitrust attack under *Federal Baseball/Flood*. If so, it would seem likely that section 3(c) of the Act would not strip the FTC of that jurisdiction and authority.
professional major league baseball, so that among other things, the protection afforded by Section 3(b)(6) (excluding the conduct of those not in the major league baseball business from the scope of the operative language) would not be lost by an expansive interpretation of that term.

b. Subsection 2. Subsection 2 is designed to make clear that the operative language of Section 3(a) can not be used as a bootstrap to drag into its coverage other conduct which a court might attach to it. Thus, for example, if a baseball rule affects both major and minor league employment, that rule can only be challenged under antitrust law as a result of the Act to the extent it affects major league employment; and the extent to which it affects minor league employment would continue to be immune from attack under Federal Baseball/Flood.

c. Subsection 3. Subsection 3 was suggested by the MLBPA out of a concern, not shared by others, that conduct "directly" related to major league employment—and thus now subject to antitrust scrutiny under Section 3(a)—not be limited by notions borrowed from federal labor law (the National Labor Relations Act, specifically 29 U.S.C. §§ 151 et seq.), under which management may take unilateral action without committing an unfair labor practice for failing to bargain in good faith in some areas that are not "directly" related to employment conditions and thus not mandatory subjects of bargaining.33 It is not at all clear that the Supreme Court's definition of "directly" in this aspect of labor law is particularly narrow or that there is any more sensible definition if the meaning of the term as used in the Curt Flood Act were actually disputed. Also notably, this section does not define "directly"; it merely says that it should not be defined based on labor law decisions. And since there was no other discussion or legislative history surrounding the meaning of this term, this bare provision leaves open the possibility that a court interpreting "directly" as used in the Curt Flood Act could adopt a definition either narrower, the same, or broader than it is used in the labor law decisions. Thus, including this subsection was not controversial.

d. Subsection 4. Subsection 4, while stating a seemingly self-evident proposition, nonetheless clarifies that the Act cannot be used as a basis for arguing that the labor exemption from antitrust does not apply to baseball any more. This is especially important in the light of the Supreme Court's 1996 decision in Brown v. Pro Football, Inc,34 which held that as long as there is a collective bargaining relationship between

a league and a union representing its players, neither the union nor any of its members may bring an antitrust claim against the league or its member teams involving matters which are mandatory subjects of collective bargaining under the National Labor Relations Act. Thus, subsection 4 of the Act means that as long as the MLBPA continues to represent the major league players in collective bargaining as their certified representative under the NLRA, the union and players may not challenge player restraints as antitrust violations. And given that the only previously barred antitrust suits that the Act now permits are those brought by major league players (see section 3(c)) challenging rules or conduct by persons in the business of major league baseball (see section 3(b)(6)) that directly affect the market for major league employment (see section 3(a)&(b)), the only situations in which the Act permits antitrust claims against baseball are exactly those situations that are exempt under the labor exemption and the Brown decision.

For this reason, as long as the MLBPA remains an NLRB certified union that is the exclusive representative of the players for collective bargaining purposes, the Act accomplishes virtually nothing. Everything not exempt under the labor exemption and Brown is not affected by the Curt Flood Act and thus likely still immune from antitrust attack under Federal Baseball/Flood. Everything that loses its immunity under the Act is still exempt under the labor exemption and Brown. The only way for the players to get out from under this constraint, and to take advantage of antitrust litigation allowed now after the Act, is to decertify the union as their exclusive bargaining representative. The NFL players did this when the NFLPA unilaterally renounced its rights under the NLRA

35. Interestingly, while the Brown decision was briefed, argued, and decided on the nonstatutory prong of the labor exemption, a strong case could be made that in fact it is the statutory prong of the exemption that actually prevents unions from suing multi-employer bargaining units during the process of negotiating a new bargaining agreement. See Gary Roberts, Brown v. Pro Football, Inc.: The Supreme Court Gets It Right For The Wrong Reasons, 17 Antitrust Bull. 595, 616-28 (Fall 1997). Section 3(d)(4) says that the Act does not affect the application only of the nonstatutory exemption. There is nothing in the record, there was nothing expressed during the discussions relating to the drafting of the Act, and there is no logical reason to support any suggestion that the Act intended to affect the application of the statutory labor exemption to professional baseball. It would be absurd on its face to think that the Act, in language designed solely to protect baseball organizations emphatically from being put at antitrust risk for all but the most narrow types of situations outlined in the operative language of section 3(a), in effect repealed the statutory labor exemption for baseball when that exemption is available for every other employer in the economy. Thus, the semantic ambiguity in subsection 3(d)(4) that arises from its reference only to the nonstatutory exemption cannot rationally be used to claim that the purpose of this subsection was to do anything other than to leave the entire labor exemption as it already applies to baseball unaffected by the Act.
in 1989 after the Eighth Circuit ruled in *Powell v. NFL* that the labor exemption barred its suit against the NFL during collective bargaining. The players then filed the same antitrust claim in *McNeil v. NFL*, which the district judge ruled was not barred by the labor exemption because the union had properly ended the collective bargaining relationship. But the NFL appealed this ruling, arguing that the NFLPA had not really decertified since it remained as a representative of the players in the same offices, with the same officers and employees, the same governing board, and the same objectives—thus the NFL argued that the NFLPA was now just a union in disguise that was refusing to fulfill its legal obligation to bargain in good faith. The *McNeil* case was settled in 1994 before the Eighth Circuit could resolve this issue, and thus the question of what a players union must do to decertify itself sufficiently to release itself from the labor exemption bar remains unanswered.

Given all of this, the only way for the MLBPA to gain the benefit of being able to bring an antitrust suit now not barred by *Federal Baseball/Flood* is to end its status as an NLRB certified union, even though it is not entirely clear what the minimum requirement for such decertification is. This is a costly process that strips the union during the lengthy pendency of the antitrust case of its ability, among other things, to certify and control player agents and to be involved in the control of collectively bargained player pension and disability plans. Since the labor exemption that protects union activity would be surrendered, decertification might also expose the Association to antitrust risks of its own in various matters, including the group licensing of players rights to their likenesses. It also diminishes the importance of the Association leadership in the process of negotiating a new arrangement with the teams since that would have to be undertaken by antitrust counsel in the context of settling the antitrust suit. For these, and possibly other reasons, the NBPA did not undertake to decertify and file an antitrust suit during the lengthy lockout that resulted in the loss of the first half of the 1998-99 NBA season and an eventual settlement that most observers felt was not favorable to the players. Thus, the only way for the MLBPA to benefit directly from the Curt Flood Act would be for it to undertake a costly and risky decertification that it would probably employ only as a last resort.

Of course, at some extreme point, the MLBPA would likely be willing to undertake to decertify in order to bring an antitrust suit during collective bargaining. Just the threat of being able to do so will give it

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some incremental bargaining leverage. But on balance, the marginal bargaining benefit that the Act gives the players seems quite minimal—seemingly not worth the substantial effort the Association expended to get the Act passed. And it undoubtedly explains in large part the owners’ willingness to agree in the CBA to cooperate with the union in getting the Act passed.

e. Subsection 5. Finally, subsection 5 provides even more protection for the minor leagues (as well as the major leagues on nonplayer matters) by making sure that judges interpreting those matters described in section 3(b) as not affected by the operative language of section 3(a) do not construe those categories of unaffected conduct narrowly. This language was added because of the general rule of construction that antitrust exemptions are to be construed narrowly and the NAPBL’s fear that a judge looking to use the Act as a way to get around Federal Baseball/Flood would label section 3(b) as an exemption and then construe it very narrowly. (Notably, the NAPBL believes and hopes that courts will interpret section 3(b) as recognizing the already immune status of the six categories, which is very close to an express exemption that would thus normally be construed narrowly.) Subsection 5 eliminates that as a possible line of reasoning.

III. THE CONCEPTUAL JUSTIFICATION FOR CONTINUED IMMUNITY FOR NONCOVERED MATTERS

The fundamental reason that the drafters of the Curt Flood Act were so willing to give great protection to the minor leagues was the pure political clout that comes from having an organization with over 200 significant business organization members from almost as many congressional districts and several states. But even purely politically motivated congressmen and senators are much more comfortable having some public interest rational for their action.

With respect to major league practices other than those affecting the player market, the rational for not including them in the matters for which the exclusion is lifted is simply that the agreement between the owners and MLBPA in their CBA only dealt with player matters. Also, especially with respect to franchise relocation issues, there was a strong sense among the legislators, planted over the years by MLB, that without the exemption, teams would be more free to relocate and thus put their teams up to the highest bidding city in the same way NFL teams had done so often over the past two decades since the infamous Raiders
Thus, because the implications of lifting the exclusion for other than labor market matters were not fully understood or explored, there was little enthusiasm for lifting the immunity for major league matters other than those affecting major league players.

The rational for continuing to immunize the minor leagues from antitrust enforcement was more elaborately developed. In a nutshell, if the minor leagues were subject to antitrust scrutiny with respect to any or all of its operations, the effect would inevitably be to increase the costs of operating minor league teams and/or to reduce the subsidy that minor league teams get from their major league parent teams. Furthermore, if rules giving minor league teams exclusive playing territories were subject to antitrust review, there is a good chance that teams in the smaller towns and cities across the nation, especially in the face of higher costs and lower subsidies from the major leagues, would feel free to abandon their roots and relocate into bigger cities where they could sell more tickets. Thus, applying antitrust law to the minor leagues would undoubtedly create a profit squeeze on many teams and create conditions for a fundamental restructuring of the minor leagues.

Normally, this type of effect would not be a matter of public concern. Indeed, the principle underlying antitrust law is that the forces of the marketplace should be allowed to work, and inevitably those forces of supply and demand will require adjustments in the marketplace that, while temporarily causing frictional discomfort and dislocation for some, will in the long run inure to the benefit of consumers and the public. But in the case of the minor leagues, there is a crucial "externality" that makes this free market model inappropriate and justifies an "exemption" from antitrust enforcement.

Sports are materially distinguishable from most products and services in that they are consumed much more widely than only by those who pay directly for them. While certainly people who buy tickets or luxury suites for games or pay rights fees in order to put games on radio or television are consuming the product in a way that the microeconomic model of the free market contemplates, the product of a sports league and its teams is consumed to a great extent by those in the public who do not buy tickets or broadcast rights. Sports creates enjoyment (i.e., economic utility) for all those who read the daily newspaper's sports section or watch the sports news on television, who discuss or argue over the performance of the local team and its players in their offices, homes,

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schools, or barber shops, who become involved in office betting pools, and who listen to and participate in talk radio shows. In this sense, sports is very much a "public good" that is consumed to a very large extent by "free riders" who enjoy the utility created by this public good without having to pay directly for it.

Antitrust law is founded on the view that enhancing competition in a market will move the allocation of society's scarce resources closer to optimizing consumer utility. But in a suboptimal world in which many markets suffer from substantial externalities such as networking effects and free riding, making one market function closer to the point where marginal cost intersects average revenue/demand does not necessarily achieve an increase in total consumer welfare, and may well actually diminish consumer welfare. This is especially true in the case of the markets in which professional baseball, and particularly minor league baseball, function.

Just as one example. Assume there are two minor league baseball teams in a country with two cities, one with 5 million inhabitants and the other with 1 million inhabitants. These teams earn their revenue solely from the sale of tickets. In a free market, those two teams will thus select the city in which they can sell the most tickets, which, assuming demographic similarity between the two cities, means that both of these teams will end up in the larger city and neither team will play in the smaller city. While this will likely lead to greater total attendance at minor league baseball games, and thus greater consumer welfare for those who pay for the right to consume the product, it will nonetheless diminish total consumer welfare because the inhabitants of the smaller city will be left without a team about which they can identify and read in the local newspapers, discuss in their homes and offices, and follow throughout the season. Total consumer utility will be maximized if one team is in the larger city and the other in the smaller city, but in a legally imposed free market in which only consumer expenditures for game tickets count, both teams will end up in the same city to the detriment of total consumer welfare. 39

39. This same phenomenon also explains in part the willingness of communities and their politicians to subsidize local teams through the building of facilities designed to attract and keep teams in the community. Since the citizens of the community get a great deal of enjoyment out of the presence of a home team, and thus "free ride" on the utility created by the team and its league, rather than lose the team to another community they are willing to pay indirectly to the team something up to the value of the utility the team creates for the community but for which the team is not directly compensated.
This same type of analysis can be used in many of the markets in which minor league teams function. What this ultimately means is that the underlying assumption of antitrust law, to the extent it is valid in other markets where consumption is largely by those consumers who pay directly for the product, does not predictably apply in most cases to professional sports and particularly minor league baseball leagues and teams. Thus, minor league baseball is a fitting candidate for an exemption from the normal enforcement of antitrust law. It is this rationale that enabled Congress to maintain the historic *Federal Baseball/Flood* antitrust exclusion for the minor leagues in the Curt Flood Act without appearing to be acting for purely political reasons.

**Conclusion**

While the impetus for the Curt Flood Act came from the MLBPA and some legislators who wanted to restrict the antitrust immunity of Major League Baseball derived from the *Federal Baseball/Flood* line of cases, the ensuing protections for baseball, and especially the minor leagues, that were put into the Act, coupled with the antitrust protection of *Brown v. Pro-Football, Inc.* for all sports leagues from suits brought by unionized players, make the likely effect of the Act actually to expand the scope and strength of the antitrust immunity in most respects and leave it largely unaffected in the major league player-labor market. Thus, legislation that started out to apply antitrust more broadly to baseball has probably caused exactly the opposite effect.