Baseball's Antitrust Exemption and an Owner-Imposed Salary Cap: Can They Coexist?

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Clark Griffith, a Minneapolis attorney and former Minnesota Twins executive, recently stated, "Baseball has a 100-year history of claiming it's in dire trouble . . . now it is in dire trouble."[1] Baseball is currently being played without a labor contract; the old collective bargaining agreement expired at the end of 1993.[2] Every time the owners and players have attempted to renegotiate a collective bargaining agreement since 1972, a work stoppage has occurred.[3] Baseball's unique antitrust exemption, established in a 1922 Supreme Court decision, has been blamed for the persistent lockouts and strikes.[4]

At issue in renegotiating the new agreement is baseball's current economic situation. Since the creation of salary arbitration between the players and their respective clubs as set forth in the 1973 Basic Agreement[5] and, more significantly, the creation of free agency as set forth in the 1976 Basic Agreement, players' salaries have skyrocketed.[6] The average major league baseball salary in 1970 was $28,000, in 1990 it was $580,000, and in 1992 it was $1.02 million.[7] In 1994 at least 146 players have signed for a total of $449 million.[8] In addition, baseball's television revenues, overall profits, and attendance for a majority of the teams are declining and its fan base is aging.[9] Compounding this is the financial disparity among major league teams[10] leading to the players' perception, if not reality, that baseball is actually experiencing more success than ever.[11] Also added to the chaos is baseball's lack of a commissioner since Fay Vincent was forced to resign in September 1992, and Congress' rejuvenated efforts to terminate baseball's antitrust exemption.[12]

To remedy this, baseball's owners have debated a revenue-sharing plan that will require the players to agree to a "salary cap," in addition to sharing revenues by owners.[13] Salary caps are not new to baseball. Owners have repeatedly proposed this option to the players for the last nine years.[14] While any prediction regarding professional sports' labor markets is difficult, it is reasonable to assume that the players will continue to reject the salary cap, arguing that the market for players does not need to be restrained and the owners' revenue-sharing should sufficiently resolve baseball's economic problems.[15] Further complicating the negotiating process, the owners postponed the appointment of a new commissioner, traditionally a catalyst to labor negotiations, until after a new labor agreement has been created. Moreover, they plan to restructure the new commissioner's job description to keep him out of future labor negotiations.[16]

The Baseball Antitrust Exemption and Its Effect on Labor Negotiations

Baseball's exemption from antitrust liability is a significant distinguishing characteristic from other professional sports.[17] The Supreme Court decisions granting baseball its exemption are anomalous. The applications of the exemption have been pronounced in some areas of the sport, but remain unclear in other areas.[18]

The Sherman Antitrust Act and Applicable Case Law

Sections 1 and 2 of the Sherman Antitrust Act of 1890 are the principal antitrust legislation most frequently applied to sports leagues.[19] Section 1 proscribes any restraint of trade by a multiple entity, such as a conspiracy among persons or businesses, and section 2 proscribes any restraint of trade by a single entity, such as a person or business, within interstate commerce. Based on Sherman Act language, a claimant seeking relief under section 1 must satisfy three criteria: (1) whether the practice is in or affects interstate commerce; (2) whether the practice is a collaborative effort; and (3) whether the practice unreasonably restrains trade.[20] To determine whether a restraint is reasonable, courts apply either a per se test or a rule of reason test.[21]

The per se test is never applied to a section 2 claim, however.[22] A section 2 claimant must allege: (1) the defendant's possession of monopoly power in the relevant geographic and product market, and (2) the defendant's willful acquisition or maintenance of

that power as distinguished from a justifiable business decision.[23] The Clayton Act of 1914 declares certain monopolistic acts illegal and, in section 4, provides for a private cause of action granting treble damages to successful plaintiffs.[24]

Virtually all of the early cases on baseball's antitrust liability dealt with baseball's alleged restraint of trade known as the "reserve clause," which was written into all player contracts and bound a player to his team perpetually until either the team released him or assigned his contract to another team.[25] The reserve clause also prohibited other teams from making offers to the player to sign with another team or league; if the player broke his contract to accept one of these offers he risked being blacklisted from baseball. Owners felt the reserve clause was necessary to maintain the competitive balance between teams, preventing any one team from obtaining all the best players.

Since the beginning of baseball, the reserve clause provoked litigation by players challenging it on theories of contract or labor law.[26] *American League Baseball Club of Chicago v. Chase*[27] was the first lawsuit to challenge the reserve clause on antitrust grounds and the first suit to allege that baseball violated the antitrust laws.[28] Chase signed a contract to play baseball with Chicago of the American League but annulled his contract after three months to play for Buffalo of the Federal League.[29] Chicago sought to enjoin Chase from annulling his contract but Chase defended on antitrust grounds, alleging that the reserve clause was an illegal restraint of trade.[30] Although the New York state court decided the case in Chase's favor principally on state contract and labor law, it held that "the business of baseball for profit was not interstate trade or commerce" subject to the provisions of the Sherman Act.[31]

Thus, *Chase* laid the groundwork for the United States Supreme Court, which held eight years later in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[32] that baseball was exempt from the Sherman Act because it was not "interstate commerce" within the meaning of the statute. *Chase* also represented a successful challenge to the reserve clause that frustrated the American and National League's attempts to resist player recruitment by the Federal League.[33]

The Supreme Court affirmed the court of appeals' *Federal Baseball* decision, that the "business of baseball" is not subject to antitrust laws, thereby rejecting an antitrust challenge to the reserve clause without reaching the merits of the alleged restraint or the reserve clause.[34] Writing for the unanimous Court, Justice Holmes stated:

> The business is giving exhibitions of base ball, which are purely state affairs. . . . But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of their business . . . [t]he transport is a mere incident, not the essential thing.[35]

At the time of the *Federal Baseball* decision, the prevailing economic philosophy in the country was "laissez faire," limiting government intervention in private business affairs. Accordingly, the Supreme Court held a particularly narrow view of what constituted interstate commerce, thus limiting the federal government's ability to regulate businesses.[36]

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The Supreme Court did have an opportunity to revisit *Federal Baseball* in *Toolson v. New York Yankees*.[37] Toolson alleged that his blacklisting from baseball pursuant to the reserve clause was a trade restraint violating the Sherman and Clayton Acts.[38] He attempted to distinguish his case from *Federal Baseball*, showing that baseball did constitute interstate commerce through its radio and television broadcasting and sales of interstate advertising—factors not considered in *Federal Baseball*.[39] Nonetheless, the Supreme Court issued a 7–2 *per curiam* opinion adhering to *Federal Baseball*'s antitrust exemption.

The Court reasoned that "the business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation," and delegated to Congress the decision to overrule the exemption.[40] The Court relied on *stare decisis* and the policy of reliance to retain the exemption without reviewing the correctness of *Federal Baseball*.[41]

Justices Burton and Reed addressed *Federal Baseball*'s inapplicability to baseball in their dissent, stating that baseball had become a large business with significant impact on interstate commerce and should therefore be subject to antitrust laws.[42] The majority of the court also interpreted congressional inaction here to mean Congress' intent to maintain the status quo, while the dissent argued that congressional silence should be construed as Congress' permission to change the existing rule.[43]

Stare decisis and congressional inaction continued the baseball exemption even when challenged in *Flood v. Kuhn*.[44] Curt Flood claimed that his forced trade from the St. Louis Cardinals to the Philadelphia Phillies, which the reserve clause allowed, violated the federal and state antitrust laws as well as his Thirteenth Amendment right against involuntary servitude.[45]

Flood thought his case could be distinguished from *Federal Baseball* and *Toolson*, or could overturn the baseball exemption, because baseball was increasingly involved with interstate commerce and recent Supreme Court decisions expressly rejected an antitrust exemption for other professional sports.[46] Justice Blackmun wrote a sizeable decision, opening with a tribute to the game of baseball and ending with a lengthy analysis of all the cases underlying baseball's antitrust exemption. He noted in particular that:

> Professional baseball is a business and it is engaged in interstate commerce; with its reserve system enjoying exemption from federal antitrust laws baseball is an exception and an anomaly; *Federal Baseball* and *Toolson* have become an aberration confined to baseball; the aberration is an established one recognized in five Supreme Court cases and therefore entitled to *stare decisis;* other professional sports are not so exempt; radio and television did not occasion an overruling of *Federal Baseball* or *Toolson;* remedial legislation has been introduced in Congress but none has been enacted therefore Congress has no intention of subjecting baseball's reserve system to the antitrust statutes . . .[47]

The Court once again looked to Congress to overrule the exemption stating, "[i]f there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."[48] The Court also held that baseball was exempt from state antitrust laws because to hold otherwise would conflict with federal policy.[49]

Scope of the Antitrust Exemption

In exempting baseball from antitrust laws, the Supreme Court referred only to the "business of baseball." Lower federal court decisions later narrowed this exemption to matters that are sufficiently central to baseball.[50] In *Professional Baseball Schools and Clubs v. Kuhn*,[51] for instance, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of an antitrust claim by a minor league franchise owner alleging illegal trade restraints by Major League Baseball for the player assignment and franchise location systems; monopolization of the business of professional baseball; and the Carolina League's rule requiring member teams to only play games with other National Association teams.[52] The court stated in a *per curiam* opinion that "each of [the activities stated above] plainly concern matters that are an integral part of the business of baseball" and are therefore properly exempted from antitrust laws pursuant to the Supreme Court's decisions.[53]

On the other hand, in *Henderson Broadcasting Corp. v. Houston Sports Ass'n*,[54] the court denied the defendant baseball team's motion to dismiss a radio station's lawsuit charging the team with violating the Sherman Act by conspiring with another radio station to monopolize the market for broadcasting baseball games.[55] The court held the team was not exempted from antitrust liability because broadcasting baseball games was not sufficiently central to the "business of baseball." In reaching this decision, the court relied on the fact that interstate television and radio broadcasts were not sufficiently connected to baseball to overturn the baseball exemption. It commented that broadcasting is a distinct and separate industry having no bearing on league structure, and that holding a radio station that broadcasts baseball exempt from antitrust laws would extend and distort the exemption beyond what Congress ever intended.[56]

Most recently, the thwarted purchase of the San Francisco Giants by a Tampa/St. Petersburg limited partnership that wanted to bring the Giants to Tampa, Florida, has incited litigation that threatens to significantly limit, if not eliminate, baseball's antitrust exemption.[57] The first case, *Piazza v. Major League Baseball*,[58] is a civil suit filed against Major League Baseball (MLB) by the Piazza partnership—two Pennsylvania and four Florida limited partners—who attempted to buy the San Francisco Giants but were outbid by a MLB-supported purchaser who promised to keep the Giants in San Francisco offering the Giants' owner $15 million less than Piazza.[59] The plaintiffs alleged, in addition to defamation, civil rights and constitutional violations, that Major League Baseball violated sections 1 and 2 of the Sherman Act by monopolizing the market for Major League Baseball teams and by illegally placing restraints on the purchase and sale of such teams.[60] The court denied the League's motion to dismiss based on its antitrust exemption because the court held baseball's antitrust exemption was limited to only the reserve clause, which was not at issue in this case.[61]

The second case spawned by Piazza's thwarted purchase of the Giants, *National League of Professional Baseball Clubs v. Butterworth*,[62] involved the State of Florida's investigation into the National League's possible violation of Florida's state antitrust statutes when it rejected the Piazza partnership's purchase.

Despite *Flood*'s holding that baseball is exempt from state antitrust laws, Florida issued civil investiga-

tive demands to determine whether any of its antitrust laws were violated by the National League's actions.[63] The League failed to comply with the Attorney General's subpoena and motioned the court to quash the subpoena based on baseball's antitrust exemption.[64] The court ruled in favor of the National League, setting aside the subpoena, but stated, "[w]hile baseball's antitrust exemption clearly continues . . . it is not unlimited in its scope. Because the exemption is aberrant and rests solely on stare decisis lower courts have given it an increasingly narrow interpretation."[65]

Hence, while the Supreme Court never expressly stated that the exemption was limited to the reserve clause, each of its three baseball cases either directly or indirectly involved the reserve clause. The *Piazza* case has interpreted the exemption as limited to that fact.

Future of the Antitrust Exemption

It seems illogical that the Supreme Court could say *stare decisis* does not apply when the facts are the same but the athletic event at issue is different. For instance all the major professional sports in this country—baseball, football, hockey and basketball—have had a reserve clause or player recruitment system of some sort that restrains trade, but only baseball's is exempt from the antitrust laws.[66]

The Court has been heavily criticized for its interpretation of congressional intent and its consistent "passing the buck" to Congress to correct it.[67] Some argue baseball was given this special status because it is our treasured "national pastime."[68] This inconsistency is merely historical. Because baseball is older than any other team sport in the United States, it had the opportunity to litigate its antitrust status first and reached the Supreme Court at a time when the Court was reluctant to extend federal regulation to the business world. The Supreme Court eventually realized it was wrong in *Federal Baseball* but was bound to its decision by the policy of reliance underlying *stare decisis*.[69] *Piazza* has raised the issue, to be decided either judicially or congressionally, whether the *stare decisis* applied in the Court's baseball cases was the interpretation of the Sherman Act or the interpretation of Congress' intent to exempt baseball from antitrust laws.

Congress has been addressing baseball's antitrust exemption virtually every year since the 1950s, but has not yet enacted anything.[70] Hearings, fueled in part by the *Piazza* case, were recently held and are expected to resume after the fall 1994 elections, with all of the following testifying at all or some of these hearings: former Baseball Commissioner Fay Vincent; Players' Union Legal Counsel Donald Fehr; Acting Commissioner Bud Selig; U.S. Representative and former pitcher Jim Bunning (R-Ky.); Hall of Fame pitcher Robin Roberts and noted baseball writer Jerome Hoffman; and U.S. Senator Connie Mack (R-Fla.), grandson of the former manager Connie Mack.[71]

Bills have recently been introduced in both the House and the Senate that overturn baseball's antitrust exemption.[72] Congress' primary concern is baseball's ability, as an entity exempt from antitrust laws, to limit the amount of teams, prevent expansion, and raise prices thereby depriving many Americans of access to baseball either geographically or financially. This is particularly noted by the high level of participation by Florida's senators and congressmen since the Giants reneged on their offer to move to Florida.[73]

Congress also has expressed concern over the current vacancy in the baseball commissioner's office, recent restructuring of the commissioner's duties that allegedly reduce the position's power, moving more baseball games from free television to pay television, and baseball's poor history of labor negotiations.[74]

The owners' dealings with the players is certainly a significant consideration by Congress in deciding whether to uphold the exemption. Evidence of this was stated by Senator Metzenbaum,[75] who observed that none of the other professional sports have had labor problems similar to baseball's because they were able to avail themselves of the antitrust laws by suing their respective leagues.[76] Metzenbaum stated that the exemption allows the owners to unilaterally impose restrictions on player mobility and "exacerbates the tendency of the owners and players to be confrontational in labor negotiations."[77]

Bunning confirmed this in his testimony, saying, "28 owners totally control the destiny of the game and the lives of all those who are affected by the sport."[78] Regardless of what motivates Congress to repeal the antitrust exemption, if it does and baseball is subject to the antitrust laws, the effect on labor relations would be profound.[79] It appears Congress is closer than it ever has been to passing legislation that will lift the baseball exemption.

It seems inevitable that baseball will lose its antitrust exemption and it is merely a matter of when and how, not if, the exemption will be lifted.

Implications of the Antitrust Exemption

As Donald Fehr, the players' chief negotiator, maintains, "As long as the antitrust exemption exists, it will affirmatively contribute to bad labor relations. It will increase the likelihood that there will be yet another work stoppage."[80] The theory behind this is that the exemption deprives the players of a significant weapon in labor negotiations that virtually every

other labor union, both athletic and nonathletic, possesses: the antitrust lawsuit.[81] In football, basketball and hockey, for example, whenever the owners attempted to impose a restraint on the players such as a reserve clause, a rule limiting draftability into the league or a first-round draft choice compensation rule restricting free agency, the players were able to sue the owners for violating the Sherman Act and win treble damages.[82]

In baseball, however, the owners can unilaterally impose any rule or restraint on the players and the Major League Baseball Player Association's (MLBPA) only option is to strike.[83] A strike only has leverage if it is during the season, presumably toward the end when fan interest is keenest and owners' revenues are highest.[84]

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The clearest example of the baseball players' handicap from the antitrust exemption is the owner collusion cases of the late 1980s. Almost a decade after free agency was incorporated into the Basic Agreement[85] and after many free agents had been signed for dramatically increased salaries, offers from owners to talented free agents in the 1985 post-season were virtually nonexistent.[86]

The MLBPA subsequently filed a grievance against the owners for violating a provision of the Basic Agreement by colluding to not sign free agents.[87] Before a decision was rendered in *Collusion I*, the MLBPA filed another grievance a year later, alleging that the owners continued to collude in violation of the Basic Agreement.[88] Despite arbitration decisions adverse to the owners in the first two collusion cases, the players filed a third collusion grievance against the owners for allegedly creating an "information bank" on free agent signings in violation of the anti-collusion provision of the Basic Agreement.[89]

All three arbitrators found the owners guilty of collusion and awarded the players a judgment of $112 million for the three years.[90] Had baseball not been exempt from the Sherman Act, the players could have sued the owners under the Act for "concerted action" and won three times the damages from these collusion cases.[91] Fehr believes this collusion occurred largely because it was riskless—the damages the owners would have to pay would be the market price for free agents without colluding.[92]

The NBA-Style Salary Cap

Salary caps seem to be the latest "fad" in professional sports—they have either been implemented, are being negotiated or are being considered seriously by the owners in hockey, basketball, football and baseball.[93]

No two caps are alike, in that each is born to different circumstances.[94] Professional basketball was on the verge of financial collapse in 1983 when it convinced the players to agree to pioneer this revolutionary concept.[95] Football implemented a salary cap just this year as the price of a settlement of years of litigation that culminated in the granting of free agency to the players.[96] Hockey wants to implement a salary cap because players have been playing without a collective bargaining agreement, salaries have been climbing, and revenues have been stagnant.[97] The basic concept of a salary cap is to counteract the negative effects of free agency, in which each team bids for the best players like at an auction, by ensuring that all teams in a professional sports league spend the same total amount of money to field a team.[98]

Ideally, a salary cap is a partnership agreement that benefits all the parties involved. Franchises benefit because their payrolls are limited. The league benefits from increased stability and parity: large-market/financially successful teams can't spend unlimited amounts of money on star players, allowing the small-market/less wealthy teams to retain these players so all the teams are equally competitive, games are exciting and ticket sales and television revenues are increasing. Players benefit because a salary cap operates under a system of free agency, albeit restricted, and requires teams' payrolls to be above a certain minimum amount.[99]

The NBA salary cap operates by calculating all the League's gross revenues, as defined in the NBA Collective Bargaining Agreement (CBA), multiplying them by 53 percent and dividing that number by all the NBA teams.[100] That is the maximum amount each team can spend on its entire payroll and a certain percentage of the average salary is the minimum amount each team can spend for salary.[101]

The revenues are projected for each year, and the teams whose payrolls were either above the maximum or below the minimum in the prior year have their caps adjusted accordingly for the upcoming year.[102] The gross revenues defined in the CBA that are used to calculate the cap are known as "defined gross revenues" and do not include revenues from the All Star Game; concessions; parking; sales of programs, novelties and other primarily local revenues.[103]

The NBA, unlike the National Football League, has

a "soft cap,"[104] which means it contains many exceptions such as allowing a team to re-sign a player that has played at least one year on that team for an unlimited amount.[105] The CBA contains other provisions, beyond the scope of this article, which clarify the application of the cap to various other payment schemes within the Uniform Player Contract or CBA and which generally prevent teams from finding loopholes around the salary cap.

The baseball owners have not yet revealed any details about their revenue-sharing plan or the salary cap to which they expect the players to agree, other than a rumored ceiling of $1 billion, which the owners are currently debating removing from the negotiating table.[106]

In 1990, the owners proposed that 48 percent of television and gate receipts be targeted toward player salaries. This percentage would apply to players with six or more years of major league experience and would determine a "participation level," or percentage, that teams could add onto the individual club average payroll.[107]

Baseball has had a system of free agency since 1976 and, consequently, a spending "free for all" by teams seeking to obtain the best players baseball has to offer.[108] Each team's spending has been limited only by its financial resources, which varies for each team. It is commonly understood that these resources must be limited and a salary cap could prevent or delay draining these resources. However, what this limit is or when it will be reached is the central issue being debated between the players and the owners.[109]

The Salary Cap as a Solution—The Owners' View

The owners, or at least some of them, believe their financial resources are finally approaching the point of depletion and have agreed to share their revenue but only if the players are willing to cap their salaries as the NBA did in 1983.[110]

The loss of national television revenues has been cited by the owners as the greatest financial loss aggravating this problem because these were the only revenues previously shared by the owners.[111] Both the players and owners recognize the significant disparity of wealth between the large-market teams and small-market teams.[112]

The two sides therefore acknowledge that baseball's increased reliance on unshared local revenues will increase this disparity, causing the wealthy teams to become wealthier and the poorer teams to become poorer. The owners have conceded that they must share revenues but contend that the players are overpaid and also need to contribute.[113] As Richard Ravitch, president of the PRC said, "baseball is going to be [at the salary cap] at some point, and the sooner the better for both the players and the clubs."[114]

Ravitch claims 50 percent of the compensation is going to 13 percent or 14 percent of the players.[115] The owners argue that a salary cap adds financial stability because when a cap is in place, salaries follow the revenue trends, increasing and decreasing along with the league revenues.[116]

The other professional sports, primarily football and basketball, share more revenues from national television and pay less for player development.[117]

The Salary Cap Is Unnecessary—The Players' View

The players harbor substantial distrust of the owners.[118] Since the beginning of baseball, owners have been accused of negotiating in bad faith with players, keeping them enslaved with the reserve clause and colluding to keep salaries low when free agency was finally granted, thus depriving players of free agency's benefits.[119]

The players are skeptical that the owners are suffering financially. While the players may concede that baseball's profits have declined or baseball has sustained a significant loss in national television revenues, the owners, who are generally large conglomerates involved in other businesses, have failed to come forth with any financial statements showing they are in dire straits.[120] The players also blame the owners for any decline baseball is suffering, alleging that the owners have neglected the sport by failing to hire a commissioner and failing to adequately market the game.[121]

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The players fail to see why they should be deprived of their right to earn as much money as the free market will bear to pay them—just like every other American tries to do.[122] Fehr points out that the extra money the owners save from the salary cap is likely to go into the pockets of the large-market team owners after they bail out the small-market teams. Therefore, argues Fehr and the players, why should the owners pocket baseball's revenues instead of the players who are doing all the work?[123]

Comparing the proposed baseball cap to the NBA cap, Fehr noted that "what made the NBA cap work so successfully was its quickly rising revenues; had the NBA gotten to the cap, it would have had [all the

problems baseball is having]; baseball will start at the cap (because of its financial health)."[124]

The players don't care how owners share revenues among themselves, as long as it doesn't adversely affect the free market.[125] They believe revenue-sharing will adequately resolve baseball's economic problems but consider the MLBPA's help, via a salary cap, to be unnecessary. The players will probably require a compelling reason to accept the cap;[126] otherwise, the players argue, the free market should dictate salaries.

Coexistence of Baseball's Antitrust Exemption with the Salary Cap

Several scenarios could unfold. The antitrust exemption could continue or be overturned either judicially or legislatively. Congress or the Supreme Court could also narrow the exemption. If the exemption is limited or lifted by Congress, it would most likely apply only prospectively.

The Antitrust Exemption Overturned[127]

The clearest scenario is to assume Major League Baseball has become subject to federal and state antitrust laws. The Supreme Court cases that exempted baseball from antitrust laws never went beyond the interstate commerce issue; therefore, the remaining Sherman Act issues determining the merits of an antitrust complaint have never been applied to the business of baseball.

The question in this case is whether the owners will be held liable for violating sections 1 and 2 of the Sherman Act when they impose a salary cap on the players and the MLBPA sues the owners. The NBA is the only professional league in this country that has had a salary cap long enough to have litigated this issue but it has not done so yet. There are some articles, however, which discuss the issue and can be analogized to baseball.[128]

Sherman Act § 1 Claim The first question is whether the salary cap affects interstate commerce. *Flood* acknowledged that baseball now constitutes interstate commerce and the Supreme Court today maintains a much broader definition of interstate commerce than it did in 1922. Also, by assuming that baseball is no longer exempt from the Sherman Act, it is also being assumed that the business of baseball, which would include an owner-imposed salary cap, affects interstate commerce.

Essentially a salary cap involves an employer, or several employers combined, that limits the amount spent on hiring employees. It is analogous to a consumer who limits the amount spent on a certain product offered by sellers.

This situation, known as "monopsony price-fixing" is the opposite of the more common situation, monopoly price-fixing. Monopoly price-fixing is a single seller, or group of sellers, that sell a product at a price higher than if other sellers of the product existed. As the definition implies, monopsony price-fixing is rare because it requires a situation where there are less buyers than sellers and these buyers are the sellers' only customers. The baseball salary cap is a monopsony price-fixing arrangement in violation of section 1 of the Sherman Act just as the NBA salary cap is illegal monopsony price-fixing.[129] The owners are the buyers who, either individually or as a group, have agreed to pay a limited amount to the players or sellers. The players outnumber the owners by about thirty to one and can only sell their services to the twenty-eight Major League owners.[130]

The Supreme Court cases that exempted baseball from antitrust laws never went beyond the interstate commerce issue.

The final issue for the Sherman Act section 1 claim is whether a salary cap unreasonably restrains trade. This is actually two questions: whether the salary cap is a restraint and whether, as a restraint, it is unreasonable. As noted for the NBA, a salary cap is a restraint in two respects—player mobility and player salaries.[131] Baseball's proposed cap will directly restrain salaries because, as noted previously, it will cap salaries at the present level or less.[132] Since teams' salary budgets will be artificially limited, the cap would inhibit the market, making it difficult if not impossible, for all players to attain a salary commensurate with their true value.[133]

A salary cap will indirectly restrain player mobility because teams that ordinarily would have acquired a player, either by trade or free agent signing, will have to consider whether that player's salary falls within the team's cap before he can be signed.[134] The cap could therefore force players to re-sign with their current teams, preventing players from playing where they choose and depriving owners of desired talent.[135]

Although it has been established that a salary cap is a collaborative effort within interstate commerce that restrains trade, it is not illegal unless this restraint is unreasonable.[136] Unreasonableness is determined by courts applying either a per se test or a rule of reason analysis.[137]

Unless an activity is "plainly anticompetitive,"

which professional sports cases are generally not so held, a rule of reason analysis will be employed.[138] The rule of reason analysis involves two steps: (1) examining the activity to determine whether its procompetitive effects outweigh its anticompetitive effects, and (2) determining whether the alleged illegal activity is the least restrictive alternative available.[139] A rule of reason analysis will therefore be applied to the salary cap because, as with most sports leagues' restraints, some procompetitive justifications may exist.

> The salary cap is more anticompetitive than procompetitive and a less restrictive alternative exists.

The primary procompetitive justification for baseball's salary cap is to stabilize baseball's deteriorating financial situation.[140] But the owners have not clearly demonstrated the severity of baseball's financial situation like the NBA did in 1983 and they are asking the players to forego their fundamental American right of working for the highest salary they can obtain in the market of their choice.

While the League's financial condition is a valid reason for invoking a salary cap, the anticompetitive effects are very great, particularly in light of the existence of a less restrictive alternative. Unless the owners' financial statements show otherwise, revenue-sharing is a less restrictive alternative and the mere existence of a less restrictive alternative suffices to render the conduct at issue violative of the Sherman Act.[141]

It is more important to protect player mobility and player salaries than to protect large-market franchises' ability to earn excess profits. Excess profits at the expense of competition is precisely what the antitrust laws proscribe. Thus, the salary cap is an unreasonable restraint in interstate commerce that would violate section 1 of the Sherman Act and the owners will be liable if baseball is not exempt.

Sherman Act § 2 Claim The first question under a section 2 claim will be whether the owners possess monopoly power in the relevant geographic and product market. The product at issue is a baseball player's playing abilities. The relevant market is the twenty-eight Major League teams organized under Major League Baseball in the United States and Canada which require professional baseball talent.

Monopoly power refers to the ability of an entity to affect the price that will prevail upon the market by making itself impervious to competition.[142] The collusion cases are a clear illustration of the owners' possession of monopoly power in the market for professional baseball talent.

In *Collusion I* and *Collusion II*, it was shown that the owners were able to conspire to not purchase baseball talent thereby eliminating the players' market for the sale of their services. In *Collusion III* it was shown that the owners were able to conspire by sharing information on the bidding for free agents thereby driving down the prices players could charge for their playing services. Also, the definition of monopsony price-fixing, as discussed above and applied to salary caps, includes the ability to manipulate market prices. The owners therefore maintained monopoly power in the relevant product and geographic market.

To successfully show the owners violated section 2 of the Sherman Act, the MLBPA will have to show that the owners, in addition maintaining monopoly power, applied the salary cap restraint to willfully maintain and abuse this power rather than as a legitimate business judgment. This is always answered with a rule of reason analysis or a showing that the monopolist's activity, the salary cap in this case, has an anticompetitive effect.[143]

As demonstrated in the rule of reason analysis above, the salary cap is more anticompetitive than procompetitive and a less restrictive alternative exists. If the owners were merely implementing a legitimate business decision to save the baseball economy, they would limit their proposal to a revenue-sharing plan and not include a salary cap. Therefore, the owners would be held to have violated section 2 of the Sherman Act.

The Antitrust Exemption Continues

The Exemption Is Unlimited If baseball's antitrust exemption continues unabated as Federal Baseball defined it, the doctrinal discussion above holding owners liable for violating the Sherman Act would be moot; the other Sherman criteria would never be reached by the court.

Even if the MLBPA could sufficiently prove that the business of baseball constitutes interstate commerce within the meaning of the Sherman Act, as it probably could, it would need to persuade the court that *Federal Baseball* must be overruled based on Congress' intent to subject baseball's business to antitrust laws. The courts have very clearly delegated this duty to Congress; therefore, the owners in this case would effectively be shielded from antitrust liability for imposing a salary cap.

The Exemption Is Limited For the MLBPA to otherwise successfully challenge the salary cap on antitrust grounds, it will have to show that the salary cap is not a part of the business of baseball that has been exempted by the Court from antitrust laws. The MLBPA can accomplish this by arguing Piazza's holding that the exemption only applies to the reserve clause and the salary cap is beyond the reserve clause.144 The players could also try to argue that the salary cap is not an integral part of the business of baseball.145

The latter argument is attenuated. It would be difficult for the players to show that the owners' budgetary decisions concerning the proportion of their revenues that should be paid to their employee-players is independent of and irrelevant to the administration of their professional baseball league.

Any court would hold that an employer's judgment of how much his employees should be paid is an integral part of his business.

Since the 1976 Basic Agreement effectively destroyed the reserve clause, it is difficult to understand the implications of *Piazza*'s holding limiting the baseball antitrust exemption to the reserve clause.

It is difficult for the MLBPA to argue that a salary cap has nothing to do with the reserve clause because salaries are clearly connected to the term or conditions of an employment contract. But one argument that the MLBPA could make is that the exemption follows the reserve clause, so if the reserve clause no longer exists,[146] neither does the exemption. If the MLBPA could persuade the court to accept this argument, it should have a viable antitrust claim against the owners following the aforementioned analysis.

However, the owners could refute this argument by persuading the court that a salary cap is impliedly included within the reserve clause. If a reserve clause refers to a club's ability to continually employ a player it must also refer to the club's obligation to pay the player and, accordingly, the amount that the player should be paid.

Both of these arguments, however, are only valid to the extent that *Piazza* is valid, and they skirt the issue of whether Congress intends to include the business of baseball, or the salary cap, within its antitrust exemption.

While there is much merit in overturning the exemption and holding for the players on this issue, it is not clear a court would be willing to eliminate baseball's antitrust exemption on these grounds and it may still give Congress the last word.

Major League Baseball is undergoing many changes in an effort to modernize itself and remain competitive with newer professional sports that are rising in popularity.

Critical to baseball's reformation effort is the resolution of its long-standing labor problems, the reevaluation of an antitrust exemption granted to professional baseball in an anomalous 1922 Supreme Court decision and the restructuring of its obsolete financial system.

As part of this process, baseball's owners have agreed to a revenue-sharing system but are demanding that the players assent to an NBA-style salary cap in the new Basic Agreement being negotiated in 1994 between the players' union and the owners. The players want to challenge the salary cap on antitrust grounds but are barred by baseball's antitrust exemption.

The owners believe it is imperative that the players agree to a salary cap because, they contend, the game is losing money and the players are overpaid. The players believe a revenue-sharing system is sufficient to resolve baseball's economic problems and the owners are unjustified in depriving the players of their right to sell their services at the highest price the market will bear.

If the antitrust exemption is lifted, the players will prevail in an antitrust challenge to the salary cap because the cap is an unreasonable restraint—the anticompetitive effect on the players' right to sell their services outweighs the procompetitive effects of stabilizing baseball's finances, and revenue-sharing is a less restrictive alternative in the present situation.

Baseball's antitrust exemption has increasingly been under fire from the courts and Congress.

If the exemption continues, the owners will be shielded from an antitrust challenge to the cap and could unilaterally impose it on the players. If the exemption is limited, it is unclear whether the owners will prevail.

Baseball's antitrust exemption has increasingly been under fire from the courts and Congress. In its most determined effort to date, Congress has proposed a bill in each house to overturn the exemption in response to recent conduct by the owners that Congress perceived as abusive of their antitrust exemption. The conduct provoking Congress to overturn the exemption includes the owners' ability to impose restraints on players and the players' deprivation of a significant bargaining tool that labor unions

in other industries and sports leagues maintain—the antitrust lawsuit. Some recent litigation also threatens to overturn or substantially limit the exemption.

Although baseball has been around for over 100 years and will continue to exist, 1994 will be a turning point for Major League Baseball: A players' strike has occurred over the salary cap issue, among others; Congress may vote to overturn the antitrust exemption or a federal appellate court could narrow the exemption further; a new commissioner will be appointed; a new playoff structure has been created; and a new collective bargaining agreement will be formed that, it is hoped, will end baseball's labor disputes for the rest of time.

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Endnotes

1. Jay Weiner, *Bottom of the Ninth for Baseball Game Faces Cloudy Future as Negotiators Step to Plate*, STAR TRIB., Apr. 1, 1994, at 2S. "We believe that baseball faces a challenge far broader and more critical than simply reaching a labor agreement. The challenge is to arrest the decline and embitterment of baseball in American life, and to forge a framework in which owner and players can go beyond their individual financial interests to pursue constructively, fruitfully and together their shared interests." *Id.* (citing the Economic Study Committee on Baseball).

2. Mark Maske, *Leaders Can't Agree Even on What's Going On*, WASH. POST, Jan. 16, 1994, at D4.

3. *Baseball Owners Make a Push Revenue-Sharing Plan Should Be Ready Shortly After All-Star Break*, SAN FRANCISCO CHRON., June 19, 1993, at D2. Donald Fehr, Major League Baseball Player Association's (the player's union, hereinafter MLBPA) chief negotiator, noting that there have been three strikes and four lockouts since 1972. *Id.*

4. Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S. Ct. (1922); H. Ward Classen, *Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption*, 21:4 AKRON L. REV. 369, 385-86 (1988) (explaining how the antitrust exemption deprives the baseball players' union of an important negotiating tool which other sports players' unions have been able to use). *See* Part I and accompanying notes.

5. The Basic Agreement is baseball's collective bargaining agreement between the players' union, Major League Baseball Players Association, and the owners' representative, the Player Relations Committee.

6. James M. Bergen, *Arbitration May Face Last Inning*, NAT'L L.J., Feb. 22, 1993, at 25.

7. Norm Alster, *Major League Socialism: In Many Ways Professional Baseball is Socialistic*, FORBES, May 27, 1991, at 138; *Baseball Salaries Go Up, Owners' Profits Go Down*, PLAIN DEALER, Mar. 19, 1994, at D2.

8. Peter Gammons, *Baseball Needs to Get Down to Business in a Hurry*, BOSTON GLOBE, Jan. 29; 1993, at 66.

9. "Baseball's revenue increase dropped from an average of 15–20 percent during the previous five years to an average increase of 8.4 percent from 1991 to 1992 and attendance declined for 18 out 26 teams. The average age of the person watching professional basketball on television is half that of the person watching baseball." BOSTON GLOBE, *supra* n. 8.; "Major league teams increased expenditures 14.1 percent from 1991 to 1992 and operating profit declined 78 percent in the same period to a total $22.2 million in 1992. The 1992 profit was the smallest since the clubs made $11.53 million in 1986 (1992 is the most recent season for which audited figures are available)." PLAIN DEALER, *supra* n.7; "Baseball's national television revenue will drop 50 percent this year from $15.4 million in 1993 to around $6 million or $7 million in 1994." *Giles Predicts Doom for Some Franchises without Salary Cap*, PLAIN DEALER, Apr. 14, 1994, at 4D.

10. Jerome Holtzman, *Tough Sell: Convincing Owners to Share Revenue*, CHICAGO TRIB., Aug. 11, 1993, at 3. Three economic levels have been defined: big-market/financially successful teams, which include both teams in New York and Chicago, the Los Angeles Dodgers, and teams in Toronto, Boston, Baltimore, Atlanta, Florida, and Colorado; middle-market teams, which include those in San Francisco, Oakland, Detroit, Philadelphia, Texas, Houston, St. Louis, Cincinnati, and the California Angels; small-market teams, which include those in Pittsburgh, Montreal, Seattle, San Diego, Minnesota, Milwaukee, Kansas City and Cleveland. At the top of the list is the Yankees who have a twelve-year, $486 million local cable television contract and at the bottom of the list are the Minnesota Twins generating about $4 million in local broadcast revenue and the San Diego Padres who have no local television contract. *Id.*

11. Donald Fehr, Address at the National Press Club Luncheon (Apr. 5, 1994). Donald Fehr cites total revenues in 1993 of $1.25 billion and record-breaking overall attendance figures for major league baseball, minor league baseball and spring training plus extraordinary attendance at baseball's two newest franchises in Miami and Denver. *Id.*

12. Maske, *supra* n.2. *See* text under "The Baseball Antitrust Exemption and Its Effect on Labor Negotiations" and accompanying notes.

13. John Lowe, *Baseball Unanimously OKs Revenue Sharing*, DETROIT FREE PRESS, Jan. 19, 1994, at 2C. The unanimous vote on January 18, 1994, was historical in that it was one of the few times baseball's owners were united. *Id. See* text under "The NBA-Style Salary Cap" and accompanying notes.

14. *Baseball Owners Propose Salary Cap, No Re-entry Draft*, MIAMI HERALD, May 21, 1985, at 1C; Jerome Holtzman, *Salary Cap Study Is Just a Charade*, CHICAGO TRIB., Dec. 16, 1990, at 14 (announcing the establishment of a six-man committee to study the possibility of revenue sharing, "a fancy moniker for a salary cap").

15. Murray Chass, *Labor Talks to Start*, N.Y. TIMES, Feb. 17, 1994, at B16.

16. *Id.*; John Helyar, *Sen. Mitchell Do You Really Want This Job?* WALL ST. J., Apr. 15, 1994, at B1. Based on past experience, the owners believe a new commissioner will expedite the bargaining process by placing more pressure on them to accept the players' demands in negotiating a new agreement. Not appointing a new commissioner until after the new agreement is drafted would therefore relieve the owners of this pressure. *Id.*

17. Classen, *supra* n.4. In fact, it has been purported that baseball's timing within American jurisprudence is an explanation for the bizarre result of baseball's early antitrust litigation.

18. *Id.* (discussing the application of the antitrust exemption to labor restraints); *see also* Y. Shukie Grossman, *Antitrust and Baseball—A League of Their Own*, 4 FORDHAM INTELL. PROPERTY, MEDIA AND ENT. L.J. 563 (1993) (discussing the application of baseball's antitrust exemption on franchise relocation which is somewhat unclear); *Finley Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978) (applying the antitrust exemption to the baseball commissioner's authority); *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, 541 F. Supp

263 (S.D. Tex. 1982) (applying baseball's antitrust exemption to the broadcast rights of a baseball team).

19. 15 U.S.C. §§ 1 & 2.

20. Grossman, *supra* n.18, at 567–68.

21. *Id.* at 571.

22. *Id.* at 574.

23. *Id.*

24. 15 U.S.C.A. §§ 12–27. Section 4 provides (in part):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

25. Classen, *supra* n.4, at 377.

26. Richard L. Irwin, *A Historical Review of Litigation in Baseball*, 1 MARQUETTE SPORTS L.J. 283, 290 (1991). Baseball's first labor union, known as the Brotherhood of Professional Base Ball Players, was established in 1885 by a player for the New York Giants, named Ward, who graduated from Columbia Law School in that same year. Ward led players to challenge their league contracts based on a lack of equity in the contract. This union was successful for a year but disbanded because of poor management and undercutting by investors. *Id.* at 285–86.

27. 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914).

28. Irwin, *supra* n.26, at 290.

29. *Chase*, 149 N.Y.S. at 9. The National League was the first and only professional baseball league until the American League was established in 1900 and the Federal League was established in 1913. When these leagues initially began, they competed vigorously with the National League for players thus producing much litigation over the reserve clause in players' contracts. Eventually the American and National Leagues would form an agreement, known as the National Agreement, not to compete for players but the Federal League continued to violate the American and National League's reserve clause, as with *Chase*. Irwin, *supra* n.26 at 288–89. See *infra* notes 38–41 and accompanying text.

30. *Chase*, at 14.

31. *Id.* at 14. "Baseball is an amusement, a sport . . . it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce." *Id.*

32. 259 U.S. 200 (1922) (hereinafter *Federal Baseball*).

33. Grossman, *supra* n.18, at 576–77.

34. 259 U.S. 200, 208. ". . . the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." *Id.* at 209. Thus the first criteria of a section 1 claim, interstate commerce, was not satisfied and the Court never reached the other tests determining whether the antitrust statutes applied to baseball.

35. *Id.* at 208–09. *See* Hooper v. California, 155. U.S. 648, 655 (1895) (stating that the transport is a mere incident, not the essential thing).

36. The "interstate commerce" clause of the United States Constitution is one of the few ways Congress has been able to legislate directly to the states.

37. 346 U.S. 356, 74 S. Ct. 78 (1953). George Toolson was a pitcher for the New York Yankees who refused to report to the Yankees Binghamton farm club and was therefore blacklisted from baseball. Classen, *supra* n.4 at 379.

38. Classen, *supra* n.4 at 379.

39. *Id.*

40. 346 U.S. 356, 357.

41. *Id.* The reliance to which the court refers is the owners' understanding, when developing new teams, that a reserve system existed to prevent players from freely terminating their contracts.

42. *Id.* at 357–65. In 1950 major league revenue totalled $18.3 million versus $6.5 million in 1929 and radio and television revenues, which didn't exist in 1929, totalled $3.3 million in 1950. *Id.* at 359.

43. *Id.* at 364.

> Conceding the major asset which baseball is to our Nation, the high place it enjoys in the hearts of our people and the possible justification of special treatment for organized sports which are engaged in interstate trade or commerce, the authorization of such treatment is a matter within the discretion of Congress. Congress, however, has enacted no express exemption of organized baseball from the Sherman Act. . . . It is interstate trade or commerce and, as such, it is subject to the Sherman Act until exempted. *Id.* at 365.

44. 407 U.S. 258, 92 S. Ct. 2099 (1972). Curt Flood was a star centerfielder for the St. Louis Cardinals from 1961–1969, who won seven Golden Glove Awards and played in three World Series, but was traded against his will to the Philadelphia Phillies at the end of the 1969 season when he was thirty-one years old. His salary in 1961 with St. Louis was $13,500 and in 1969 was $90,000. *Id.* at 264-65.

45. *Id.* at 265–66. The United States District Court for the Southern District of New York denied Flood's preliminary injunction relying on *Federal Baseball* and *Toolson*. The Second Circuit affirmed. *Id.* at 267–68.

46. Irwin, *supra* n.26, at 296; *see* United States v. International Boxing Club, 348 U.S. 236, 75 S. Ct. 259, 99 L. Ed. 290 (1955); Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957); Haywood v. National Basketball Ass'n, 401 U.S. 1204, 91 S. Ct. 672, 28 L. Ed. 2d 206 (1971). See discussion *infra* notes 62-69 and accompanying text.

47. 407 U.S. 258, 282–83. The Court upheld the exemption with a 5–3 vote; Justice Powell did not take part in the decision.

48. *Id.* at 284. Chief Justice Burger stated in his concurrence that "the least undesirable course now is to let the matter rest with Congress. . . ." *Id.* at 286. The five cases referred to were *Federal Baseball*, *Toolson*, *International Boxing*, *Radovich* and *Haywood*.

49. *Id.* at 284. "National uniformity is required in any regulation of baseball and its reserve system." *Id.*

50. Professional Baseball Schools and Clubs v. Kuhn, 693 F. 2d 1085 (11th Cir. 1982); Henderson Broadcasting Corp. v. Houston Sports Ass'n, 541 F. Supp. 263 (S.D. Tex. 1982).

51. 693 F.2d 1085 (11th Cir. 1982).

52. *Id.* Both the National Association and the Carolina League are minor leagues.

53. *Id.* at 1086.

54. 541 F. Supp. 263 (S.D. Tex. 1982).

55. *Id.* This action arose from defendant Houston Astros breach of a contract with radio station KYST because the Astros also entered into a contract with KYST's competitor, radio station KENR. The Astros were accused of illegally monopolizing the market for advertising revenue from the broadcast of its baseball games. *Id.* at 264.

56. *Id.* at 271.

57. *See* Neal R. Stoll and Shepard Goldfein, *The Narrowing of Baseball's Exemption*, 210 N.Y. L.J. 3 (Dec. 21, 1993).

58. 831 F. Supp 420 (E.D. Pa. 1993).

59. *Id.* at 422–23. Several years ago Tampa Bay built a new, domed stadium in hopes of procuring a baseball team either by relocating an existing team or by baseball expanding. Existing teams, namely the Seattle Mariners, Chicago White Sox and San Francisco Giants, had frequently been threatening their municipalities or stadium lessors that they will relocate if certain improvements were not made or a new stadium not built. The City of San Francisco voted not to build a new stadium as requested by the Giants. Piazza's limited partnership agreed with the Giants' then-

current owner, Robert Lurie, to purchase the Giants' for $115 million and move them to Tampa's new stadium. Major League Baseball requires all franchise purchases to be approved by the other owners. Here, the other owners voted down the sale and invited a North Carolina owner who would not move the Giants to purchase the Giants for $100 million, which eventually was executed. *Id.*

60. *Id.* at 423–24.

61. As will be discussed later, the reserve clause is now practically defunct because of the Basic Agreement created in 1976, which established free agency. Therefore the reserve clause cannot be implemented by owners to block a purchase, sale or transfer of a franchise as it could in the days of *Federal Baseball* when teams could deprive another team of star players.

62. No. CI92-1604, 1993 WL 390521 (Fla. Cir. Ct. Jan. 4, 1993).

63. *Id.*

64. *Id.*

65. *Id.* The court refused to narrow the exemption to only the reserve clause as the Attorney General argued.

66. Classen, *supra* n.4, at 383–85.

67. *Flood*, 407 U.S. 258, 285–86 (1972) (Burger, Ch. J., concurring, "I have grave reservations as to the correctness of [Toolson]"). *Id.* at 286 (Douglas, J., dissenting, "While I joined the Court's opinion in [Toolson], I have lived to regret it; and I would now correct what I believe to be its fundamental error.") Salerno v. American League, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, J., "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic, inconsistent and illogical'. . .").

68. *Id.* at 292 (Marshall, J., dissenting) ("Americans love baseball as they love all sports. Perhaps we have become so enamored of athletics that we assume that they are foremost in the minds of legislators as well as fans.")

69. *See Radovich*, 259 U.S. 200. Perhaps the argument that baseball as our "national pastime" has been favored might be true to the extent the Court values the reliance interest of baseball owners so highly.

70. Manny Topol, *Status Is on the Line: Baseball's Antitrust Exemption Threatened*, NEWSDAY, Mar. 20, 1994, at 20. The article cites hearings in 1958, 1976 and 1981. *Id.*

71. *Hearing of the Senate Judiciary Committee, Subcommittee on Anti-trust: Major League Baseball Anti-trust*, Dec. 10, 1992; *Professional Baseball Antitrust Reform Act of 1993*, 103d Cong., 1st Sess., 139 CONG. REC. S2416-02 (1993); *The Judiciary Committee's Inquiry into Professional Sports*, 103d Cong., 2d Sess., 140 CONG. REC. S3180-02 (1994). Fay Vincent was baseball's commissioner from 1989 to 1992; Bud Selig is the current owner of the Milwaukee Brewers and acting commissioner of baseball; Donald Fehr is the executive director and chief negotiator for the Major League Baseball Players Association; Rep. Jim Bunning and Robin Roberts were major league pitchers; Jerome Hoffman is chief of the antitrust enforcement section in the Florida Attorney General's office.

72. S.500, 103d Cong., 1st Sess. (1993) (entitled, "Professional Baseball Antitrust Reform Act of 1993" and sponsored by Sen. Howard M. Metzenbaum (D-Ohio)); H.R. 108, 103d Cong., 1st Sess. (1993) (sponsored by Rep. Michael Bilirakis (R-Fla.)). Section 3 of S.500, "Application of Antitrust Laws to Professional Baseball," adds a section 27 to The Clayton Act, 15 U.S.C. §§ 12 *et seq.*, which reads, "Except as provided in P.L. No. 87-331 (15 U.S.C. §§ 291 *et seq.*) (commonly known as the Sports Broadcasting Act of 1961), the antitrust laws shall apply to the business of organized professional baseball." Section 4 of S.500, specifying the effective date, states that this amendment will not take effect until one year after it is passed and will apply only to conduct that occurs after the effective date. 139 CONG. REC. S2416-02, *S2418.

73. Participating in the December 1992 hearings were Senators Feinstein, Graham, Mack, Leahy, Simpson, and Specter; in the March 1993 hearings were Senators Mack, Graham, Leahy, Warner, Wellstone, Bingaman, Robb, Lott and Kerry. It was a Florida Congressman, Michael Bilirakis, who sponsored the House bill to eliminate baseball's exemption.

74. *Hearing of the Senate Judiciary Committee, Subcommittee on Anti-trust: Major League Baseball Anti-trust*, Dec. 10, 1992.

75. 139 CONG. REC. S2416-02, *supra* n.71.

76. *Id.* at *3.

77. *Id.* at *8-9.

78. Frank Dolson, *Putting Bud Selig Through His Paces on Enemy Turf, The Acting Commissioner Had a Lot to Explain About Baseball's Special Status*, PHILADELPHIA INQUIRER, Mar. 22, 1994, at E4.

79. See text under "Coexistence of Baseball's Antitrust Exemption" and accompanying notes.

80. Fehr, *supra* n.11, at *12.

81. *Id.* at *10.

82. *See, e.g.* Denver Rockets v. All-Pro Management, 325 F. Supp. 1049 (C.D. Cal. 1971) (basketball player challenging draft regulation which prohibits drafting a player younger than four years after high school graduating class); Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978) (football player challenging rule prohibiting other teams from negotiating with team's new draftee once placed on "reserve list"); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (football player challenging "Rozelle Rule," which required team acquiring free agent to compensate team losing free agent in amount determined by Commissioner Rozelle); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977) (hockey player challenging World League rule that prohibited persons under the age of 20 from playing hockey); Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (basketball player challenging League's refusal to reinstate him after suspension for gambling); Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) (one-eyed hockey player challenging rule that prohibited him from playing hockey because only had one eye); Brown v. National Football League, 821 F. Supp. 20 (D.D.C. 1993) (football player challenging uniform salary provisions in developmental squad player contract).

83. Fehr, *supra* n.11, at *10.

84. *Id.* This is another argument for Congress to repeal the exemption; the American public is tired of tolerating baseball player strikes in the middle of the season.

85. Baseball players attained free agency and the demise of the reserve clause through arbitration. In 1970, the MLBPA and the Major League Baseball Player Relations Committee (the owners' negotiating representative, hereinafter PRC) managed to agree in collective bargaining upon the establishment of impartial arbitration for internal grievances in the 1970 Basic Agreement. The creation of arbitration for the players was significant because it established another means for the player to challenge his contract without having to resort to antitrust litigation that proved itself useless in baseball. Subsequently, after Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos, two major league pitchers, played their entire 1974 season without a contract, they claimed they fulfilled their contract obligations with their respective teams and declared free agency for the 1975 season in defiance of the reserve clause. The owners rejected this argument and claimed that an arbitration panel did not have jurisdiction to decide issues concerning the reserve clause. The arbitration panel held for the players and thereby declared free agency. The owners attempted to challenge this arbitration in federal court, Kansas City Royals Baseball Corp. v. MLBPA, 535 F. 2d 615 (8th

Cir. 1976), but were unsuccessful. In the 1976 collective bargaining between the MLBPA and the PRC, the owners regained a reserve clause but for only six years: the 1976 Basic Agreement declared a player a free agent, able to sell his talents to the highest bidder, after six years of major league service; after three years of major league service a player could have his salary decided by an arbitrator. Irwin, *supra* n.26, at 296–97.

In the 1985 Basic Agreement the free agency rules had just been modified making free agency less restrictive by imposing certain deadlines for the player's former club to negotiate with the free agent. Stephen L. Willis, *A Critical Perspective of Baseball's Collusion Decisions*, 1 SETON HALL J. SPORTS L. 109, 119, n.94 (1991).

86. *Id.* at 120.

87. Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 86-2, Panel Dec. No. 76 (1987) (Roberts, Arb.) (hereinafter *Collusion I*).

88. Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 87-3 (1988) (Nicolau, Arb.) (hereinafter *Collusion II*).

89. Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 88-1 (1990) (Nicolau, Arb.) (hereinafter *Collusion III*). The owners were found to be exchanging information with each other concerning offers made to free agents and amounts paid to sign them. *Id.*

90. Marcia Chambers, *Some Games Are Played in the Dark*, NAT'L L.J., Oct. 15, 1990, at 13.

91. Willis, *supra* n.85, at 132-33.

92. Chambers, *supra* n.90. "If all you have to pay is what you would have to pay anyway plus some interest, you go through the following analysis: If I do it, one thing I know, I'll save a lot of money. Maybe I'll get caught, maybe I won't. Maybe they'll prove their case, maybe they won't Maybe they'll prove damages, maybe they won't . . . anything up to and including that is a wash." *Id.*

93. Steve Aschburner, *Top Dollar, Bottom Line Salary Caps Create Sporting Debate*, MINNEAPOLIS STAR TRIB., Oct. 17, 1993, at C8. Baseball and hockey are seriously contemplating or proposing a cap, football has already implemented one recently and basketball must renegotiate their cap this year.

94. *Id.*

95. *Id.* In 1981–1982 the National Basketball Association's (NBA) 23 teams lost $24 million and several teams were facing bankruptcy. Charles Grantham, executive director of the National Basketball Players Association (NBPA) said, "we were in far more desperate straits than (other sports) ever have been. . . . In order to save the jobs, primarily from a union standpoint, we agreed to the salary cap." *Id.*

96. *Id.* "A lot of people now will say it would be better if we had no salary cap. I'd like to have peace on earth. But I have to compare this system with what was in place before," said Randy Vataha, a former NFL player who is now an agent and helped develop the cap. *Id.*; *See also*, Mackey v. Nat'l Football League, 542 F.2d 606 (8th Cir. 1976); Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), 764 F.Supp 1351 (D. Minn. 1991); Brown v. Pro Football, Inc., 782 F. Supp 125 (D.D.C. 1991); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); Smith v. Pro Football, Inc., 593 F.2d 1174 (D.C. Cir. 1978); McNeil v. Nat'l Football League, 1991-2 Tr. Cas. (CCH) ¶ 69,982.

97. Kelly Garrett, *Problems, Problems: The NHL Has Loads of Them, and It Must Solve Them in Order to Prosper*, SPORT, Jan. 1992, at 72.

98. David Aldridge, *Salary Cap a Lesson in Financial Planning, Teams Get Creative in a System Designed to Control Spending*, WASH. POST, July 30, 1991, at D2.

99. Scott J. Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 158 (1985).

100. Collective Bargaining Agreement between the NBA and the National Basketball Players Association (NBPA), art. VII, part D, §1(a) & (b) (Nov. 1, 1988); Aldridge, *supra* n.98. Subsection (a) also provides a maximum above which the 53 percent of defined gross revenues cannot go.

101. Collective Bargaining Agreement, *supra* n.100, at part G, §§ 1-6.

102. To get salary caps for each season, the NBA takes the gross revenues from the previous year and adds ten percent plus television revenues. David DuPree and Chuck Johnson, *NBA's Salary Cap Fit the Circumstances*, USA TODAY, Feb. 1, 1990, at C3.

103. Collective Bargaining Agreement, *supra* n.100, part A, §1(a)(1).

104. The National Football League has a "hard cap," meaning the salary cap applies in all cases; no exceptions are allowed. The NBA has been criticized for its many exceptions because it makes the cap very complicated to follow and creates many loopholes.

105. Collective Bargaining Agreement, *supra* n.100, at part F §§ 1-6.

106. Fehr, *supra* n. 11, at *9. The revenue sharing plan is believed to call for a big-market team pool of approximately $55 million for the most needy owners. About a third of the clubs would be paying and a third receiving. Ross Newhan, *At Last, Big Teams Agree to Share Revenue*, LOS ANGELES TIMES, Jan. 19, 1994, at C3.

107. DuPree & Johnson, *supra* n.102. At this time the owners estimated TV and gate receipts equalled 81 percent of total team revenues. *Id.*

108. Irwin, *supra* n.26, at 296-97.

109. Weiner, *supra* n.1. Chuck Knoblauch, the Minnesota Twins second baseman and team union representative stated, "I'm not an accountant or anything, but you would think that one and one equal two, if [the owners are] paying players 6 or 7 million dollars a year, where is that money coming from? I guess they're generous people, and they're just emptying their pockets to pay players." *Id.*

110. *Giles Predicts Doom for Some Franchises Without Salary Cap*, PLAIN DEALER, Apr. 14, 1994, at D4. Philadelphia Phillies owner Bill Giles predicting the twenty-eight Major League teams will lose $100 million, the Seattle Mariners will lose $17 million, and the Pittsburgh Pirates will lose $9 million, said, "If we don't get [the salary capl, a lot of teams are going to move—San Diego, Pittsburgh and Montreal. Maybe three or four others will have to move somewhere." He cited the drop in national broadcast money as a chief reason. *Id.*

111. *Giles Cites Salary Cap as Way Teams Can Stay*, USA TODAY, Apr. 14, 1994, at C5. "One of the worst things that ever happened to baseball was the CBS-ESPN deal of four years ago, when we got paid twice of what we should have gotten paid," said Bill Giles, the Phillies' owner, explaining that this TV deal caused the salary escalation that continues even without a TV deal.

112. *See* note 10. Large-market teams, as the name implies, have a larger market in their home territory from which to draw revenues than do small- or intermediate-market teams. The size of the market is based on population and is ranked by the advertising industry. The revenues that vary most from market to market are advertising (primarily from radio and television broadcasts) and ballpark attendance.

113. Because it would be the large-market/financially successful teams sharing their revenues with the smaller-market/less wealthy teams, the large-market teams demanded the salary cap as a condition to agreeing to a revenue-sharing plan. It has been alleged that the salary cap is therefore a means for the owners to recoup their "donations" to the small market teams. Fehr, *supra* n.11.

114. Ross Newhan, *At Least Baseball Has Cue*, LOS ANGELES TIMES, Jan. 8, 1993, at C6.

115. *Id.*

116. Holt Hackney, *A Question of Continuity: A Pregame Chat with Dr. Jerry Buss, Owner of the Los Angeles Lakers and Kings*, FW, June 11, 1991, at 60.

117. *Id.* Baseball spends $210 million on player development in its minor leagues while football and basketball spend zero on player development because colleges do it all for them. *Id.*

118. Chambers, *supra* n.90.

119. *Id.* Baseball's antitrust exemption allowed the owners to unilaterally impose these restraints. An example of the owners' bad-faith negotiating tactics is Fehr's illustration of how the owners would tell the players to arrive at a salary cap proposal. When the players replied that they were against the cap and would not make such a proposal, the owners would walk away from the negotiating table. *Id.* at *9 ("How does one negotiate in that framework? The ordinary expectation is that the party that wants the major change in the agreement will at least tell you what he or she wants. . . . Apparently not.") *See* text under "Coexistence of Baseball Antitrust Exemption" and accompanying notes (discussing collusion).

120. Fehr, *supra* n.11, at *4–5.

121. *Id.* at *6. "So the real question is what is going on here? How could an industry that's had this kind of sustained growth be in a crisis situation?" *Id.*

122. *Id.* at *8.

123. *Id.*

124. DuPree & Johnson, *supra* n.102. Baseball players already earned approximately 53 percent of the League's gross revenues in 1992 noted Richard Ravitch. Newhan, *supra* n.114. Ironically, while baseball and other leagues are praising the NBA's salary cap, the NBA cap is drawing much criticism because it's too complicated, it restricts player movement and it's not considered necessary anymore since the League has recovered financially. Jerry Kirshenbaum, *Captivating*, SPORTS ILLUSTRATED, Dec. 21, 1992, at 11.

125. Newhan, *supra* n.114.

126. Fehr, *supra* n.11, at *13. "The purpose of the cap then becomes to figure out how much you can underpay compared to market value what your players are." *Id.*

127. It should be noted that the labor exemption could also be applied to a salary cap restraint to prevent a salary cap from violating antitrust laws. The labor exemption is complicated and beyond the scope of this article. Basically, it is an exemption from antitrust liability for labor unions which allows unions to engage in restrictive or conspiratory behavior in order to promote their goal of bargaining with the employer. The labor exemption to antitrust laws is both statutory and nonstatutory and attempts to reconcile the conflicting policies behind labor law and antitrust law. D. Albert Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 INDIANA L.J. 95, 98 (1986); Foraker, *supra* n. 99, at 161.

128. Foraker, *supra* n.99; at 161.

129. Foraker, *supra* n.99, at 171.

130. No other professional baseball league exists in the United States that plays the same caliber of baseball. Many other professional baseball leagues exist but they are minor leagues that play an inferior level of baseball and feed players into the Major League.

131. Foraker, *supra* n.99, at 171.

132. A baseball player having a successful year would be unable to sell his services to a team with other high-paid players (presumably star players) at a price that reflects this success because such a price would likely cause a team to spend over the cap unless teammates are willing to be paid less which would not be reasonable if they too performed more successfully. At least in the NBA, when the cap was introduced, the cap was set at a higher amount than would baseball's so the market was less restricted. Nonetheless, the cap still presented a market restraint, which is more restrained now that the NBA has been earning higher revenues and more players' salaries have approached the cap. *Id.*

133. *Id.* Donald Fehr, reacting to the NBA-styled salary cap proposal stated:

> [W]hat this [salary cap] proposal does is functionally eliminate the free agent market for players. . . .Basically what they [the owners] are saying is that they will control salaries and there won't be a market for free agents. What this means is that they will tell baseball players, "You will be denied the right to seek your value on the free market. . . .
>
> WASH. POST, May 21, 1985, at 1.

134. Teams that are over the cap when it gets implemented will not have to release high-paid players that raise the team above the cap if the cap models itself after the NBA and not the NFL.

135. The salary cap's restraint on player mobility is comparable to the old "Rozelle Rule" in football which was adjudged an illegal restraint of trade in violation of the Sherman Act in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976). The Rozelle Rule, named after football's then-commissioner Pete Rozelle, required any team acquiring a free agent to compensate the team losing the free agent with whatever the commissioner determined was reasonable compensation. Often the compensation was a future first-round draft pick that was such a heavy price that it served as a disincentive to acquire free agents thereby restraining player mobility. The salary cap would equally be a disincentive to a club acquiring free agents. Foraker, *supra* n.99, at 172.

136. Grossman, *supra* n.18, at 571.

137. *Id.*

138. Foraker, *supra* n.99, at 175. The unique competitive nature of the athletic industry makes it inappropriate to apply the per se test to professional sports. While a professional sport consists of franchises which compete against each other for players and quality of play, sports franchises must also cooperate to ensure the survival and competitiveness of other franchises. Failure to do so will result in the demise of franchises which will detract from the overall level of competition of a league, thereby reducing spectator interest and revenues. *Id.*

139. *Id*, n.99, at 176.

140. Another procompetitive justification for a salary cap is to foster competitive balance among the teams but this has not really proven to be a problem in baseball with free agency. A perfect example is the 1992 New York Mets which had one of the most expensive payrolls in baseball, signing many free agents that year, but still finished with a losing record (72-90) in fifth place. Also, the Atlanta Braves have created a minidynasty the last two years mostly with homegrown talent, not free agents.

If any competitive imbalance exists in Major League Baseball, it is based on the financial problem—that small-market teams can't afford the expensive free agents like the large-market teams. Revenue-sharing should resolve this.

141. Foraker, *supra* n.99, at 179–80.

142. Grossman, supra n.18, at 575.

143. *Id.* at 574.

144. 831 F. Supp. 420 (E.D. Pa. 1993).

145. Professional Baseball, 693 F.2d 1085 (11th Cir. 1982); Henderson Broadcasting, 541 F. Supp. 263 (S.D. Tex. 1982).

146. The reserve clause today exists for the first six years of a player's baseball career so this argument would only help the owners defend a salary cap for players with six or less years major league experience. The owners are targeting the salary cap the other way—to players with six or MORE years of major league experience.