

THE CURT FLOOD ACT OF 1998: A HOLLOW GESTURE AFTER ALL THESE YEARS?

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In 1998, Congress passed legislation¹ ostensibly designed to provide major league baseball players with narrowly fashioned relief from three United States Supreme Court decisions² that gave Major League Baseball an exemption from antitrust laws. The act was named in honor of Curtis Charles Flood,³ a courageous⁴ baseball player who filed suit in 1969 against Major League Baseball's reserve clause after being traded from the St. Louis Cardinals to the Philadelphia Phillies. Flood was so incensed at the treatment accorded to him by his employers that he wrote to Commissioner Bowie Kuhn demanding:

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1. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824. The passage of the Curt Flood Act of 1998 came after nearly fifty years of Congressional consideration of baseball's antitrust exemption. For more details, see, e.g., Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption*, 1994 T. MARSHALL L. REV. 627; STEPHEN R. LOWE, *THE KID ON THE SANDLOT: CONGRESS AND PROFESSIONAL SPORTS, 1910-1992*, 15-60 (1995).

2. See *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

3. Curt Flood died on January 20, 1997, at the UCLA Medical Center after a prolonged fight against throat cancer. See, e.g., Murray Chass, *On Baseball: Flood Was a Man for Every Season*, N.Y. TIMES, Jan. 21, 1997; *Baseball Pioneer Dies at 59: Flood Led Fight for Player Free Agency*, SEATTLE POST-INTELLIGENCER, Jan. 21, 1997, at D1; *Baseball: Outfielder's Unsuccessful Challenge of Reserve System in 1970s Led to Free Agency*, L.A. TIMES, Jan. 21, 1997, at C1; I. J. Rosenberg, *Baseball Notebook: Players Owe a Tip of the Cap, and Much More, to Flood*, ATLANTA JOURNAL-CONSTITUTION, Jan. 26, 1997, at F02; Ross Newhan, *Player Champion Flood Dead at 59; Baseball: Outfielder's Unsuccessful Challenge of Reserve System in 1970s Led to Free Agency*, L.A. TIMES, Jan. 21, 1997, at C1; Bob Broeg, *Flood Fell a Few Singles Short of Fame and Riches*, ST. LOUIS POST-DISPATCH, Jan. 27, 1997, at C1; Richard Reeves, Editorial, *The Inglorious Undoing of a Proud, Angry Man*, SEATTLE TIMES, Jan. 29, 1997, at B4. For an interesting website highlighting Flood's life and legal legacy see http://xroads.virginia.edu/~CLASS/am483_97/projects/brady/flood.html.

4. Rep. John Conyers, Jr. (D-Mich.) identified Flood as a courageous and beautiful athlete during the Congressional discussion of the Curt Flood Act of 1998. 144 Cong. Rec. H9942-03, H9944 (Oct. 7, 1998).

After twelve years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States.

It is my desire to play baseball in 1970, and I am capable of playing. I have received a contract offer from the Philadelphia club, but I believe I have the right to consider offers from other clubs before making any decisions. I, therefore, request that you make known to all Major League clubs my feelings in this matter, and advise them of my availability for the 1970 season.⁵

Flood would ultimately lose his case before the Supreme Court. However, less than five years later arbitrator Peter Seitz would award free agency status to pitchers Andy Messersmith and Dave McNally.⁶ The availability of free agency in professional baseball has resulted in over two decades of phenomenal salary growth.⁷ In addition to the escalation of salaries, the Major League Baseball Players Association has become a formidable force in negotiating collective bargaining agreements with the owners.

The passage of the Curt Flood Act of 1998 by the 105th Congress came over seventy-five years after the Supreme Court ruled in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*⁸ that baseball was not involved in interstate commerce or trade as customarily defined within the context of sections one and two of the Sherman Antitrust Act.⁹ In taking this action, Congress finally responded to the Supreme Court's plea in *Toolson v. New York Yankees*¹⁰ and *Flood v. Kuhn*¹¹ to seek a legislative solution to the exemption created in *Federal Baseball*. The legislation further reacted to a

5. Curt Flood, *THE WAY IT IS 194-195* (1971). See also BOWIE KUHN, *HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER* 83 (1987); MARVIN MILLER, *A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL 190-191* (1991); LEE LOWENFISH, *THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL'S LABOR WARS* 207 (Revised Edition 1991).

6. *National and American League Professional Baseball Clubs v. Major League Baseball Players Ass'n*, 66 Lab. Arb. Rep. (BNA) 101 (1976). See also *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976).

7. See, e.g., MARTIN J. GREENBERG & JAMES T. GRAY, *SPORTS LAW PRACTICE* 437-442 (2nd Ed. 1998); ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 112-113 (1992).

8. 259 U.S. 200 (1922).

9. 15 U.S.C. §§ 1-2 (1994).

10. 346 U.S. 356 (1953).

11. 407 U.S. 258 (1972).

joint agreement between Major League Baseball and the Major League Baseball Players Association embodied in their most recent collective bargaining agreement to appeal to Congress for a legislative change to the “anomaly” and “aberration” recognized and reaffirmed by the Supreme Court in *Flood*.¹² Although the legislation was hailed as significant by numerous Congressmen,¹³ one must ask whether this act is anything more than a hollow gesture to the memory of Curt Flood. Although baseball players now join basketball and football players in their ability potentially to wage antitrust war against management, a series of cases¹⁴ culminating in the Supreme Court’s decision in *Brown v. Pro Football, Inc.*¹⁵ insures that the nonstatutory labor law exemption will nearly always trump a complaint predicated upon antitrust grounds.

This article will first outline the provisions of the Curt Flood Act of 1998 and recent decisions limiting the reach of baseball’s antitrust exemption. Second, Congressional commentary will be discussed. Third, the development of the nonstatutory labor exemption by the Supreme

12. *See id.* at 282. Rep. Henry Hyde (R-Ill.) noted in his Congressional testimony that “(g)iven the agreement of the parties, Congress has now decided to legislate in this area, but we do so only in an extremely narrow manner.” 144 Cong. Rec. H9942-03 (1998 WL 694709 (Cong. Rec.)). Article XXVIII of the Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association (effective Jan. 1, 1997), reprinted in Gary A. Ubertine, editor, *LAW OF PROFESSIONAL AND AMATEUR SPORTS* 5-149 (1988), provided that Major League Baseball and the Major League Baseball Players Association would both lobby Congress for legislation to “clarify that Major League Baseball Players are covered under the antitrust laws” with the same rights as football and basketball players. Article XXVIII also stressed that the act should not change antitrust laws in any other ways concerning the parties to the collective bargaining agreement. *Id.* Furthermore, if legislation was not passed by December 31, 1998, the collective bargaining agreement would be terminated on December 31, 2000, rather than on October 31, 2000, or one day after the last game of the World Series in 2000, as provided in Article XXVII of the collective bargaining agreement. *Id.* at 5-148. The Major League Baseball Players Association was granted the right to exercise an extension option under Articles XXVII and XXVIII to push the agreement through the 2001 season. *Id.* at 5-148-5-149.

13. Rep. Mike Bilirakis (R-Fla.), Rep. Jim Bunning (R-Ky), Rep. John Conyers, Jr. (D-Mich.), Sen. Orrin Hatch (R-Utah), Rep. Henry Hyde (R-Ill.), Sen. Pat Leahy (D-Vt.).

14. *See Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff’d in part, rev’d in part*, 593 F.2d 1173 (D.C. Cir. 1979); *Wood v. National Basketball Ass’n*, 809 F.2d 954 (2d Cir. 1987); *Bridgeman v. National Basketball Ass’n*, 675 F. Supp. 960 (D.N.J. 1987); *Powell v. National Football League*, 678 F. Supp. 777 (D. Minn. 1988); *Powell v. National Football League*, 690 F. Supp. 812 (D. Minn. 1988); *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989); *Powell v. National Football League*, 764 F. Supp. 1351 (D. Minn. 1991); *McNeil v. National Football League*, 790 F. Supp. 871 (D. Minn. 1982); *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996).

15. 116 S. Ct. 2116 (1996).

Court will be outlined followed by a discussion of its application to sports. The article will conclude with an expression of the likely impact of the act on the rights of players or management to use antitrust laws effectively against the other party.

THE CURT FLOOD ACT OF 1998

The purpose of the act as outlined in section two is "to state that major league baseball players are covered under the antitrust laws."¹⁶ Section two further notes that major league baseball players are granted the same antitrust rights as basketball and football players.¹⁷ The United States Supreme Court held in *Radovich v. National Football League*¹⁸ that the National Football League did not enjoy the same antitrust exemption that the Court had granted to baseball in *Federal Baseball and Toolson*.¹⁹ Fourteen years later, the Court held that professional basketball was similarly not exempt from antitrust assault in *Haywood v. National Basketball Association*.²⁰ The final clause of section two declares that the act "[d]oes not change the application of the antitrust laws in any other context or with respect to any other person or entity."²¹ The clause appears to assure the owners and commissioner of Major League Baseball that all other aspects of the business of baseball will remain free from antitrust challenge.

Section three declares that the legislation involves "the business of organized professional major league baseball *directly relating to or affecting employment of* major league baseball players."²² Furthermore, subsection (b) reiterates that the act only relates to employment of players.²³ The drafters of the act have taken great pains to reinforce in numerous ways the extremely narrow grant accorded in section two.

Subsection (b) then lists six instances in which the act does not change the existing jurisprudence concerning baseball's antitrust exemption.²⁴ First, the act does not grant any rights to minor league players, including "any reserve clause as applied to minor league players."²⁵

16. Curt Flood Act of 1998, Pub. L. No. 105-297, § 2, 112 Stat. 2824.

17. *See id.*

18. 352 U.S. 445 (1957).

19. *Id.* at 447-448.

20. 401 U.S. 1204, 1205 (1971). *See also, Flood*, 407 U.S. at 280; *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1060 (C.D. Cal. 1971).

21. Pub. L. No. 105-297, § 2.

22. *Id.* at § 3(a)(emphasis added).

23. *See id.* at § 3(b).

24. *See id.*

25. *Id.* at § 3(b)(1).

Fearful that minor league players might employ the act to rid themselves of the burden of the minor league reserve system, minor league baseball owners petitioned their Congressmen to refrain from changing the delicate balance that exists between major league and minor league baseball. Minor league baseball has seen a significant resurgence in the past twenty-five years in fan interest resulting in an increased financial value for franchise owners and a greater rationale for cities to try to attract and keep minor league teams.²⁶ Many cities with minor league teams have responded by investing millions of dollars in new state-of-the-art facilities. A change in the employment conditions of minor league players would jeopardize these expenditures. The second enumerated item under subsection (b) underscores the act's grant of antitrust rights only to major league players by disallowing any claim based upon the Professional Baseball Agreement between Major League Baseball and the National Association of Professional Baseball Leagues, the governing body of minor league baseball.²⁷

FRANCHISE RELOCATION

The third feature of baseball specifically identified by the act as continuing to enjoy protection from any antitrust action concerns "franchise expansion, location or relocation, franchise ownership issues," and "the relationship between the Office of the Commissioner and franchise owners."²⁸ Furthermore, the marketing or sales of baseball or the licensing of intellectual property rights cannot be challenged.²⁹ The Commissioner and the owners in baseball have not been subjected to antitrust liability regarding franchise relocation as the National Football League was in *Los Angeles Memorial Coliseum Commission v. National Football League*.³⁰ In fact, in *Wisconsin v. Milwaukee Braves, Inc.*,³¹ the Wisconsin Supreme Court upheld the viability of the baseball exemption respecting franchise relocation of the Braves from Milwaukee to Atlanta. The decision was rendered in a suit claiming a violation of state antitrust

26. See, e.g., ZIMBALIST, *supra* note 7, at 112-113; NEIL J. SULLIVAN, *THE MINORS: THE STRUGGLES AND THE TRIUMPH OF BASEBALL'S POOR RELATION FROM 1876 TO THE PRESENT* 256-273 (1990).

27. Pub. L. No. 105-297, § 3(b)(2).

28. *Id.* at § 3(b)(3).

29. See *id.*

30. 726 F.2d 1381 (9th Cir. 1984) (antitrust liability issue) & 791 F.2d 1356 (9th Cir. 1986) (damages issue).

31. 144 N.W.2d 1 (Wis. 1966).

law. Because the structure of league was at issue, the court ruled against the state. However, the court stated

(w)e venture to guess that this exemption does not cover every type of business activity to which a baseball club or league might be a party and does not protect clubs or leagues from application of the federal acts to activities which are not incidental to the maintenance of the league structure³²

Furthermore, the drafters of the legislation appear to establish that the decisions in *Piazza v. Major League Baseball*,³³ *Butterworth v. National League*,³⁴ and *Minnesota Twins Partnership v. State by Humphrey*³⁵ should not be relied upon.

In *Piazza*, the District Court for the Eastern District of Pennsylvania considered claims by Vincent M. Piazza, Vincent N. Tirendi and PT Baseball, Inc. that Major League Baseball had interfered illegally in their efforts to purchase the San Francisco Giants and relocate the team to Tampa Bay, Florida.³⁶ Plaintiffs asserted numerous claims under the United States Constitution, federal antitrust laws, and certain state laws.³⁷ Judge John Padova's thorough and analytical decision discussed the standard of review,³⁸ federal Constitutional claims,³⁹ a civil rights claim,⁴⁰ the relevant market for antitrust analysis,⁴¹ and standing⁴² before turning to a consideration of baseball's antitrust exemption claim. Judge Padova noted that each of the three cases involved the reserve clause.⁴³ Major League Baseball argued that the exemption extended to the "business of baseball" generally, while the plaintiffs asserted that the exemption was limited to the reserve clause.⁴⁴ Judge Padova asserted that "the Court in *Flood v. Kuhn* stripped from *Federal Baseball* and *Toolson* any precedential value that those cases may have had beyond the particular facts there involved, i.e., the reserve clause."⁴⁵ Judge Padova concluded that the exemption was properly limited to the reserve

32. *Id.* at 15.

33. 831 F. Supp. 420 (E.D. Pa. 1993).

34. 644 So. 2d 1021 (Fla. 1994).

35. 1998-1 Trade Cases (CCH) ¶ 72,136.

36. *Piazza*, 831 F. Supp. at 421.

37. *See id.*

38. *See id.* at 424-425.

39. *See id.* at 425-426.

40. *See id.* at 426-429.

41. *See Piazza*, 831 F. Supp. at 429-431.

42. *See id.* at 431-433.

43. *See id.* at 435.

44. *See id.*

45. *Piazza*, 831 F. Supp. at 436.

system, a non-issue in the case, and “reject[ed] Baseball’s argument that it is exempt from antitrust liability in this case.”⁴⁶ In finding a narrow application for baseball’s exemption, Judge Padova distinguished *Charles O. Finley & Co. v. Kuhn*,⁴⁷ a case involving the power of the Commissioner to disapprove the sale for three baseball players from the Oakland As to other teams.⁴⁸ Judge Padova cited the finding of the court in *Henderson Broadcasting Corp. v. Houston Sports Association*⁴⁹ which stated that the exemption did not cover the broadcasting of games.

*Butterworth*⁵⁰ involved the same factual context as *Piazza*. Florida Attorney General Robert Butterworth issued antitrust civil investigative demands against the National League and its president, Bill White, involving the Giants-Tampa Bay situation.⁵¹ The Circuit Court of Florida’s Ninth Judicial Circuit issued an order quashing the Attorney General’s investigation and civil investigative demands and determined that the antitrust exemption applied.⁵² The Florida Fifth District Court of Appeal affirmed the decision,⁵³ and certified a question to the Florida Supreme Court requesting its determination as to the applicability of baseball’s exemption to the sale and relocation of franchises under federal and state antitrust laws. The court ruled against Major League Baseball citing favorably the decision in *Piazza* because of its thorough analysis of the issues and the case law.⁵⁴ Like *Piazza*, the *Butterworth* Court refused to extend the antitrust exemption beyond the reserve clause.⁵⁵

In *Humphrey*⁵⁶ a Minnesota district court considered the request by the state’s attorney general to investigate baseball through discovery to determine if the business and trade laws of the state had been violated. The attorney general’s concern was whether or not Major League Baseball owners had conspired to secure federal funding to construct a new stadium in Minneapolis/St. Paul to prevent the relocation of the Twins

46. *Id.* at 438.

47. 569 F.2d 527 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

48. 831 F. Supp. at 436-437.

49. 541 F. Supp. 263 (S.D. Tex. 1982).

50. 644 So. 2d 1021 (Fla. 1994).

51. *See id.* at 1022.

52. *See id.*

53. 622 So. 2d 177 (Fla. 5th Dist. Ct. App. 1993).

54. 644 So. 2d at 1025.

55. *See id.*

56. 1998-1 Trade Cases (CCH) ¶ 72,136 at 81,885.

franchise to North Carolina.⁵⁷ The court felt that it was essential to determine the application of baseball's antitrust exemption prior to finding whether to allow the use of Civil Investigatory Demands (CIDs). The court began with a discussion of the Supreme Court's decisions in *Federal Baseball*, *Toolson*, and *Flood*.⁵⁸ Agreeing with the *Butterworth* decision, the court noted the thoroughness and detail of Judge Padoza's analysis⁵⁹ and concluded "that the ruling in *Flood* confines the antitrust exemption to the narrow area of the reserve clause."⁶⁰ The court next turned to the issue of whether the Commerce Clause⁶¹ prevented the action that the attorney general wished to take.⁶² In finding that the issues raised were serious and might violate state or federal antitrust laws, the court cited *Morsani v. Major League Baseball*⁶³ and *Postema v. National League of Professional Baseball Clubs*⁶⁴ in "holding that state antitrust laws are neither pre-empted nor precluded by any federal considerations."⁶⁵ The Minnesota Supreme Court heard oral arguments on the appeal of this case on February 3, 1999.⁶⁶

The *Humphrey* case might offer the first judicial test regarding the impact of subsection 3(b) of the Curt Flood Act of 1998. The language of the subsection states that the "section does not create . . . a cause of action by which to challenge under the antitrust laws . . . any conduct . . . including but not limited to.— (3) the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issue."⁶⁷ However, the introductory language of the subsection states that "[n]o court shall rely on the enactment of this section as a *basis for changing the application* of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a)."⁶⁸

57. See Robert Whereatt, *High Court Hears Argument on State's Baseball Inquiry*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Feb. 4, 1999, at B3.

58. See *Humphrey* at 81,886-81,888.

59. *Id.* at 81,888.

60. *Id.* at 81,889.

61. See U.S. Const. art. I, § 8.

62. See *Humphrey* at 81,889.

63. 663 So. 2d 653, 657 (Fla. 2d Dist. Ct. App. 1995).

64. 799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd in part on other grounds*, 998 F.2d 60 (2d Cir. 1993).

65. *Humphrey* at 81,890.

66. See, e.g., Whereatt, *supra* note 57; Professor Stephen Ross authored an amicus brief for the attorney general, see, e.g., La Velle E. Neal, III, *Tewksbury Isn't Done Teaching*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Sept. 2, 1998, at C6.

67. Pub. L. No. 105-297, § 3(b).

68. *Id.* (emphasis added).

Although a recent decision of the Eastern District of Louisiana⁶⁹ refused to follow the line of authority established in *Piazza, Butterworth, Humphrey, Morsani, and Postema*, the question arises as to whether or not these courts are correct in deciding that the exemption has been restricted to the reserve clause. If the exemption does enjoy that judicial determination, then holding that the exemption applies to franchise relocation is a change in the application of the laws. Although Congress seemed to foreclose reliance on these decisions, the nature of the language provides a slight crack in the otherwise air-tight nature of the legislation for an imaginative judge like John Padova to argue that the language of the statute most conform with the reality that the exemption has already been reduced to covering only the reserve clause. Major League Baseball and its supporters will certainly argue that such a reading goes against the meaning and intent of the legislators passing this statute. Furthermore, such a reading would defeat the meaning of all of the language in section three of the act. However, the language allows for an argument over the meaning of these cases within the context of the act.

The fourth listed aspect of the business of baseball maintaining protection under subsection 3(b)⁷⁰ is the right to pool the league's transfer of broadcast rights in "sponsored telecasts" under the Sports Broadcasting Act of 1961.⁷¹ The great disparity between the broadcast rights of teams in large markets versus small markets is probably the greatest challenge to the financial viability of Major League Baseball. Furthermore, this problem threatens to undermine the collective bargaining relationship when one team, such as the Los Angeles Dodgers, can pay one player, Kevin Brown, more than the total salaries of the entire roster of the Montreal Expos.⁷²

The fifth item listed under subsection (b) is the relationship between organized professional baseball and umpires or other employees of or-

69. See *New Orleans Pelicans Baseball, Inc. v. National Ass'n of Professional Baseball Leagues, Inc.*, 1994 WL 631144 (E.D. La. 1994). See, e.g., *Portland Baseball Club, Inc. v. Kuhn*, 368 F. Supp. 1004, *aff'd per curiam*, 491 F.2d 1101 (9th Cir. 1974); *Professional Schools & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982); *Triple-A Baseball Club Ass'n v. Northeastern Baseball, Inc.* 832 F.2d 214 (1st Cir. 1987).

70. Pub. L. No. 105-297, § 3 (b)(4).

71. See 5 U.S.C. §§ 1291-1295 (1994).

72. See Barre Campbell, *Beattie Cool Under Fire, Expos GM Says Team's Future Hinges on Ownership, Stadium*, OTTAWA SUN, Feb. 12, 1999, at 83; Joe Giuliotti, *Baseball Notes; Let's Bring On Big Hurt—Frankly, Sox Need Thomas*, BOSTON HERALD, Jan. 24, 1999, at B24; Howard Beck, *Will Fans Return? NBA Takes Steps to Woo Spectators*, L.A. DAILY NEWS, Jan. 8, 1999, at S1.

ganized professional baseball. The most likely reason for this statutory language involves litigation between umpires and Major League Baseball.

In *Salerno v. American League of Professional Baseball Clubs*,⁷³ the plaintiffs, umpires fired by the president of the American League, filed an antitrust claim against the league. The umpires claimed that they were not discharged for incompetence as claimed by the American League, but, rather, because of their attempts to organize the umpires for collective bargaining with the league.⁷⁴ The case was decided two years prior to *Flood*. Judge Friendly of the Second Circuit Court of Appeals declined to rule for the umpires feeling that serious doubt existed as to whether or not a claim for breach of contract or tort would provide a basis for an antitrust claim even if the exemption did not exempt Major League Baseball. Judge Friendly deferred to the Supreme Court's rulings in *Federal Baseball* and *Toolson* while offering his view about the vitality of the exemption.⁷⁵

Seven years ago, the National League defended an employment discrimination and a common law restraint of trade case in *Postema v. National League of Professional Baseball Clubs*.⁷⁶ Pam Postema, the first female to umpire above the Class A level,⁷⁷ argued that her termination by Triple-A Baseball on November 6, 1989, was the result of gender-based discrimination.⁷⁸ In refusing to dismiss the common law restraint of trade claim, the court noted that "the exemption does not provide baseball with blanket immunity for anti-competitive behavior in every

73. 429 F.2d 1003 (2d Cir. 1970).

74. *See id.* at 1004.

75. In one of the more eloquent statements regarding baseball's exemption prior to *Flood*, Judge Friendly asserted:

[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch (sic).

Id. at 1005.

76. 799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd in part on other grounds*, 998 F.2d 60 (2d Cir. 1993).

77. 799 F. Supp. at 1478.

78. For a discussion of Postema's career as a minor league umpire, *see* PAM POSTEMA & GENE WOJCIECHOWSKI, *YOU'VE GOT TO HAVE B*LLS TO MAKE IT IN THIS LEAGUE: MY LIFE AS AN UMPIRE* (1992). For an analysis of Postema's lawsuit, *see, e.g.*, Sharlene A. McEvoy, *The Umpire Strikes Out: Postema v. National League: Major League Gender Discrimination*, 11 U. MIAMI ENT. & SPORTS L. REV. 1 (1993).

context in which it operates.”⁷⁹ In another blow to Major League Baseball’s desire to extend its exemption to the entire business of baseball, the court concluded

that Defendants have not shown any reason why the baseball exemption should apply to baseball’s employment relations with its umpires. Unlike the league structure or the reserve system, baseball’s relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability.⁸⁰

Certainly, the drafters of the legislation are insisting that, notwithstanding the language of *Postema*, the relationship between Major League Baseball and its umpires should not be subjected to antitrust liability after the passage of act. Major League Baseball’s contentious relationship with the Major League Baseball Players Association has also at times been the hallmark of its relationship with the union representing umpires and its executive director, Richie Phillips.⁸¹

The final listing under subsection (b) is an additional statement to ensure that courts will not use the act to change preexisting antitrust laws beyond the scope of the employment relationship of major league baseball players. The act specifically excludes “any conduct, acts, practices, or agreements of persons not in the business of organized professional major league baseball”⁸² from coverage under the statute.

Subsection (c) provides that only “a major league baseball player has standing to sue.”⁸³ Four definitions are provided for what constitutes a “major league baseball player” for the purposes of this subsection.⁸⁴ The first definition is any “party to a major league player’s contract” or one who “is playing baseball at the major league level.”⁸⁵ The second listed definition is one “who was a party to a major league player’s contract or playing baseball at the major league level at the time of the in-

79. 799 F. Supp. at 1489.

80. *Id.*

81. See Sean McAdam, *The Day is Coming When Umps Won’t Be Above the Law: After Years of Increasing Power and Decreasing Performance By Umpires, Baseball Officials are Tackling the Problem*, PROVIDENCE SUNDAY JOURNAL, Oct. 18, 1998, at D1; Ross Newhan, *Budding Leader Bud Selig, Who Used to Say He Didn’t Want to be Commissioner, is Expected to be Near-Unanimous Choice Today Because He’s a Known Quantity*, L.A. TIMES, July 9, 1998, at C1.

82. Pub. L. No. 105-297, § 3(b)(6).

83. *Id.* at § 3(c). This section created some concern for the Department of Justice because it deprives them of standing.

84. *Id.* at § 3(c)(1)-3(c)(4).

85. *Id.* at § 3(c)(1).

jury that is the subject of the complaint.”⁸⁶ The third definition allows a claim for a former major league player or a former party to a major league contract who alleges an antitrust violation for one “injured in his efforts to secure a subsequent major league player’s contract.”⁸⁷ There is a provision within the subsection, however, asserting that no claim can relate to employment “at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players.”⁸⁸ The final definition provides relief for:

a person who was a party to a major league player’s contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.⁸⁹

Three particular provisions under subsection (d) bear mentioning. The first is contained within subsection (d)(2) reiterating that only employment issues within Major League Baseball are subject to subsection (a).⁹⁰ This provision presumably limits the impact of decisions like *Piazza*, *Butterworth*, or *Humphrey* that tried to alter the long-standing position that the exemption applied to all aspects of the business of baseball.

The second important provision within subsection (d), (d)(4), presents perhaps the most significant limitation on the reach of the new act: “Nothing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws.”⁹¹ This subsection, the focus of the majority of the rest of this article, effectively precludes the use of the antitrust leverage provided by the act within the context of a labor relationship.

Finally, subsection (d)(5) states that “(t)he scope of the conduct, acts, practices, or agreements covered by subsection (b) shall not be strictly or narrowly construed.”⁹² This pro-management component of the act was written so that major league ownership could assert to a court any addi-

86. *Id.* at § 3(c)(2).

87. Pub. L. No. 105-297, § 3(c)(3).

88. *Id.*

89. *Id.*

90. *See id.* at § (d)(2).

91. *Id.* at § (d)(4).

92. Pub. L. No. 105-297, § (d)(5).

tional set of factors necessary to insure the strict construction of subsection (a) limiting the antitrust implications of the act solely to employment issues. This subsection seems to assure by redundancy the unequivocal desire of the drafters not to allow a court any opening to assert that antitrust law can be used in a non-labor area.

CONGRESSIONAL COMMENTARY

In the discussion on the floor of Congress, Representative Henry Hyde (R-Ill.) urged passage of the bill noting: “(a)fter years of disagreement, the baseball players, the baseball owners, and the minor leagues have reached an historic agreement on the application of the antitrust laws to labor relations in baseball.”⁹³ After listing the trilogy of Supreme Court cases establishing baseball’s exemption, Representative Hyde stated “(g)iven the agreement of the parties, Congress has now decided to legislate in this area, but we do so only in an extremely narrow manner.”⁹⁴ After discussing the collective bargaining agreement clause requiring Major League Baseball and the Major League Baseball Players Association to petition Congress for legislative action, Representative Hyde stressed the importance of the nonstatutory labor exemption:

I want to note that nothing in this bill will affect in any way the protections afforded to the major league clubs by the nonstatutory labor exemption . . . (B)oth the players and the owners were willing to support the repeal of the specific and narrow portion of the baseball exemption covering labor relations between major league players and major league clubs. The bill was carefully drafted, however, to leave the remainder of the exemption intact.⁹⁵

Representative Hyde next turned his attention to issues raised by minor league owners by asserting that the act would not provide any relief to one trying to attack any aspect of minor league employment.⁹⁶ Before turning over the discussion to Representative John Conyers, Jr. (D-Mich.), Representative Hyde supported the narrow construction of the legislation by noting that “[t]his bill does not affect the application of the antitrust laws to anyone outside the business of baseball.”⁹⁷

93. 144 Cong. Rec. H9942-03, H9943 (Oct. 7, 1998).

94. *Id.*

95. *Id.*

96. *See id.*

97. *Id.*

Representative Conyers opened by asserting that “[p]rofessional baseball is the only industry in the United States exempt from the anti-trust laws without being subject to regulatory supervision.”⁹⁸ Representative Conyers stressed that baseball’s numerous work stoppages begged for a Congressional response in order to bring baseball within the same antitrust purview as other professional sports.⁹⁹

The commentary offered by Jim Bunning (R-Ky.) was particularly interesting because he is a member of the Baseball Hall of Fame and a former member of the Executive Board of the Major League Baseball Players Association. He threw his “strong support” behind the legislation,¹⁰⁰ while stating that “[p]ersonally, I think this exemption should be repealed altogether.”¹⁰¹ Representative Sherwood L. Boehlert (R-NY), the chairman of the Minor League Baseball Caucus,¹⁰² after naming some baseball luminaries, pointed out the importance of the legislation’s maintenance of the antitrust exemption for minor league baseball and its 35 million fans.¹⁰³

The Congressional commentary on the Curt Flood Act of 1998 underscored the narrow scope of the legislation. Although heralded as an important step forward in providing major league baseball players with similar antitrust rights as basketball and football players, the nonstatutory labor exemption far overshadows the value of antitrust rights in the professional sports context.

THE NONSTATUTORY LABOR EXEMPTION

To gauge the value of the Curt Flood Act of 1998 for major league baseball players, one must discuss the development of the nonstatutory labor exemption alluded to in section (d)(4) of the act.¹⁰⁴ The development of this exemption during the past three decades has left most professional team sports’ athletes in a position where collective bargaining

98. 144 Cong. Rec. H9942-03, H9943 (1998).

99. *See id.*

100. *Id.*

101. 144 Cong. Rec. at H9945.

102. For a discussion of Representative Boehlert and the Minor League Baseball Caucus, *see, e.g.*, Robert Gavin, *Boehlert’s Hardball Politics May Be His Calling, But Baseball is a Passion for Rep. Sherwood Boehlert*, SYRACUSE POST-STANDARD, Aug. 11, 1997, at A1; Paul White, *Will Antitrust Fight Wreck the Minors*, BASEBALL WEEKLY, Mar. 5, 1997, at 2; Jonathan D. Salant, *Minor Leagues Find Backing in Congress*, CLEVELAND PLAIN DEALER, Aug. 22, 1993, at 10A; Penny Bender, *New Caucus Enters Fray Over Baseball Exemption*, GANNETT NEWS SERVICE, Aug. 20, 1993.

103. *See* 144 Cong. Rec. at H9945.

104. Pub. L. No. 105-297, § (d)(4).

and the policy of federal labor laws will nearly always trump antitrust claims.

Prior to addressing the nonstatutory labor exemption in the sports context, it is important to consider the development of the relationship between antitrust laws and labor laws in Supreme Court jurisprudence throughout this century. The early relationship between antitrust laws and labor laws tilted strongly towards the preeminence of antitrust laws. In 1908 the Supreme Court in *Loewe v. Lawlor*¹⁰⁵ decided that union collective activity violated the Sherman Act.¹⁰⁶ The lawsuit focused on the actions of United Hatters of North America, a member of the American Federation of Labor, against the co-partners, owners of Loewe & Company, a Danbury, Connecticut hat-making factory. Congress ultimately responded by creating a statutory exemption¹⁰⁷ for labor law which provided that labor unions were not illegal combinations in restraint of trade and limited federal courts in their injunctive powers in the area of labor law.

In 1940 the Supreme Court in *Apex Hosiery Co. v. Leader*¹⁰⁸ considered the antitrust liability of a union, the American Federation of Full Fashioned Hosiery Workers, involved in a sit-down strike against the Apex Hosiery Company.¹⁰⁹ The purpose of the strike was to force Apex to recognize the union.¹¹⁰ The Court held that the strike was not a restraint directed at the product market of Apex's business¹¹¹ and did not produce effects which the Sherman Act proscribed.¹¹² The statutory exemption was determined to insulate legitimate collective bargaining activity.¹¹³

The following year in *United States v. Hutcheson*,¹¹⁴ the Supreme Court considered a charge of a Sherman Act violation against a carpenter's union, the United Brotherhood of Carpenters and Joiners of America, and its officials.¹¹⁵ This was based upon the union's nation-

105. 208 U.S. 274 (1908).

106. *See id.* at 292-297.

107. The statutory exemption is based on sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52 (1994) and the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1994).

108. 310 U.S. 469 (1940).

109. *See id.* at 480-481.

110. *See id.* at 481-482.

111. *See id.* at 501.

112. *See id.* at 502-503.

113. *See Apex Hosiery*, 310 U.S. at 503.

114. 312 U.S. 219 (1941).

115. *See id.* at 228.

wide picketing and boycotting of Anheuser-Busch.¹¹⁶ The union was involved in a jurisdictional dispute between itself and a machinists' union, the International Association of Machinists, working for Busch.¹¹⁷ The court determined that the statutory exemption immunized union activity "(s)o long as a union acts in its self-interest and does not combine with non-labor groups."¹¹⁸

In 1945 the Supreme Court in *Allen Bradley Co. v. Local Union 13, IBEW*¹¹⁹ rendered its first decision expanding the statutory exemption to include agreements between management and labor.¹²⁰ The focus of the Court's inquiry was the activity of Local No. 3 of the International Brotherhood of Electrical Workers towards electrical equipment manufacturers and contractors trying to enter the New York City market.¹²¹ Under the agreement, contractors were required to purchase equipment only from manufacturers employing union members, and manufacturers could sell equipment only to contractors using union employees.¹²² The effects were to increase profits for participating companies, force union wages higher, and shorten hours.¹²³ Justice Black's opinion established a balancing of Congressional antitrust policy with the goal of preserving the right of labor to organize and gain better working conditions.¹²⁴ Justice Black determined that the exemption would not protect this activity because the labor group participated with management in activities that the Court characterized as a conspiracy to monopolize.¹²⁵

The next major Supreme Court decision involving the nonstatutory exemption was *United Mine Workers v. Pennington*.¹²⁶ The labor exemption claim arose from a cross-claim filed by Phillips Brothers Coal Company against the United Mine Workers alleging a Sherman Act violation.¹²⁷ The company claimed that the union had conspired with larger coal companies to eliminate small producers.¹²⁸ This was effectuated by imposing a prior wage agreement on all operators.¹²⁹ The small

116. *See id.*

117. *See id.*

118. *Id.* at 232.

119. 325 U.S. 797 (1945).

120. *See id.* at 798.

121. *See id.* at 798-799.

122. *See id.* at 799-800.

123. *See id.* at 799.

124. *See Allen Bradley*, 325 U.S. at 806.

125. *See id.* at 811.

126. 381 U.S. 657 (1965).

127. *See id.* at 659.

128. *See id.* at 660.

129. *See id.*

operators were caught between the union's demand for a higher wages package and the ability of the larger companies to cut prices.¹³⁰ The action was held not to be immune from application of the antitrust law solely because of union involvement.¹³¹ A critical factor was the presence of the union-employer conspiracy to control conditions beyond their immediate bargaining concerns.¹³²

On the same day, in *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,¹³³ the Court considered a collective bargaining agreement between a butchers' union and food stores forbidding the sale of meat before 9:00 a.m. and after 6:00 p.m. in both service and self-service markets.¹³⁴ The Court established a balancing test regarding the antitrust and labor law policies.¹³⁵ This policy established that the union's activities were exempt from antitrust liability because the marketing-hours restriction was the product of arm's-length bargaining and was not at the behest of a nonlabor group.¹³⁶

Ten years later in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*,¹³⁷ the Supreme Court was concerned with an attempt by a union to force a general contractor to agree to sub-contract mechanical work only to firms which were parties to the union's current collective bargaining agreement.¹³⁸ The Court concluded that the agreement involved was not within the exemption because it restrained the business market to a much greater extent than necessary in the pursuit of better wages and working conditions.¹³⁹ The Court determined that the agreement

which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite . . . may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.¹⁴⁰

130. *See id.* at 660-661.

131. *See United Mine Workers*, 381 U.S. at 662-663.

132. *See id.* at 665-666.

133. 381 U.S. 676 (1965).

134. *See id.* at 680.

135. *See id.* at 688-689.

136. *See id.* at 689-690.

137. 421 U.S. 616 (1975).

138. *See id.* at 618-619.

139. *See id.* at 625-626.

140. *Id.* at 635.

THE NONSTATUTORY LABOR EXEMPTION IN THE SPORTS CONTEXT

Three years prior to *Connell*, the importance of the nonstatutory labor exemption in the sports area was noted by Justice Thurgood Marshall in his dissent in *Flood*.¹⁴¹ Justice Marshall noted that “[I]t is apparent that none of the prior cases is precisely in point. They involve union-management agreements that work to the detriment of management’s competitors. In this case, petitioner [Flood] urges that the reserve system works to the detriment of labor.”¹⁴² Justice Marshall noted that the Court had “rejected a claim that federal labor statutes governed the relationship between a professional athlete and the professional sport”¹⁴³ in *Radovich v. National Football League*.¹⁴⁴ Justice Marshall pointed out, however, “that the issue was not squarely faced”¹⁴⁵ in *Radovich* nor in *Flood*. Justice Marshall wished to remand the case to the district court “for consideration of whether petitioner can state a claim under the antitrust laws despite the collective-bargaining agreement, and, if so, for a determination of whether there has been an antitrust violation in this case.”¹⁴⁶

The Eighth Circuit Court of Appeals squarely addressed the nonstatutory exemption four years later in *Mackey v. National Football League*.¹⁴⁷ The court affirmed the decision of the District Court of Minnesota¹⁴⁸ holding that the “Rozelle Rule”¹⁴⁹ violated section one of the Sherman Act. In reaching this decision, the Eighth Circuit established a three-prong test for determining the application of the nonstatutory labor exemption:

We find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. . . . Second, federal labor policy is implicated suffi-

141. See 407 U.S. 258, 293-294 (1972).

142. *Id.* at 295.

143. *Id.*

144. 352 U.S. 445 (1957).

145. 407 U.S. at 296.

146. *Id.*

147. 543 F.2d 606 (8th Cir. 1976).

148. See 407 F. Supp. 1000 (D. Minn. 1975).

149. The “Rozelle Rule,” named for the Commissioner of the NFL, allowed the Commissioner to award “one or more players, from the Active, Reserve, or Selection List (including future selection choices)” of a team who signed a free agent formerly under contract to another NFL team if the two teams could not arrive at an agreement over the appropriate compensation to the team losing its free agent. 543 F.2d at 611.

ciently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.¹⁵⁰

After determining that the Rozelle Rule only affected the parties to the agreement and that the restraint involved mandatory subjects of collective bargaining,¹⁵¹ the court found that the National Football League had imposed the rule upon a union "in a relatively weak bargaining position."¹⁵² The court concluded, therefore, that the NFL's Rozelle Rule was not protected by the labor exemption.¹⁵³

In *Smith v. Pro Football, Inc.*,¹⁵⁴ the Circuit Court for the District of Columbia concluded that the NFL's draft violated the Sherman Act.¹⁵⁵ The action was brought by James "Yazoo" Smith, the first round draft choice of the Washington Redskins in 1968.¹⁵⁶ Smith's initial NFL season ended with him suffering a serious neck injury in the Redskins' final game.¹⁵⁷ The District Court for the District of Columbia decided that the nonstatutory labor exemption was inapplicable to the draft and Pro Football did not appeal that ruling.¹⁵⁸ The court went on to consider the facts under both a per se¹⁵⁹ and a rule of reason¹⁶⁰ analysis before concluding that the restraint was unreasonable and a violation of the Sherman Act. The court felt that the appropriate standard was the rule of reason and pointed out that this decision was in line with other courts and commentators considering player restraints in professional sports.¹⁶¹

Nine years later, in *Wood v. National Basketball Association*,¹⁶² Judge Ralph Winter of the Second Circuit Court of Appeals strongly advanced his opinion that player/management issues should be decided by labor

150. 543 F.2d at 614.

151. *See id.* at 615.

152. *Id.* at 615-616.

153. *See id.* at 616.

154. 593 F.2d 1173 (D.C. Cir. 1979).

155. *See id.* at 1175.

156. *See id.* at 1176.

157. *See id.*

158. *See id.* at 1177, n. 11.

159. *See Smith*, 593 F.2d at 1177-1182.

160. *Id.* at 1183-1189.

161. *See id.* at 1182.

162. 890 F.2d 954 (2d Cir. 1987).

law policies and not antitrust law.¹⁶³ Leon Wood,¹⁶⁴ the first round draft choice of the Philadelphia 76ers, brought an action against the National Basketball Association asserting that provisions of the collective bargaining agreement, including the salary cap, the college draft, and prohibitions against player corporations, violated section one of the Sherman Act.¹⁶⁵ Wood further contended that the nonstatutory exemption did not cover these league practices. Wood was initially offered a one-year contract for \$75,000.00 because the 76ers' payroll exceeded the salary cap. Judge Winter decided that Wood's claim that provisions of the agreement constituted a per se violation of the Sherman Act was a "wholesale subversion" of national labor policy which "must be rejected out of hand."¹⁶⁶ Judge Winter also rejected Wood's arguments that the agreements prevented him from achieving his full-market potential¹⁶⁷ and that future employees should not be subject to the exemption because they were outside of the bargaining unit.¹⁶⁸

THE EFFECT OF THE NONSTATUTORY LABOR EXEMPTION UPON THE
NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S
1987 STRIKE AND ITS AFTERMATH

On August 31, 1987, the Collective Bargaining Agreement executed on December 11, 1982, between the National Football League and the National Football League Players Association expired.¹⁶⁹ The 1982 Agreement came after a 57-day strike by the players.¹⁷⁰ A point of significant conflict between the players and owners was the Right of First Refusal/Compensation system established in March 1, 1977, after the demise of the Rozelle Rule. During the five years that the 1982 Agreement was in effect, not a single veteran NFL player switched teams.¹⁷¹ When negotiations failed to produce an agreement after the beginning of

163. Judge Winter was the coauthor with Michael S. Jacobs of an influential article in the 1971 Yale Law Journal, Michael S. Jacobs & Ralph Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

164. Wood is currently a referee in the National Basketball Association. See, e.g., Ed Sherman, *Michael Jordan: He Was No Bowie (Thankfully)*, CHI. TRIB., Jan. 24, 1999, at 4, Janis Carr, *County Takes Time to Honor Its Own Hall of Fame: Seven Who Made Their Name in Sports Are Honored at Induction Ceremony*, ORANGE COUNTY REG., May 1, 1998, at D2.

165. See 15 U.S.C. § 1 (1994).

166. 890 F.2d at 959.

167. See *id.* at 960.

168. See *id.* at 960-961.

169. See *Powell*, 678 F. Supp. at 781.

170. See *id.* at 780.

171. See *id.* at 781.

the 1987 season, the players went on strike on September 22, 1987.¹⁷² The NFL responded by using substitute players in regularly scheduled games. The union concluded the strike on October 15, 1987.¹⁷³

On the same day that the strike ended, a group of players led by named plaintiff Marvin Powell¹⁷⁴ filed suit in the United States District Court of Minnesota alleging that the compensation system violated the Sherman Act. The case was assigned to Judge David S. Doty. The NFL argued that the nonstatutory labor exemption protected the Right of First Refusal/Compensation system under two theories, the absolute immunity theory¹⁷⁵ and the labor law "survival" doctrine.¹⁷⁶ Judge Doty dismissed the absolute immunity doctrine¹⁷⁷ deciding that the NFL relied too heavily upon Justice Arthur Goldberg's¹⁷⁸ concurring and dissenting opinions in *Jewel Tea*¹⁷⁹ and *Pennington*.¹⁸⁰ Judge Doty pointed out that "[g]ranted a labor practice complete insulation from antitrust scrutiny merely because the activity concerns a subject of mandatory bargaining does not strike the proper accommodation between labor and antitrust laws."¹⁸¹ Turning next to consideration of the NFL's survival doctrine theory, Judge Doty concluded that the *Mackey* three-prong test had been satisfied. In finding that the nonstatutory labor exemption survived the expiration of the collective bargaining agreement, Judge Doty decided that "parties to an expired agreement have an obligation to maintain the status quo as to these provisions until a new agreement is concluded or until the parties reach 'impasse'."¹⁸²

Judge Doty then turned his attention to a discussion of the duration during which the exemption remains in effect. The court rejected the players' contention that protections dissolve once the employees make it "unequivocally clear" that they no longer assent to terms or practices because such an application would subject employers to "instant" anti-

172. *See id.*

173. *See id.*

174. Other named plaintiffs were Brian Holloway, Michael Kenn, Michael Davis, James Lofton, Michael Luckhurst, Dan Marino, George Martin, Steve Jordan and the National Football League Players Association.

175. *See* 678 F. Supp. at 783.

176. *See id.* at 783-784.

177. *See id.* at 783.

178. Former Justice Arthur Goldberg argued on behalf of Curt Flood before the Supreme Court in *Flood*, 407 U.S. 258.

179. 381 U.S. 676 (1965).

180. 381 U.S. 657 (1965).

181. 678 F. Supp. at 783.

182. *Id.* at 784.

trust liability and treble damages.¹⁸³ Judge Doty also pointed out that the players' position would not foster the national labor policy favoring good faith bargaining.¹⁸⁴

The court also rejected the position reached in *Bridgeman v. National Basketball Association*,¹⁸⁵ a parallel case involving the breakdown of the collective bargaining process between the National Basketball Association and National Basketball Players Association. Judge Doty quoted the standard created in *Bridgeman*:

I find that the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement. When the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm's length negotiation between the union and the employer.¹⁸⁶

Judge Doty rejected this test deciding that "the standard does not give proper regard to the strong labor policy promoting the collective bargaining process."¹⁸⁷ Judge Doty also rejected the owners' position that the exemption survived indefinitely concerning mandatory subjects of collective bargaining or, alternatively, for the duration of the bargaining relationship. The court rejected this position because the "proposed standards would lead to the anomalous result that illegal provisions exempted from antitrust scrutiny would continue in force longer than lawful terms and conditions."¹⁸⁸ Judge Doty concluded that the

proper accommodation of labor and antitrust interests requires that a labor exemption relating to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*; thereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and the employer runs the risk that continued imposition of the condition will subject the employer to liability.¹⁸⁹

Judge Doty also defined the court's test for impasse as "whether, following intense, good faith negotiations, the parties have exhausted the pros-

183. *See id.* at 786.

184. *See id.* at 787.

185. 675 F. Supp. 960 (D.N.J. 1987).

186. *Powell*, 678 F. Supp. at 787 (quoting *Bridgeman*, 675 F. Supp. at 967).

187. 678 F. Supp. at 787.

188. *Id.* at 788.

189. *Id.* at 788.

pects of concluding an agreement.”¹⁹⁰ Judge Doty concluded that the exemption would trump any challenged restraint until impasse was reached on that issue, and he stayed certain motions until the issue of impasse could be determined.¹⁹¹

Judge Doty subsequently granted summary judgment to the players on June 17, 1988, finding that impasse had been reached as to the free agency issue.¹⁹² Turning to an analysis of jurisdiction to grant an injunction under the Norris-LaGuardia Act,¹⁹³ Judge Doty declared that granting the injunction would “subvert the collective bargaining process and . . . offend a central purpose of the . . . Act.”¹⁹⁴

On appeal to the Eighth Circuit Court of Appeals, Judge John R. Gibson reversed Judge Doty¹⁹⁵ and sided with the NFL. Judge Gibson recounted the analysis of the Eighth Circuit’s prior decision in *Mackey*.¹⁹⁶ Finding that the decision was not controlling because the restraint in question here was the result of collective bargaining, the court decided, however, that the analytical structure for the nonstatutory labor exemption fashioned in *Mackey* must be used.¹⁹⁷ The court considered the impasse test adopted by the district court and analyzed the *Bridgeman* decision.¹⁹⁸ The court decided that the parties “have not reached the point in negotiations where it would be appropriate to permit an action under the Sherman Act.”¹⁹⁹ Noting that the labor laws permit numerous remedies to both management and labor after impasse,²⁰⁰ the court pushed the application of the nonstatutory labor exemption beyond impasse.²⁰¹

As a result of the Eighth Circuit’s decision, the Executive Committee of the NFLPA met on November 3, 1989,²⁰² and considered withdrawing as the collective bargaining agent for all NFL players. Three days later the Executive Committee notified the NFL Management Council that it would abandon its rights to bargain on behalf of the players.²⁰³ The de-

190. *Id.* (citing *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967)).

191. *See id.* at 789.

192. *See* 690 F. Supp. at 812.

193. *See* 29 U.S.C. §§ 101-115 (1994).

194. 690 F. Supp. at 817.

195. *See* 930 F.2d 1293 (8th Cir. 1989).

196. *See id.* at 1297.

197. *See id.* at 1298.

198. *See id.* at 1299-1300.

199. *Id.* at 1302.

200. *See* 930 F.2d at 1302.

201. *Id.* at 1304.

202. *McNeil*, 764 F. Supp. 1351, 1354.

203. *See id.*

cision of the NFLPA Executive Committee was supported by over sixty percent of the players.²⁰⁴ The NFLPA asserted that its status had changed from a labor union to a voluntary professional association and that this decertification reestablished the right to assert antitrust claims because the nonstatutory exemption certainly could not insulate the NFL's newly imposed Plan B.²⁰⁵ Finding that

[b]ecause no 'ongoing collective bargaining relationship' exists, the court determines that nonstatutory labor exemption has ended. . . . In the absence of continued union representation, the Eighth Circuit's rationale for the exemption no longer applies because the parties may not invoke any remedy under the labor laws, whether it be collective bargaining, instituting an NLRB proceeding for failure to bargain in good faith or resorting to a strike.²⁰⁶

Judge Doty offered four orders to conclude his decision in *McNeil*, including striking the NFL's labor exemption defenses.²⁰⁷

In September 1992, a jury finally received an opportunity to consider whether or not the NFL's Plan B violated antitrust laws.²⁰⁸ The jury found in favor of the players, paving the way for more litigation²⁰⁹ and the ultimate resolution of the litigation with the signing of a new collective bargaining agreement.²¹⁰ However, the last chapter of this volume between the NFL and the NFLPA over the nonstatutory labor exemption was just beginning to unfold in the District of Columbia.²¹¹

Brown v. Pro Football, Inc.

The culmination of the twenty year judicial consideration of the nonstatutory labor exemption in the sports area was the decision in *Brown v. Pro Football, Inc.*²¹² At issue was the imposition by the NFL of Resolution G-2.²¹³ In 1989 the NFL created a new Developmental Squad of up

204. *See id.*

205. *See id.*

206. *Id.* at 1359.

207. *See* 764 F. Supp. at 1360.

208. *See* Jackson v. National Football League, 802 F. Supp. 226, 229 (D. Minn. 1992).

209. *See* White v. National Football League, 822 F. Supp. 1389 (D. Minn. 1993).

210. *See id.* at 1395.

211. During the ongoing litigation surrounding the fractured relationship between the NFL and the NFLPA, Judge Winter had another opportunity to comment upon the relationship between labor laws and antitrust laws in *Williams v. National Basketball Ass'n*, 45 F.3d 684 (2d Cir. 1995). Judge Winter again determined that the nonstatutory labor exemption triumphed over an attempt to bring antitrust laws back to the forefront.

212. 821 F. Supp. 20, *rev'd*, 50 F.3d 1041, *aff'd*, 116 S. Ct. 2116 (1996).

213. *See* 50 F.3d at 1046.

to six rookie or first year players.²¹⁴ The crux of the concern to the NFLPA was the NFL's decision to create a fixed salary.²¹⁵ On May 17, 1989, the NFL's management committee proposed a uniform salary of \$1,000.00 per week for all Developmental Squad players.²¹⁶ Prior to the suggestion of a new Developmental Squad salary cap, such players had been able to negotiate their own salary and benefits.²¹⁷ Although the NFLPA disputed the fixed salary aspect of the proposal, the NFL unilaterally imposed the plan.²¹⁸

In May 1990, 235 Developmental Squad players, led by named plaintiff Antony Brown, filed suit claiming that the agreement to fix salaries at \$1,000.00 per week violated the Sherman Act.²¹⁹ The district court ruled that the actions of the NFL were not insulated by the nonstatutory labor exemption, and the case went to trial.²²⁰ The jury award after treble damages exceeded \$30 million.²²¹

The United States Court of Appeals for the District of Columbia Circuit reversed the lower court decision in a split two to one vote.²²² Judge Harry T. Edwards, writing for the majority, ruled

(a)fter reviewing relevant Supreme Court precedent and the policies underlying both the NLRA and the Sherman Act, we conclude that the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship. Because the fixed salary for Developmental Squad players is such an action, we hold that the exemption shields the clubs and the NFL from liability in this case.²²³

In her dissenting opinion, Judge Patricia Wald argued that the majority opinion granted the NFL total immunity from antitrust liability as long as the league and the employee players had engaged in a collective

214. *See id.*

215. *See id.*

216. *See id.*

217. *See id.*

218. *See* 50 F.3d at 1046-1047.

219. *See id.* at 1047.

220. *See id.*

221. *See id.*

222. *See id.* at 1044.

223. 50 F.3d at 1046.

bargaining relationship regarding the Developmental Squad issues.²²⁴ Judge Wald also asserted that

[t]he majority insists its ruling does no more than maintain a level playing field in employer-employee relations and carry out the congressional mandate favoring collective bargaining as the primary means of resolving labor disputes. I do not think so. The reality is that today's decision sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself.²²⁵

The players appealed to the United States Supreme Court. Justice Stephen Breyer wrote the opinion affirming the circuit court's ruling. After carefully considering prior precedent, Justice Breyer queried "[I]f the antitrust laws apply, what are employers to do once impasse is reached?"²²⁶ Justice Breyer's consideration of a number of alternatives led him to conclude that potential antitrust liability could create an unstable collective bargaining process.²²⁷ Justice Breyer determined that the appropriate deference to the collective bargaining process required the disallowance of the use of antitrust laws.²²⁸ Justice Breyer next discounted "several suggestions for drawing the exemption boundary line short of this case,"²²⁹ before finally holding

that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. . . . Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. . . . We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line.²³⁰

CONCLUSION

In analyzing Justice Breyer's decision in *Brown*, Michael J. Cozzillio and Mark S. Levinstein²³¹ argued that:

224. *See id.* at 1058.

225. *Id.* at 1058-1059.

226. 116 S. Ct. 2116, 2122 (1996).

227. *See id.* at 2123.

228. *See id.*

229. *Id.* at 2123.

230. *Id.* at 2127.

231. *See* MICHAEL J. COZZILIO & MARK S. LEVINSTEIN, *SPORTS LAW: CASES AND MATERIALS* 415 (1997).

It is now inevitable that unionized professional athletes who seek to challenge restraints upon player mobility (or similar restraints) through antitrust will have no alternative but to decertify their bargaining representative and terminate the collective bargaining relationship.²³²

This position is certainly correct. Justice Breyer's decision plainly reduces the potential value of the antitrust weapon from a treble damage bomb to a child's pop gun that will necessarily remain predominantly at the bottom of the toy chest. Justice Breyer has solidified Judge Winter's argument from *Wood* that any disagreement between a union and management must be decided at the bargaining table devoid of any antitrust leverage. This leaves all unions in the undesirable position of committing organizational suicide in order to bring their strongest legal weapon to the fore. Does the specter of decertification and a protracted and expensive trial strike fear in the hearts of management? It would hardly seem so. Although management needs the insulation from possible antitrust liability that the nonstatutory labor exemption supplies, the odds that a union will resort to this strategy seem increasingly remote.

The National Basketball Association's recent player lockout provided management with the tactical advantage of placing the issues squarely in the labor realm. Any thought of decertification had to be considered within the context of the *Brown* decision. What amount of time would satisfy Judge Breyer's position? Union decertification creates the possibility of stripping away all benefits contained in the collective bargaining agreement. How many players would be willing to risk the loss of significant wages and benefits for the uncertainty of reentering the judicial system to ascertain if they have been without a collective bargaining representative for the necessary time to satisfy a court construing the *Brown* decision? In each case where a players association has successfully orchestrated and financed antitrust litigation since the advent of the collective bargaining era, the result has been a monetary settlement and/or a quick return to the bargaining table to hammer out a new agreement. Union self-preservation has mandated this result. The only alternative would be the chaos of individual negotiation. Cozzillio and Levinstein's additional observation and metaphor would also appear to be accurate:

If *Brown* functionally forecloses player restraint issues from antitrust review, then the removal of the baseball exemption in this area may be a toothless advance for the players. In essence, they

232. *Id.*

have left the frying pan of the baseball exemption to the fire of *Brown* and its 'decertify or forget the Sherman Act' mandate.²³³

Over twenty-five years after the Supreme Court's decision in *Flood*, Congress finally enacted legislation named to honor the memory of the former Cardinals player who refused to accept a trade and, instead, attempted to use the power created by Congress in 1890 when it passed the Sherman Antitrust Act to free himself from the impact of the reserve clause. Baseball players would have to wait for an arbitrator's decision growing out of a collective bargaining agreement to rid themselves of the reserve clause. Despite Congressional action in 1998, baseball players will assuredly need to continue to resort to collective bargaining rather than antitrust laws to establish their employment relationship with the owners of major league baseball clubs. The language of the Curt Flood Act of 1998 and the legislative intent argue strongly for the narrowest use of antitrust laws in furtherance of the goals of major league baseball players. With the widening gap between large market and small market teams in baseball, the prospect of labor peace in Major League Baseball has not been significantly advanced by the passage of the Curt Flood Act of 1998.

233. *Id.*

APPENDIX

CURT FLOOD ACT OF 1998
PUB. L. 105-297, 112 STAT. 2824

AN ACT 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 1998”.

SEC. 2. PURPOSE.

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

SEC. 3. APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL.

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

“SEC. 27. (a) Subject to subsections (b) through (d), 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 any other professional sports business affecting interstate commerce.

“(b) No 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 baseball players to play baseball at the major league level, including but not limited to.—

“(1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;

“(2) the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the ‘Professional Baseball Agreement’, the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to organized professional baseball’s minor leagues;

“(3) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively;

“(4) any conduct, acts, practices, or agreements protected by Public Law 87-331 (15 U.S.C. Sec. 1291 et seq.) (commonly known as the ‘Sports Broadcasting Act of 1961’);

“(5) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons; or

“(6) any conduct, acts, practices, or agreements of persons not in the business of organized professional major league baseball.

“(c) Only a major league baseball player has standing to sue under this section. For the purposes of this section, a major league baseball player is—

“(1) a person who is a party to a major league player’s contract, or is playing baseball at the major league level; or

“(2) a person who was a party to a major league player’s contract or playing baseball at the major league level at the time of the injury that is the subject of the complaint; or

“(3) a person who has been a party to a major league player’s contract or who has played baseball at the major league level, and who claims he has been injured in his efforts to secure a subsequent major league player’s contract by an alleged violation of the antitrust laws: *Provided however*, That for the purposes of this paragraph, the alleged antitrust violation shall not include any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players; or

“(4) a person who was a party to a major league player’s contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.

“(d)(1) As used in this section, ‘person’ means any entity, including an individual, partnership, corporation, trust or unincorporated association or any combination or association thereof. As used in this section, the National Association of Professional Baseball Leagues, its member leagues and the clubs of those leagues, are not ”in the business of organized professional major league baseball“.

“(2) In cases involving conduct, acts, practices, or agreements that directly relate to or affect both employment of major league baseball players to play baseball at the major league level and also relate to or affect any other aspect of organized professional baseball, including but not limited to employment to play baseball at the minor league level and the other areas set forth in subsection (b), only those components, portions or aspects of such conduct, acts, practices, or agreements that directly relate to or affect employment of major league players to play baseball at the major league level may be challenged under subsection (a) and then only to the extent that they directly relate to or affect employment of major league baseball players to play baseball at the major league level.

“(3) As used in subsection (a), interpretation of the term ‘directly’ shall not be governed by any interpretation of section 151 et seq. of title 29, United States Code (as amended).

“(4) Nothing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws.

“(5) The scope of the conduct, acts, practices, or agreements covered by subsection (b) shall not be strictly or narrowly construed.”