

**Baseball and Antitrust:  
The Legislative History of  
the Curt Flood Act of 1998  
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# THE CURT FLOOD ACT OF 1998: A CONGRESSIONAL RESPONSE TO BASEBALL'S ANTITRUST EXEMPTION

Edmund P. Edmonds<sup>1</sup>

In 1998, Congress passed legislation<sup>2</sup> ostensibly designed to provide major league baseball players with narrowly fashioned relief from three United States Supreme Court decisions<sup>3</sup> that gave Major League Baseball an exemption from antitrust laws. The act was named in honor of Curtis Charles Flood,<sup>4</sup> a courageous<sup>5</sup>

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<sup>1</sup>Director of the Law Library and Professor of Law, University of St. Thomas School of Law, B.A., 1973, University of Notre Dame, M.L.S., 1974, University of Maryland, J.D., 1978, University of Toledo. A version of this article was first published as *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?* at 9 MARQ. SPORTS L.J. 315 (1999). The article was part of a symposium that included numerous discussions of the Act and the history of labor relations in Major League Baseball. Permission to create a revision of that article to serve as an introduction to this legislative history of the Curt Flood Act of 1998 was granted by Paul M. Anderson, Adjunct Assistant Professor of Law and Assistant Director of the National Sports Law Institute at Marquette University School of Law. The author wishes to express his appreciation to Paul Anderson, Associate Professor J. Gordon Hylton and Matthew Mitten, Professor of Law and Director of the National Sports Law Institute of the Marquette University School of Law for their encouragement throughout this project. I also wish to thank Nancy L. Strohmeyer, Associate Law Librarian for Public Services, Loyola University New Orleans School of Law, for her expert editorial assistance, and William Manz, Executive Law Librarian, St. John's University Law School Library, for his steadfast loyalty towards the completion of this project.

<sup>2</sup>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).

<sup>3</sup>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).

<sup>4</sup>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*

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:

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 others 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.<sup>6</sup>

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.<sup>7</sup> The availability of free agency in professional baseball has resulted in over two decades of phenomenal salary growth.<sup>8</sup> In addition to the escalation of salaries, the Major League Baseball

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*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](http://xroads.virginia.edu/~CLASS/am483_97/projects/brady/flood.html) (visited on Feb. 10, 2001)

<sup>5</sup>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).

<sup>6</sup>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).

<sup>7</sup>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).

<sup>8</sup>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).

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*<sup>9</sup> 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.<sup>10</sup> In taking this action, Congress finally responded to the Supreme Court's plea in *Toolson v. New York Yankees*<sup>11</sup> and *Flood v. Kuhn*<sup>12</sup> to seek a legislative solution to the exemption created in *Federal Baseball*. The legislation further reacted to a 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*.<sup>13</sup> Although the legislation was hailed as significant by numerous Congressmen,<sup>14</sup> one must ask

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<sup>9</sup>259 U.S. 200 (1922).

<sup>10</sup>15 U.S.C. " 1-2 (1994).

<sup>11</sup>346 U.S. 356 (1953).

<sup>12</sup>407 U.S. 258 (1972).

<sup>13</sup>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. UBERSTINE, 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*.

<sup>14</sup>Rep. Mike Billakis (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.).

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 cases<sup>15</sup> culminating in the Supreme Court's decision in *Brown v. Pro Football, Inc.*<sup>16</sup> insures that the nonstatutory labor law exemption will nearly always trump a complaint predicated upon antitrust grounds.

This introduction to the legislative history of the Curt Flood Act of 1998 will first outline the provisions of the Act and recent decisions discussing the reach of baseball's antitrust exemption. Second, Congressional commentary will be discussed. Third, the development of the nonstatutory labor exemption by the Supreme 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."<sup>17</sup> Section two further notes that major league baseball players are granted the same antitrust rights as basketball and football players.<sup>18</sup> The United States Supreme Court held in *Radovich v. National Football League*<sup>19</sup> that the National Football League did not enjoy the same antitrust exemption that the Court had granted to baseball in *Federal Baseball* and *Toolson*.<sup>20</sup> Fourteen years later, the Court held that

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<sup>15</sup>See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *McCort 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.*, 518 U.S. 231 (1996).

<sup>16</sup>518 U.S. 231 (1996).

<sup>17</sup>Curt Flood Act of 1998, Pub. L. No. 105-297, ' 2, 112 Stat. 2824.

<sup>18</sup>See *id.*

<sup>19</sup>352 U.S. 445 (1957).

<sup>20</sup>*Id.* at 447-448.

professional basketball was similarly not exempt from antitrust assault in *Haywood v. National Basketball Association*.<sup>21</sup> The final clause of section two declares that the act "does not change the application of the antitrust laws in any other context or with respect to any other person or entity."<sup>22</sup> 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*."<sup>23</sup> Furthermore, subsection (b) reiterates that the act only relates to employment of players.<sup>24</sup> 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.<sup>25</sup> First, the act does not grant any rights to minor league players, including "any reserve clause as applied to minor league players."<sup>26</sup> 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.<sup>27</sup> 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

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<sup>21</sup>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).

<sup>22</sup>Pub. L. No. 105-297, ' 2.

<sup>23</sup>*Id.* at ' 3(a)(emphasis added).

<sup>24</sup>See *Id.* at ' 3(b).

<sup>25</sup>See *Id.*

<sup>26</sup>*Id.* at ' 3(b)(1).

<sup>27</sup>See, e.g., Zimballist, *supra* note 8, 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).

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.<sup>28</sup>

### 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."<sup>29</sup> Furthermore, the marketing or sales of baseball or the licensing of intellectual property rights cannot be challenged.<sup>30</sup> 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*.<sup>31</sup> In fact, in *Wisconsin v. Milwaukee Braves, Inc.*,<sup>32</sup> 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 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 structure ....<sup>33</sup>

Furthermore, the drafters of the legislation appear to establish that the decisions in *Piazza v. Major League Baseball*<sup>34</sup> and *Butterworth v. National League*,<sup>35</sup> should

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<sup>28</sup>Pub. L. No. 105-297, ' 3(b)(2).

<sup>29</sup>*Id.* at ' 3(b)(3).

<sup>30</sup>*See id.*

<sup>31</sup>726 F.2d 1381 (9th Cir. 1984) (antitrust liability issue) & 791 F.2d 1356 (9th Cir. 1986) (damages issue).

<sup>32</sup>144 N.W.2d 1 (Wis. 1966).

<sup>33</sup>*Id.* at 15.

<sup>34</sup>831 F. Supp. 420 (E.D. Pa. 1993).

not be relied upon. Rather, the drafters prefer the analysis found in *New Orleans Pelicans Baseball, Inc. v. National Association of Professional Baseball Leagues, Inc.*<sup>36</sup> and *Minnesota Twins Partnership v. State*<sup>37</sup> determining that the entire business of baseball is covered by the antitrust exemption.

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.<sup>38</sup> Plaintiffs asserted numerous claims under the United States Constitution, federal antitrust laws, and certain state laws.<sup>39</sup> Judge John Padova's thorough and analytical decision<sup>40</sup> discussed the standard of review,<sup>41</sup> federal Constitutional claims,<sup>42</sup> a civil rights claim,<sup>43</sup> the relevant market for antitrust analysis,<sup>44</sup> and standing<sup>45</sup> before turning to a consideration of baseball's antitrust exemption claim. Judge Padova noted that each of the three cases involved the reserve clause.<sup>46</sup> Major League

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<sup>35</sup>644 So. 2d 1021 (Fla. 1994).

<sup>36</sup>1994 U.S. Dist. LEXIS 21468 (E.D. La. 1994).

<sup>37</sup>592 N.W.2d 847 (Minn. 1999), *cert. denied*, 528 U.S. 1013 (1999).

<sup>38</sup>*Piazza*, 831 F. Supp. at 421.

<sup>39</sup>*See id.*

<sup>40</sup>Gary Roberts in *The Curt Flood Act: A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective*, 9 MARQ. SPORTS L.J. 413 (1999) noted the "extraordinary efforts" employed by Judge Padova. Professor Roberts also stated that "[i]his decision might be dismissed as the bizarre and aberrational effort of one Italian-American judge to give redress to two fellow Italian-American plaintiffs whom some National League owners had allegedly defamed in connection with their purported efforts to buy a part interest in the San Francisco Giants." *Id.* at 422.

<sup>41</sup>*See id.* at 424-425.

<sup>42</sup>*See id.* at 425-426.

<sup>43</sup>*See id.* at 426-429.

<sup>44</sup>*See Piazza*, 831 F. Supp. at 429-431.

<sup>45</sup>*See id.* at 431-433.

<sup>46</sup>*See id.* at 435.

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.<sup>47</sup> 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."<sup>48</sup> Judge Padova concluded that the exemption was properly limited to the reserve system, a non-issue in the case, and "rejected Baseball's argument that it is exempt from antitrust liability in this case."<sup>49</sup> In finding a narrow application for baseball's exemption, Judge Padova distinguished *Charles O. Finley & Co. v. Kuhn*,<sup>50</sup> a case involving the power of the Commissioner to disapprove the sale for three baseball players from the Oakland As to other teams.<sup>51</sup> Judge Padova cited the finding of the court in *Henderson Broadcasting Corp. v. Houston Sports Association*<sup>52</sup> which stated that the exemption did not cover the broadcasting of games.

*Butterworth*<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> The Florida Fifth District Court of Appeal affirmed the decision,<sup>56</sup> 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

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<sup>47</sup>*See id.*

<sup>48</sup>*Piazza*, 831 F. Supp. at 436.

<sup>49</sup>*Id.* at 438.

<sup>50</sup>569 F.2d 527 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

<sup>51</sup>831 F. Supp. 436-437.

<sup>52</sup>541 F. Supp. 263 (S.D. Tex. 1982).

<sup>53</sup>644 So. 2d 1021 (Fla. 1994).

<sup>54</sup>*See id.* at 1022.

<sup>55</sup>*See id.*

<sup>56</sup>622 So. 2d 177 (Fla. 5th Dist. Ct. App. 1993).

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.<sup>57</sup>

Like *Piazza*, the *Butterworth* Court refused to extend the antitrust exemption beyond the reserve clause.<sup>58</sup>

Despite the imaginative attempts to narrow the scope of baseball's historic exemption by the courts in *Piazza* and *Butterworth*, a federal court in Louisiana and the Minnesota Supreme Court found the arguments unpersuasive. In *New Orleans Pelicans Baseball, Inc. v. National Association of Professional Baseball Leagues, Inc.*,<sup>59</sup> Judge Martin Feldman found that the exemption did indeed extend to the entire business of baseball. The *Pelicans* case involved a dispute between two rivals attempting to relocate minor league teams to the New Orleans market. Groups representing both the AAA Denver Zephyrs franchise and the AA Charlotte Knights were looking for a new home location after Major League expansion added the Colorado Rockies and the Florida Marlins to the National League displacing both minor league teams from their markets.<sup>60</sup> According to the rules of the National Association of Professional Baseball Leagues, the governing body of Minor League Baseball, a league in a higher classification can control the territory by submitting a notice in response to the request by a team from a lower classification to relocate into that market.<sup>61</sup> In turning aside plaintiff's arguments that *Piazza* should control on a summary judgment motion, Judge Feldman noted that "[a]lthough *Piazza* presents an impressive dissent from precedent, this Court associates itself with the weight of authority."<sup>62</sup>

The Minnesota Supreme Court also refused to accept the rationale of *Piazza* and *Butterworth* in *Minnesota Twins Partnership v. State*.<sup>63</sup> The Minnesota Attorney General's Office had requested compliance with civil investigative demands concerning the possible sale and relocation of the Minnesota Twins

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<sup>57</sup>644 So. 2d at 1025.

<sup>58</sup>See *id.*

<sup>59</sup>1994 U.S. Dist. LEXIS 21468 (E.D. La. 1994).

<sup>60</sup>*Id.* at \*3.

<sup>61</sup>*Id.* at \*14-16.

<sup>62</sup>*Id.* at \*25.

<sup>63</sup>592 N.W.2d 847 (Minn. 1999), *cert. denied*, 528 U.S. 1013 (1999).

franchise.<sup>64</sup> Major League Baseball argued that its antitrust exemption protected it from compliance with the request. In reversing the decision of a Minnesota district court ordering compliance, the Minnesota Supreme Court considered the historic trilogy of United States Supreme Court cases<sup>65</sup> as well as Judge Padova's analysis in *Piazza*.<sup>66</sup> The court decided:

“to follow the lead of those courts that conclude the business of professional baseball is exempt from federal antitrust laws. Further, we conclude that the sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood* is an integral part of the business of professional baseball and falls within the exemption.”<sup>67</sup>

The decisions in *Pelicans* and *Twins* undercut any attempts to rely upon *Piazza*, *Butterworth* and *Postema v. National League of Professional Baseball Clubs*.<sup>68</sup> Congress has tried to foreclose any reliance on these three decisions attempting to narrow the scope of the exemption and to reinforce the analysis presented in *Pelicans* and *Twins*. However, the nature of the language of the Act 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)<sup>69</sup> is the right to pool the league's transfer of broadcast rights in "sponsored telecasts" under the Sports Broadcasting Act of 1961.<sup>70</sup> The great

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<sup>64</sup>592 N.W.2d at 849.

<sup>65</sup>*Id.* at 852-854.

<sup>66</sup>*Id.* at 855.

<sup>67</sup>*Id.*

<sup>68</sup>799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd in part on other grounds*, 998 F.2d 60 (2d Cir. 1993). See *infra* notes 78-83 and accompanying text.

<sup>69</sup>Pub. L. No. 105-297, § 3 (b)(4).

<sup>70</sup>See 5 U.S.C. §§ 1291-1295 (1994).

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 because of the impact on salaries. In 1999, the New York Yankees averaged over \$3.6 million in salaries.<sup>71</sup> Los Angeles, Atlanta, and the New York Mets all exceeded \$3 million.<sup>72</sup> By contrast, the Minnesota Twins took the honors of the lowest average at slightly over \$601,000 while Montreal and Kansas City averaged below \$800,000.<sup>73</sup> This trend will only increase after the record-shattering ten-year, \$252 million deal between the Texas Rangers and Alex Rodriguez.<sup>74</sup>

The fifth item listed under subsection (b) is the relationship between organized professional baseball and umpires or other employees of organized 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*,<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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<sup>71</sup>Ronald Blum, *Average Baseball Salary up 18 Percent*, CHARLESTON DAILY MAIL, Dec. 21, 2000 at 4B.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.*

<sup>75</sup>429 F.2d 1003 (2d Cir. 1970).

<sup>76</sup>See *id.* at 1004.

<sup>77</sup>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

Nine 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*.<sup>78</sup> Pam Postema, the first female to umpire above the Class A level,<sup>79</sup> argued that her termination by AAA Baseball on November 6, 1989, was the result of gender-based discrimination.<sup>80</sup> 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 context in which it operates."<sup>81</sup> 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.<sup>82</sup>

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 players was no less

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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.

<sup>78</sup>799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd in part on other grounds*, 998 F.2d 60 (2d Cir. 1993).

<sup>79</sup>799 F. Supp. at 1478.

<sup>80</sup>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).

<sup>81</sup>799 F. Supp. at 1489.

<sup>82</sup>*Id.*

acrimonious than its relationship with the Major League Umpires Association, the union headed by chief legal counsel Richie Phillips.<sup>83</sup> In July 1999, Phillips badly miscalculated appropriate strategy in negotiations with Major League Baseball when union membership all offered resignations to force the hand of Major League Baseball and the two leagues.<sup>84</sup>

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"<sup>85</sup> from coverage under the statute.

Subsection (c) provides that only "a major league baseball player has standing to sue."<sup>86</sup> Four definitions are provided for what constitutes a "major league baseball player" for the purposes of this subsection.<sup>87</sup> The first definition is any "party to a major league player's contract" or one who "is playing baseball at the major league level."<sup>88</sup> 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 injury that is the subject of the complaint."<sup>89</sup> 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

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<sup>83</sup>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 Sellig, 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.

<sup>84</sup>*Litvin, Blumberg, Matusow and Young Files Lawsuit Against Commissioner Of Baseball Bud Sellig, Major League Baseball, and National American Leagues On Behalf of Richie Phillips*, PR NEWSWIRE, Jan 3, 2001.

<sup>85</sup>Pub L. No. 105-297, § 3(b)(6).

<sup>86</sup>*Id.* at § 3(c). This section created some concern for the Department of Justice because it deprives them of standing.

<sup>87</sup>*Id.* at § 3(c)(1)-3(c)(4).

<sup>88</sup>*Id.* at § 3(c)(1).

<sup>89</sup>*Id.* at § 3(c)(2).

subsequent major league player's contract."<sup>90</sup> 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."<sup>91</sup> 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.<sup>92</sup>

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).<sup>93</sup> This provision presumably limits the impact of decisions like *Piazza* and *Butterworth* 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."<sup>94</sup> 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."<sup>95</sup> This pro-management component of the act was written so that major

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<sup>90</sup>*Id.* at § 3(c)(3).

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>See *Id.* at § 3(d)(2).

<sup>94</sup>*Id.* at § 3(d)(4).

<sup>95</sup>Pub. L. No. 105-297, § 3(d)(5).

league ownership could assert to a court any additional 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

Congressional concern over baseball's special treatment under the nations antitrust law spanned five decades,<sup>96</sup> including numerous hearings and the introduction of a significant number of bills that never reached the floor of Congress. However, the 1994 strike by players, highlighted by the cancellation of the World Series, increased Congressional interest. Furthermore, the inclusion of Article XXVIII<sup>97</sup> in the collective bargaining agreement that ended the labor discord pushed both ownership and the MLBPA towards a real Congressional consideration of the antitrust exemption. Senators Orrin Hatch (R-UT) and Patrick Leahy (D-VT) responded by the introduction of the Curt Flood Act of 1997, S. 53.<sup>98</sup> The legislation simply declared that "the antitrust laws shall apply to the business of professional major league baseball"<sup>99</sup> while listing that the act would not affect the existing applicability or nonapplicability of antitrust laws to certain aspects of minor league baseball, franchise relocation, and the Sports Broadcasting Act.<sup>100</sup> Despite the listed assurances to minor league baseball, the National Association of Professional Baseball Leagues, the governing body of minor leagues was not satisfied. The NAPBL quickly marshaled its significant political clout based upon the great number of Congressional members with minor league baseball in their district.

Hearings were held by the Senate Judiciary Committee on June 17, 1997. Donald Fehr, Executive Director of the Major League Baseball Players Association, and Dan Peltier, a former player at nearly every level of minor and major league baseball testified.<sup>101</sup> Although Stanley Brand had been invited to testify on behalf

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<sup>96</sup>See Edmonds, *supra* note 2 and Lowe, *supra* note 2.

<sup>97</sup>See *supra* note 13.

<sup>98</sup>S. 53, 105th Cong., 1st Sess. (1997).

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*

<sup>101</sup>*Major League Baseball Antitrust Reform: Hearings on S. 53 Before the Senate Comm. on the Judiciary, 105th Cong. (1997).*

of the NAPBL, he did not appear after requesting a delay in the hearing. Further, Allan H. "Bud" Selig, chairman of the Major League Executive Council, declined to appear.

On October 29, 1997, Senate Report 105-118,<sup>102</sup> was issued recommending the passage of a significantly amended S. 53. In revising the language relating to the minor league, the Report noted that "[t]he Committee has consistently sought not to adversely affect the legal status of the minor leagues or minor league players."<sup>103</sup> The final vote of the Judiciary Committee was eleven yeas to six nays with one recusal.<sup>104</sup>

In the discussion on the floor of Congress, Representative Henry Hyde (R-IL) 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."<sup>105</sup> 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."<sup>106</sup> 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.<sup>107</sup>

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<sup>102</sup>S. Rep. 105-118, 105th Cong., 1st Sess. (1997).

<sup>103</sup>*Id.* at 4.

<sup>104</sup>*Id.* at 5.

<sup>105</sup>144 Cong. Rec. H9943 (Oct. 7, 1998).

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

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.<sup>108</sup> Before turning over the discussion to Representative John Conyers, Jr. (D-Mich.), Representative Hyde supported the narrow construction of the legislation by noting that "this bill does not affect the application of the antitrust laws to anyone outside the business of baseball."<sup>109</sup>

Representative Conyers opened by asserting that "professional baseball is the only industry in the United States exempt from the antitrust laws without being subject to regulatory supervision."<sup>110</sup> 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.<sup>111</sup>

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,<sup>112</sup> while stating that "personally, I think this exemption should be repealed altogether."<sup>113</sup> Representative Sherwood L. Boehlert (R-NY), the chairman of the Minor League Baseball Caucus,<sup>114</sup> 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.<sup>115</sup>

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<sup>108</sup>See *id.*

<sup>109</sup>*Id.*

<sup>110</sup>Cong. Rec. H49942-03, H9943 (1998).

<sup>111</sup>See *id.*

<sup>112</sup>*Id.*

<sup>113</sup>144 Cong. Rec. at H9945.

<sup>114</sup>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.

<sup>115</sup>See 144 Cong. Rec. at H9945.

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 3(d)(4) of the act.<sup>116</sup> The development of this exemption during the past three decades has left most professional team sports' athletes in a position where collective bargaining 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 the past 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*<sup>117</sup> decided that union collective activity violated the Sherman Act.<sup>118</sup> 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 exemption<sup>119</sup> 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*<sup>120</sup> considered the antitrust liability of a union, the American Federation of Full Fashioned Hosiery

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<sup>116</sup>Pub. L. No. 105-297, § 3(d)(4).

<sup>117</sup>208 U.S. 274 (1908).

<sup>118</sup>See *id.* at 292-297.

<sup>119</sup>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).

<sup>120</sup>310 U.S. 469 (1940).

Workers, involved in a sit-down strike against the Apex Hosiery Company.<sup>121</sup> The purpose of the strike was to force Apex to recognize the union.<sup>122</sup> The Court held that the strike was not a restraint directed at the product market of Apex's business<sup>123</sup> and did not produce effects which the Sherman Act proscribed.<sup>124</sup> The statutory exemption was determined to insulate legitimate collective bargaining activity.<sup>125</sup>

The following year in *United States v. Hutcheson*,<sup>126</sup> 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.<sup>127</sup> This was based upon the union's nationwide picketing and boycotting of Anheuser-Busch.<sup>128</sup> The union was involved in a jurisdictional dispute between itself and a machinists' union, the International Association of Machinists, working for Busch.<sup>129</sup> 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."<sup>130</sup>

In 1945 the Supreme Court in *Allen Bradley Co. v. Local Union 13, IBEW*<sup>131</sup> rendered its first decision expanding the statutory exemption to include agreements between management and labor.<sup>132</sup> The focus of the Court's inquiry

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<sup>121</sup>See *Id.* at 480-481.

<sup>122</sup>See *Id.* at 481-482.

<sup>123</sup>See *Id.* at 501.

<sup>124</sup>See *Id.* at 502-503.

<sup>125</sup>See *Apex Hosiery*, 310 U.S. at 503.

<sup>126</sup>312 U.S. 219 (1941).

<sup>127</sup>See *Id.* at 228.

<sup>128</sup>See *Id.*

<sup>129</sup>See *Id.*

<sup>130</sup>*Id.* at 232.

<sup>131</sup>325 U.S. 797 (1945).

<sup>132</sup>See *Id.* at 798.

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.<sup>133</sup> 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.<sup>134</sup> The effects were to increase profits for participating companies, force union wages higher, and shorten hours.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup>

The next major Supreme Court decision involving the nonstatutory exemption was *United Mine Workers v. Pennington*.<sup>138</sup> 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.<sup>139</sup> The company claimed that the union had conspired with larger coal companies to eliminate small producers.<sup>140</sup> This was effectuated by imposing a prior wage agreement on all operators.<sup>141</sup> The small operators were caught between the union's demand for a higher wages package and the ability of the larger companies to cut prices.<sup>142</sup> The action was held not to be immune from application of the antitrust law solely

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<sup>133</sup>See *id.* at 798-799.

<sup>134</sup>See *id.* at 799-800.

<sup>135</sup>See *id.* at 799.

<sup>136</sup>See *Allen Bradley*, 325 U.S. at 806.

<sup>137</sup>See *id.* at 811.

<sup>138</sup>381 U.S. 657 (1965).

<sup>139</sup>See *id.* at 659.

<sup>140</sup>See *id.* at 660.

<sup>141</sup>See *id.*

<sup>142</sup>See *id.* at 660-661.

because of union involvement.<sup>143</sup> A critical factor was the presence of the union-employer conspiracy to control conditions beyond their immediate bargaining concerns.<sup>144</sup>

On the same day, in *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,<sup>145</sup> 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.<sup>146</sup> The Court established a balancing test regarding the antitrust and labor law policies.<sup>147</sup> 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.<sup>148</sup>

Ten years later in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*,<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup> 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

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<sup>143</sup>See *United Mine Workers*, 381 U.S. at 662-663.

<sup>144</sup>See *id.* at 665-666.

<sup>145</sup>381 U.S. 676 (1965).

<sup>146</sup>See *id.* at 680.

<sup>147</sup>See *id.* at 688-689.

<sup>148</sup>See *id.* at 689-690.

<sup>149</sup>421 U.S. 616 (1975).

<sup>150</sup>See *id.* at 618-619.

<sup>151</sup>See *id.* at 625-626.

market in ways that would not follow naturally from elimination of competition over wages and working conditions.<sup>152</sup>

### 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*.<sup>153</sup> Justice Marshall noted that "It 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."<sup>154</sup> 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"<sup>155</sup> in *Radovich v. National Football League*.<sup>156</sup> Justice Marshall pointed out, however, "that the issue was not squarely faced"<sup>157</sup> 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."<sup>158</sup>

The Eighth Circuit Court of Appeals squarely addressed the nonstatutory exemption four years later in *Mackey v. National Football League*.<sup>159</sup> The court affirmed the decision of the District Court of Minnesota<sup>160</sup> holding that the "Rozelle Rule"<sup>161</sup> violated section one of the Sherman Act. In reaching this decision, the

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<sup>152</sup>*Id.*

<sup>153</sup>See 407 U.S. 258, 293-294 (1972).

<sup>154</sup>*Id.* at 295.

<sup>155</sup>*Id.*

<sup>156</sup>352 U.S. 445 (1957).

<sup>157</sup>407 U.S. at 296.

<sup>158</sup>*Id.*

<sup>159</sup>543 F.2d 606 (8th Cir. 1976).

<sup>160</sup>See 407 F. Supp. 1000 (D. Minn. 1975).

<sup>161</sup>The "Rozelle Rule," named for the Commissioner of the NFL, allowed 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 sufficiently 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.<sup>162</sup>

After determining that the Rozelle Rule only affected the parties to the agreement and that the restraint involved mandatory subjects of collective bargaining,<sup>163</sup> the court found that the National Football League had imposed the rule upon a union "in a relatively weak bargaining position."<sup>164</sup> The court concluded, therefore, that the NFL's Rozelle Rule was not protected by the labor exemption.<sup>165</sup>

In *Smith v. Pro Football, Inc.*,<sup>166</sup> the Circuit Court for the District of Columbia concluded that the NFL's draft violated the Sherman Act.<sup>167</sup> The action was brought by James "Yazoo" Smith, the first round draft choice of the Washington Redskins in 1968.<sup>168</sup> Smith's initial NFL season ended with him

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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.

<sup>162</sup>543 F.22d at 614.

<sup>163</sup>*See id.* at 615.

<sup>164</sup>*Id.* at 615-616.

<sup>165</sup>*See id.* at 616.

<sup>166</sup>593 F.2d 1173 (D.C. Cir. 1979).

<sup>167</sup>*See id.* at 1175.

<sup>168</sup>*See id.* at 1176.

suffering a serious neck injury in the Redskins' final game.<sup>169</sup> 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.<sup>170</sup> The court went on to consider the facts under both a per se<sup>171</sup> and a rule of reason<sup>172</sup> 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.<sup>173</sup>

Nine years later, in *Wood v. National Basketball Association*,<sup>174</sup> Judge Ralph Winter of the Second Circuit Court of Appeals strongly advanced his opinion that player/management issues should be decided by labor law policies and not antitrust law.<sup>175</sup> Leon Wood,<sup>176</sup> 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.<sup>177</sup> 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

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<sup>169</sup>See *Id.*

<sup>170</sup>See *id.* at 1177, n. 11.

<sup>171</sup>See *Smith*, 593 F.2d at 1177-1182.

<sup>172</sup>*Id.* at 1183-1189.

<sup>173</sup>See *Id.* at 1182.

<sup>174</sup>890 F.2d 954 (2d Cir. 1987).

<sup>175</sup>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).

<sup>176</sup>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.

<sup>177</sup>See 15 U.S.C. § 1 (1994).

which "must be rejected out of hand."<sup>178</sup> Judge Winter also rejected Wood's arguments that the agreements prevented him from achieving his full-market potential<sup>179</sup> and that future employees should not be subject to the exemption because they were outside of the bargaining unit.<sup>180</sup>

### **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.<sup>181</sup> The 1982 Agreement came after a 57-day strike by the players.<sup>182</sup> 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.<sup>183</sup> When negotiations failed to produce an agreement after the beginning of the 1987 season, the players went on strike on September 22, 1987.<sup>184</sup> The NFL responded by using substitute players in regularly scheduled games. The union concluded the strike on October 15, 1987.<sup>185</sup>

On the same day that the strike ended, a group of players led by named plaintiff Marvin Powell<sup>186</sup> filed suit in the United States District Court of Minnesota alleging that the compensation system violated the Sherman Act. The case was

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<sup>178</sup>890 F.2d at 959.

<sup>179</sup>See *id.* at 960.

<sup>180</sup>See *id.* at 960-961.

<sup>181</sup>See *Powell*, 678 F. Supp. 781.

<sup>182</sup>See *id.* at 780.

<sup>183</sup>See *id.* at 781.

<sup>184</sup>See *id.*

<sup>185</sup>See *id.*

<sup>186</sup> 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.

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 theory<sup>187</sup> and the labor law "survival" doctrine.<sup>188</sup> Judge Doty dismissed the absolute immunity doctrine<sup>189</sup> deciding that the NFL relied too heavily upon Justice Arthur Goldberg's<sup>190</sup> concurring and dissenting opinions in *Jewel Tea*<sup>191</sup> and *Pennington*.<sup>192</sup> Judge Doty pointed out that "granting 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."<sup>193</sup> 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'."<sup>194</sup>

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" antitrust liability and treble damages.<sup>195</sup> Judge Doty also pointed out that the players' position would not foster the national labor policy favoring good faith bargaining.<sup>196</sup>

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<sup>187</sup>See 678 F. Supp. at 783.

<sup>188</sup>See *id.* at 783-784.

<sup>189</sup>See *id.* at 783.

<sup>190</sup>Former Justice Arthur Goldberg argued on behalf of Curt Flood before the Supreme Court in *Flood*, 407 U.S. 258.

<sup>191</sup>381 U.S. 676 (1965).

<sup>192</sup>381 U.S. 657 (1965).

<sup>193</sup>678 F. Supp. at 783.

<sup>194</sup>*Id.* at 784.

<sup>195</sup>See *id.* at 786.

<sup>196</sup>See *id.* at 787.

The court also rejected the position reached in *Bridgeman v. National Basketball Association*,<sup>197</sup> 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.<sup>198</sup>

Judge Doty rejected this test deciding that "the standard does not give proper regard to the strong labor policy promoting the collective bargaining process."<sup>199</sup> 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."<sup>200</sup> 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.<sup>201</sup>

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<sup>197</sup>675 F. Supp. 960 (D.N.J. 1987).

<sup>198</sup>*Powell*, 678 F. Supp. at 787 (quoting *Bridgeman*, 675 F. Supp. at 967).

<sup>199</sup>678 F. Supp. at 787.

<sup>200</sup>*Id.* at 788.

<sup>201</sup>*Id.* at 788.

Judge Doty also defined the court's test for impasse as "whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement."<sup>202</sup> 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.<sup>203</sup>

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.<sup>204</sup> Turning to an analysis of jurisdiction to grant an injunction under the Norris-LaGuardia Act,<sup>205</sup> Judge Doty declared that granting the injunction would "subvert the collective bargaining process and ... offend a central purpose of the ... Act."<sup>206</sup>

On appeal to the Eighth Circuit Court of Appeals, Judge John R. Gibson reversed Judge Doty<sup>207</sup> and sided with the NFL. Judge Gibson recounted the analysis of the Eighth Circuit's prior decision in *Mackey*.<sup>208</sup> 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.<sup>209</sup> The court considered the impasse test adopted by the district court and analyzed the *Bridgeman* decision.<sup>210</sup> 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."<sup>211</sup> Noting that the labor laws permit numerous remedies to both

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<sup>202</sup>*Id.* (citing *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967)).

<sup>203</sup>*See id.* at 789.

<sup>204</sup>*See* 690 F. Supp. at 812.

<sup>205</sup>*See* 29 U.S.C. §§ 101-115 (1994).

<sup>206</sup>690 F. Supp. at 817.

<sup>207</sup>*See* 930 F.2d 1293 (8th Cir. 1989).

<sup>208</sup>*See id.* at 1297.

<sup>209</sup>*See id.* at 1298.

<sup>210</sup>*See id.* at 1299-1300.

<sup>211</sup>*Id.* at 1302.

management and labor after impasse,<sup>212</sup> the court pushed the application of the nonstatutory labor exemption beyond impasse.<sup>213</sup>

As a result of the Eighth Circuit's decision, the Executive Committee of the NFLPA met on November 3, 1989,<sup>214</sup> 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.<sup>215</sup> The decision of the NFLPA Executive Committee was supported by over sixty percent of the players.<sup>216</sup> 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.<sup>217</sup> Judge Doty found that

because 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.<sup>218</sup>

The judge offered four orders to conclude his decision in *McNeil*, including striking the NFL's labor exemption defenses.<sup>219</sup>

In September 1992, a jury finally received an opportunity to consider whether or not the NFL's Plan B violated antitrust laws.<sup>220</sup> The jury found in favor

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<sup>212</sup>See 930 F.2d at 1302.

<sup>213</sup>*Id.* at 1304.

<sup>214</sup>*McNeil*, 764 F. Supp. 1351, 1354.

<sup>215</sup>See *Id.*

<sup>216</sup>See *Id.*

<sup>217</sup>See *Id.*

<sup>218</sup>*Id.* at 1359.

<sup>219</sup>See 764 F. Supp. at 1360.

of the players, paving the way for more litigation<sup>221</sup> and the ultimate resolution of the litigation with the signing of a new collective bargaining agreement.<sup>222</sup> 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.<sup>223</sup>

*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.*<sup>224</sup> At issue was the imposition by the NFL of Resolution G-2.<sup>225</sup> In 1989 the NFL created a new Developmental Squad of up to six rookie or first year players.<sup>226</sup> The crux of the concern to the NFLPA was the NFL's decision to create a fixed salary.<sup>227</sup> On May 17, 1989, the NFL's management committee proposed a uniform salary of \$1,000.00 per week for all Developmental Squad players.<sup>228</sup> Prior to the suggestion of a new Developmental Squad salary cap, such players had been able to negotiate their own salary and benefits.<sup>229</sup> Although the NFLPA disputed the fixed salary aspect of the proposal, the NFL unilaterally imposed the plan.<sup>230</sup>

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<sup>220</sup>See *Jackson v. National Football League*, 802 F. Supp. 226, 229 (D. Minn. 1992).

<sup>221</sup>See *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993).

<sup>222</sup>See *id.* at 1395.

<sup>223</sup> 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.

<sup>224</sup>821 F. Supp. 20, *rev'd*, 50 F.3d 1041, *aff'd*, 518 U.S. 231 (1996).

<sup>225</sup>See 50 F.3d at 1046.

<sup>226</sup>See *id.*

<sup>227</sup>See *id.*

<sup>228</sup>See *id.*

<sup>229</sup>See *id.*

<sup>230</sup>See *id.* at 1046-1047.

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.<sup>231</sup> The district court ruled that the actions of the NFL were not insulated by the nonstatutory labor exemption, and the case went to trial.<sup>232</sup> The jury award after treble damages exceeded \$30 million.<sup>233</sup>

The United States Court of Appeals for the District of Columbia Circuit reversed the lower court decision in a split two to one vote.<sup>234</sup> 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.<sup>235</sup>

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 bargaining relationship regarding the Developmental Squad issues.<sup>236</sup> Judge Wald also asserted that

the 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

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<sup>231</sup>See *Id.* at 1047.

<sup>232</sup>See *Id.*

<sup>233</sup>See *Id.*

<sup>234</sup>See *Id.* at 1044.

<sup>235</sup>See *Id.* at 1046.

<sup>236</sup>See *Id.* at 1058.

sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself.<sup>237</sup>

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 "If the antitrust laws apply, what are employers to do once impasse is reached?"<sup>238</sup> Justice Breyer's consideration of a number of alternatives led him to conclude that potential antitrust liability could create an unstable collective bargaining process.<sup>239</sup> Justice Breyer determined that the appropriate deference to the collective bargaining process required the disallowance of the use of antitrust laws.<sup>240</sup> Justice Breyer next discounted "several suggestions for drawing the exemption boundary line short of this case,"<sup>241</sup> 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.<sup>242</sup>

## Conclusion

In analyzing Justice Breyer's decision in *Brown*, Michael J. Cozzillio and Mark S. Levinstein<sup>243</sup> argued that:

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<sup>237</sup>*Id.* at 1058-1059.

<sup>238</sup>518 U.S. 231, 241 (1996).

<sup>239</sup>*See id.* at 242.

<sup>240</sup>*See id.*

<sup>241</sup>*See id.* at 243.

<sup>242</sup>*See id.* at 250.

<sup>243</sup> 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.<sup>244</sup>

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 have left the frying pan

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<sup>244</sup>*Id.*

of the baseball exemption to the fire of Brown and its 'decertify or forget the Sherman Act' mandate.<sup>245</sup>

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.

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<sup>245</sup>*Id.*