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BASEBALL'S ANTITRUST EXEMPTION AND THE RESERVE SYSTEM: REAPPRAISAL OF AN ANACHRONISM

The century that has elapsed since the inception of professional baseball in 1864 has seen American professional sports evolve from an embryonic form of diversion into a leviathan industry of international scope and influence. This phenomenal development did not transpire in an economic vacuum; the flourishing of professional sports was an integral part of a period of unprecedented economic and industrial growth.

This same century also witnessed the first attempts by American government to regulate the wild, often ruthless expansion of new industries. In 1890, Congress passed the Sherman Act[1] designed to destroy monopoly powers and combinations in restraint of trade operating in interstate commerce. The Sherman Act involved the federal government in antitrust enforcement, a matter previously under the common law jurisdiction of the state courts.[2] In 1914, the federal antitrust laws were supplemented by the passage of the Clayton Act,[3] providing, *inter alia*, for a civil remedy in the form of treble damages, as well as injunctive relief, for Sherman Act violations.[4]

In the early years of federal antitrust law, the athletics industry was in its neophyte stage and consequently did not warrant the close

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1. 15 U.S.C. §§ 1-7 (1964).

2. *See, e.g.*, Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887).

3. 15 U.S.C. §§ 12-15, 19-22, 27, 44 (1964); 29 U.S.C. §§ 52, 53 (1964).

4. Generally, a civil cause of action for an alleged antitrust violation is constructed from two components:

(1) The substantive violation, Sherman Act §§ 1, 2; 15 U.S.C. 1, 2 (1964) which provide in pertinent part:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . .
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . .

(2) The civil remedy, Clayton Act § 4; 15 U.S.C. § 15 (1964):

> Sec. 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

governmental scrutiny and regulation directed against the more highly developed industries. It was in this favorable climate of tolerance toward an innocuous leisure-oriented industry that the mold was forged which would pattern the player-management relationship in organized baseball for over four decades, and which continues to pattern it to this day. This mold was the Supreme Court decision in *Federal Baseball Club of Baltimore v. National League*[5] exempting professional baseball from regulation under the Sherman Act.

The province of this note includes an examination of the antitrust exemption—its legal basis and effect upon player controls (specifically the reserve rule), the legality of such controls absent the exemption, and possible alternative means of player control should the exemption be abolished. Space limitations foreclose the discussion of such other exemption-related windfalls as restraints on team ownership and televising rights.

Origin and Nature of the Reserve Rule[6]

In 1875 the Boston Red Stockings captured the professional baseball championship with a record of seventy-one victories against eight losses. At the opposite extreme, the cellar-bound Brooklyn Atlantics were able to salvage only two conquests in a season which saw them compile forty-two defeats.[7] At the root of this disparity of power among the professional baseball teams was the player salary differential. Wealthy clubs, situated in populous urban areas, could allocate more funds to player salaries than their less affluent rivals, and were thereby able to attract the better players. As these wealthy clubs consequently compiled vastly superior records, their gate receipts soared as those of the poorer clubs concomitantly declined. Bidding among the well-endowed clubs in the limited market for player services drove salaries beyond the reach of their less fortunate counterparts. The result was such athletic travesties as the 1875 championship "race" previously mentioned.[8]

These dynastic wars for players' services also produced another, more

5. 259 U.S. 200 (1922).

6. Throughout this note, "reserve rule," "reserve clause," "reserve agreement," and "reserve system" are used interchangeably. Arguably, the terms have slightly different meanings but these distinctions in definition are not material to the discussion which concerns this note.

7. H.R. Rep. No. 2002, 82d Cong., 2d Sess. 17-22 (1952) [hereinafter cited as House Baseball Report].

8. *See generally* Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 Yale L.J. 576 (1953).

pernicious, result. As the quality of competition on the playing field increasingly reflected the competition at the bargaining table, spectator interest declined. A consistent winner attracts avid spectators and supporters from all regions of the country. But a team that is perennially dominant in a field of marginal competition reduces the entire sport to a decadent parody. As the public grew weary of watching the predictable mismatches, even the better clubs found themselves playing to empty stadiums. Diminished gate receipts plus astronomical player salaries rendered it impossible for any club to show a profit, so that the National League, organized from fifteen teams in 1876, had lost eight of those teams to financial dissolution by 1879.[9]

It was in this aura of impending death in 1879 that the surviving seven teams of the National League met and secretly agreed to "reserve," free from economic competition, five players apiece for the approaching season.[10] As it happened, this reserve agreement rescued baseball from an early demise, for not only did the new rule reduce team operating expenses by depressing player salaries, it also produced the unforeseen felicitous result of balancing inter-club strength by restricting the flow of superior players to the league moguls. The effect on the young industry was immediate and dramatic; the financial outlook of the National League improved steadily from the year 1881, so that by 1890 the future of professional baseball appeared secure.[11]

The reserve rule, while achieving the desired result of averting imminent financial ruin, soon became the most repressive form of control over a skilled labor market in American industry. By 1883, an agreement between the National League and its now-defunct rival, the American Association, permitted each club to reserve nine players, and imposed sanctions on a club which "tampered" with another club's reserved players.[12] Finally, the reserve rule was incorporated, with a provision for assignability, into a uniform player's contract, rendering the organization's control over the player virtually absolute.[13]

Since its conception, this restrictive rule has been the object of periodic attacks by disconsolate players. A brief analysis of the effect of the reserve rule renders apparent the justification for these attacks. First, a player signing with a professional team signs a uniform contract in

9. HOUSE BASEBALL REPORT 18-22.
10. *Id.* at 22.
11. *Id.* at 23-25.
12. *Id.* at 26-27.
13. *Id.* at 29-31.

which he agrees that the club holding the contract will have a unilateral option to negotiate with him in the future, so that he is bound indefinitely to bargain with only one team. Secondly, this club retains the right to assign his contract to another club, which thereby acquires an exclusive right of dealing with the player. Finally, should the player breach his contract, he is blacklisted, so that no other professional baseball team will bargain with him. In short, the player has two alternatives—play for the team that holds his contract, or retire from professional baseball.[14]

The attacks launched by players against the reserve rule have generally been grounded on alleged violations of the Sherman Act. These grounds appear to be substantively solid, as will be seen below, but the attacks have failed due to a judicially-created hiatus in the law which has allowed organized baseball to escape antitrust enforcement.

Organized Baseball's Antitrust Exemption

In 1922 the Federal Baseball Club of Baltimore brought an action against the National League for allegedly buying out the constituent teams in plaintiff's Federal League, and in so doing attempting to monopolize major league baseball.[15] In disposing of plaintiff's appeal, the Supreme Court held that the exhibition and operation of professional baseball was not the transaction of interstate commerce, and therefore was not subject to federal regulation under the Sherman Act.[16]

The rule in *Federal Baseball* remained substantially unchallenged until 1949 when in *Gardella v. Chandler*[17] a player, suspended for a violation of his reserve clause, questioned the continued validity of the antitrust exemption. In departing from the 1922 ruling, the Court of Appeals for the Second Circuit found that interstate transmission of radio and television broadcasts of baseball games, together with new decisions holding personal services to be the subject of commerce, had rendered the old exemption rule nugatory.[18] Commissioner Chandler did not appeal this unfavorable decision, and the controversy was settled

14. For an understandably biased although fairly accurate statement of the ramifications of the reserve rule, see Curt Flood's account of his struggle with the rule—C. Flood, The Way It Is (1971).

15. Federal Baseball Club of Baltimore, Inc. v. National League, 259 U.S. 200 (1922).

16. *Id.* at 209.

17. 172 F.2d 402 (2d Cir. 1949).

18. *Id.* at 408.

out of court, but it appeared for the present that the exemption rule was dead.

Nevertheless, any hope on the part of the players of securing the protection of the antitrust laws was extinguished by the Supreme Court in 1953 in *Toolson v. New York Yankees*.[19] Over the cogent dissent of Justice Burton,[20] the Court reaffirmed per curiam the ruling in *Federal Baseball*, basing its decision not on the interstate commerce issue, but on organized baseball's thirty year development in reliance on the antitrust exemption.[21] The Court further intimated that if it was advisable to abolish the exemption, such result should be effected by legislative action and not by judicial decision.[22] Although various bills have been introduced in Congress to bring organized baseball under the purview of the Sherman Act,[23] none have been enacted into law, and the holding in *Toolson* remains the law to this day.

The Present Challenge to the System

As this note goes to press, another action is pending which seeks to review the validity of the antitrust exemption. In 1969, outfielder Curt Flood was traded by the St. Louis National Baseball Club to Philadelphia. Flood objected to the trade and appealed to Commissioner Kuhn,

19. 346 U.S. 356 (1953).

20. In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized "farm system" of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.

Id. at 357-58.

21. *Id.* at 357.

22. *Id.*

23. *Id.* The most recent of these bills was introduced in April, 1970 by Senator Warren G. Magnuson. S. 3725, 91st Cong., 2d Sess. (1970). A companion bill was introduced in the House of Representatives by Representative Brock Adams. H.R. 17078, 91st Cong., 2d Sess. (1970). The purpose of these bills is to compel baseball to operate subject to antitrust law and to remove the judicially-created advantage that baseball has enjoyed over football, basketball, and hockey.

requesting to be assigned the status of a free agent in order to be able to bargain with other major league clubs. Kuhn refused, and Flood thereupon instituted suit against Kuhn and the National League, claiming that the reserve clause is a violation of the Sherman Act to the extent that it imposes an unreasonable restraint on interstate commerce.[24] In the first stage of this controversy, the District Court of the Southern District of New York denied plaintiff's motion for a preliminary injunction against enforcement of the reserve clause because the plaintiff had not shown sufficient evidence of probable ultimate success necessary to support a motion for preliminary equitable relief.[25] One month thereafter Flood won the second round when the court denied a motion by defendants to dismiss the complaint, holding that substantial issues of fact were raised which could not be disposed of without a plenary hearing on the merits.[26]

The case proceeded to trial, and in July 1970, the court resolved the issue in favor of the defendants.[27] The court reasoned that although organized baseball was subject to regulation by Congress under the commerce power, Congress had not seen fit to disturb the 1953 ruling in *Toolson*, and therefore that ruling must control.[28] Plaintiff filed an appeal,[29] and the issue will apparently eventuate before the Supreme Court once more. This appeal will involve two questions, the answers to which may seriously affect the future operation of organized baseball. The first question to confront the Court is, should the antitrust exemption be abolished? The second is, does the reserve rule, as presently constituted, violate the Sherman Act? If both questions are answered in the affirmative, the implications respecting the continued stability of professional baseball are critical. What is the probability of the Court answering both questions in the affirmative, *i.e.*, resolving the issues in favor of the plaintiff, Flood? To answer this enquiry, it is necessary to investigate the developments in antitrust law surrounding the decisions in *Federal Baseball* and *Toolson*.

Basis and Validity of the Rule in *Federal Baseball*

The original Supreme Court decision that the operation of organized

24. Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970).
25. *Id.* at 805.
26. Flood v. Kuhn, 312 F. Supp. 404, 406-407 (S.D.N.Y. 1970).
27. Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970).
28. *Id.* at 278.
29. *Appeal docketed*, No. 35424, 2d Cir., July 24, 1970.

baseball did not constitute interstate commerce[30] was based on two grounds. First, the Court concluded that the exhibition of baseball games was purely a local affair.[31] This result was reached on the authority of *Hooper v. California*[32] in which it was held that the issuance of an insurance policy to a resident of a different state from that of the insurance company was not the transaction of interstate commerce,[33] since, in such cases, "the [interstate] transport is a mere incident, not the essential thing." [34] The second reason for the Court's decision in *Federal Baseball* was that the exhibition of baseball games was not trade or commerce "in the commonly accepted use of these words." [35] The Court reasoned that "personal effort, not related to production, is not a subject of commerce," [36] analogizing that a law firm sending an associate into another state to argue a case, or a lecture board sending a lecturer to another state does not thereby engage in interstate commerce.[37] For these reasons, the Court decided that the exhibition of professional baseball games was not the transaction of interstate commerce, and therefore was not subject to the jurisdiction of the Sherman Act.

Since the subsequent decision in *Toolson* was based in large part on the doctrine of stare decisis, following *Federal Baseball*, the continued viability of the rule in *Federal Baseball* becomes a relevant subject of enquiry.

Upon analysis it appears that the reasoning which led to the conclusion that the exhibition of games was purely a state affair is no longer valid. In 1944, the Supreme Court overruled *Hooper*, to the effect that insurance contracts are no longer considered local in nature, and a business that conducts activities across state lines is therefore subject to regulation by Congress under the commerce clause.[38] Furthermore, the concept of interstate commerce has since been extended to its logical limit, so that by 1948 any local activity which in any way affected interstate commerce was considered subject to federal regulation.[39]

30. Federal Baseball Club of Baltimore, Inc. v. National League, 259 U.S. 200 (1922).
31. *Id.* at 208.
32. 155 U.S. 648 (1895).
33. *Id.* at 655.
34. 259 U.S. 200, 209 (1922).
35. *Id.*
36. *Id.*
37. *Id.*
38. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).
39. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948).

Finally, the Supreme Court has repeatedly stated that the intent of Congress was to incorporate the full constitutional extent of the commerce power into the Sherman Act,[40] so that fine distinctions respecting the degree of interstate commerce affected would seem to be irrelevant.

The second ground for the rule in *Federal Baseball* has likewise been eroded by later decisions. Personal services, even though not commercially "productive," may now generally be considered the subject of commerce.[41] It is therefore apparent that the reasoning which induced the 1922 Court to promulgate the exemption rule has become obsolete.

Despite the fact that the reason for the rule was by this time defunct, the Supreme Court in 1953 upheld the *Federal Baseball* decision in *Toolson v. New York Yankees*.[42] Without reviewing the material issues of law, the Court based its decision on two grounds: (1) that the industry had developed to its present stage on the assumption that it was exempt from antitrust legislation,[43] and (2) that Congress had failed to invalidate through legislation the 1922 rule and hence was presumed to have acquiesced in the antitrust exemption.[44] Although these may well have been the practical reasons for the decision, the only legal justification was a strict application of the doctrine of stare decisis.[45]

The reasons advanced by the Court in support of the *Toolson* decision are not immune from criticism. Regarding the reliance of organized baseball upon the antitrust exemption, the dissenting opinion aptly points out that *Federal Baseball* did not foreclose the possibility of organized baseball ever becoming interstate commerce, but simply stated that it was not such in 1922.[46] It would be absurd to conclude that in formulating a rule of law the Supreme Court thereby contracts with all parties affected that such rule will continue, perpetually immutable, surviving the changes in the economic and social matrices from which it sprung.

Accord, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

40. *E.g.,* United States v. Frankfort Distilleries, 324 U.S. 293, 298 (1945); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944); Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932).

41. United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950) (real estate brokerage service); American Medical Ass'n v. United States, 317 U.S. 519 (1943) (group health service).

42. 346 U.S. 356 (1953).

43. *Id.* at 357.

44. *Id.*

45. *See* United States v. Shubert, 348 U.S. 222, 230 (1955).

46. 346 U.S. 356, at 357-58.

In response to the reasoning advanced in *Toolson* that the failure of Congress to enact legislation invalidating *Federal Baseball* was an indication of its intent to exempt baseball from antitrust regulation, it is sufficient to note that in 1952 the Subcommittee on Study of Monopoly Power of the House Judiciary Committee expressly denied an intent to exempt any sport from antitrust control.[47] Furthermore, Congress has specifically exempted certain enumerated activities from control under the Sherman Act, such as farm cooperatives,[48] insurance sales,[49] and labor organizations.[50] The enumeration by Congress of these specific exemptions, in conjunction with the fact that the Sherman Act has been held to encompass the exercise of the full commerce power,[51] would seem to foreclose all argument that Congress intended to exempt baseball from antitrust regulation. It is illogical in the extreme to argue that, on the one hand, the Sherman Act is armed with the plenary power of Congress to regulate interstate commerce, subject only to Congress's own enumerated limitations, and on the other, that Congress's apparent inaction in response to a 1922 judicially-created limitation served to delimit that plenary power.

It would therefore appear that, as previously stated, the sole legal basis for the *Toolson* decision was rigid stare decisis. A decision based on stare decisis must of course stand or fall on the reasoning underlying the precedent decision. Where surrounding conditions have so altered as to render that reasoning no longer valid, blind adherence to the doctrine of stare decisis can only lead to a state of legal atrophy. For reasons previously discussed, it is obvious that the rationale which supported *Federal Baseball* is no longer tenable. Moreover, developments in antitrust law and professional sports since *Toolson* have rendered the rule affirmed therein even more archaic.

POST-*Toolson* DEVELOPMENTS

Perhaps the most significant judicial determination in the area of organized athletics since *Toolson* was the Court's express refusal in

47. In discussing the rejection of four bills introduced in Congress to exempt professional sports from the antitrust laws, the subcommittee observed, "Such a broad exemption could not be granted without substantially repealing the antitrust laws." HOUSE BASEBALL REPORT 230.

48. Capper-Volstead Act, 42 Stat. 388-89, 7 U.S.C. §§ 291, 292 (1964).

49. McCarran-Ferguson Act, 59 Stat. 34, 61 Stat. 448, 15 U.S.C. § 1013 (1964).

50. Clayton Act § 6, 38 Stat. 731, 15 U.S.C. § 17 (1964).

51. Note 40 *supra*.

Radovich v. National Football League[52] to extend the antitrust exemption beyond the sphere of professional baseball. This decision carved away any remaining vestigial bases of *Federal Baseball* and *Toolson*, and left the baseball exemption rule a conspicuous anomaly.[53] Recognizing this effect, the *Radovich* Court reiterated the opinion that the appropriate means of eliminating the inconsistency was through legislation.[54] The anomaly has since been thrown into sharp relief by the routine application of the antitrust laws to such other professional sports as basketball,[55] bowling,[56] boxing,[57] and golf,[58] and the continued refusal to reevaluate the status of baseball.[59]

The commercial plexus of organized baseball has been vastly extended since the *Toolson* decision. Eight new clubs have joined the major leagues, the franchise structure has been projected to the West Coast, farm systems have been increasingly integrated into the organization, intercontinental telecasting has greatly increased television receipts. These developments, together with the 1965 incorporation of a major league draft agreement (the restrictive effect of which will be discussed below) would seem to beg a reappraisal of *Toolson* and the unique position which organized baseball consequently continues to enjoy. An opportunity for such a reappraisal will presumably be afforded by Flood's pending appeal.

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52. 352 U.S. 445 (1957).

53. Dissenting opinion of Justice Frankfurter:

> It does not derive from the Sherman Law because the most conscientious probing of the text and the interstices of the Sherman Law fails to disclose that Congress, whose will we are enforcing, excluded baseball—the conditions under which that sport is carried on—from the scope of the Sherman Law but included football.

Id. at 455.

54. If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision.

Id. at 452.

55. Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961).

56. Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966).

57. United States v. International Boxing Club, 348 U.S. 236 (1955).

58. Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir. 1966).

59. *E.g.*, Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970).

LEGALITY OF THE RESERVE RULE

If the Supreme Court decides to overrule *Toolson* and thus to abrogate the antitrust exemption, the second issue to be decided is whether the reserve rule as it now exists is illegal under the Sherman Act. The contention of Flood and previous litigants is that the reserve rule imposes an unreasonable restraint on commerce to the extent that it impedes the bargaining ability of the players. As a result of the exemption rule, the courts have never grappled with this question,[60] so that discussion of the issue can be based only on analogy to similar antitrust problems.

A strict interpretation of section one of the Sherman Act would seem to indicate that, aside from an exception allowing vertical agreements fixing the price of fair-traded items,[61] all agreements in restraint of trade are illegal, and the early antitrust cases so held.[62] In 1911, the Supreme Court ruled in *Standard Oil Co. of New Jersey v. United States*[63] that the Sherman Act proscribed only unreasonable restraints of trade. *Standard Oil* formulated the "rule of reason" test which governs the majority of antitrust decisions to this day.[64] Simply stated, the thrust of the rule of reason approach is that the courts will consider the effect of the agreement upon the entire industry in question in light of prevailing conditions, and if found unduly restrictive, or if the dominant purpose of the agreement is the restraint of trade, the agreement will be held violative of the Sherman Act. Conversely, if the industry can demonstrate an overriding justification for the restrictive agreement in rule of reason cases, such agreement will generally be held legal. In short, the legality of agreements in this type of situation is determined on a case-by-case basis.

Some activities have been determined to be so clearly contrary to public policy as to be held illegal per se under the Sherman Act. Examples of such activities are horizontal price-fixing agreements,[65] divi-

60. The only case since *Federal Baseball* in which the court refused to recognize the exemption was *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949). However, as this controversy was eventually settled out of court, the merits of the reserve system were never considered by the court.

61. This proviso was added to section 1 by Act of Aug. 17, 1937, ch. 690, tit. VIII, 50 Stat. 693 (1937). *See* 15 U.S.C. § 1 (1964).

62. Wheeler-Stenzel Co. v. National Window Glass Jobbers Ass'n, 152 F. 864 (3rd Cir. 1907).

63. 221 U.S. 1 (1911).

64. *E.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

65. *I.e.*, price-fixing agreements between parties within the same competitive level, such as retail merchants. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

sion of markets,[66] tying arrangements,[67] and secondary boycotts.[68] The per se rule, where applicable, renders immaterial such considerations as degree of market dominance and commercial necessities, and thus obviates the need for inquiry into the nature and historical development of the industry in question.

It is uncertain whether the rule of reason or the per se rule will govern the reserve agreement. There is some argument that the reserve rule engenders a form of secondary boycott, in that major league players are coerced by the rule to boycott rival leagues.[69] If a secondary boycott is found to be the effect of the rule, it probably will be held illegal on the authority of *Klors, Inc. v. Broadway-Hale Stores, Inc.*,[70] which determined that secondary boycotts were per se illegal. Such a finding by the Court would render futile any argument that the reserve system is a necessary component of the operation of organized baseball.

An exception to the per se rule was created in *Silver v. New York Stock Exchange*[71] to the effect that a concerted refusal to deal may be exempted from the per se category by "justification derived from the policy of another statute or otherwise." [72] In *Silver*, however, the Court found that the Security Exchange Act encouraged self-regulation.[73] As baseball does not have the benefit of such a statute, it is unlikely that the *Silver* exception will be applied.

Another line of reasoning which may place the reserve rule in the per se category stems from its promotion of price manipulation. It was held in *United States v. Socony-Vacuum Oil Co.*[74] that agreements tending to fix prices between parties in the same level of competition were illegal per se. Although *Socony* and its progeny[75] involved prices of

66. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

67. International Salt Co. v. United States, 332 U.S. 392 (1947).

68. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). A secondary boycott consists of the application of coercive pressure upon a third party to refrain from dealing with a competitor of the party applying the pressure. *See* Anderson, *The Sherman Act and Professional Sports Associations' Use of Eligibility Rules*, 47 NEB. L. REV. 82 (1968).

69. *See, e.g.*, Anderson, *supra* note 68.

70. 359 U.S. 207 (1959).

71. 373 U.S. 341 (1963). *See also* Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967) for an argument that the *Silver* exception should apply to professional sports.

72. *Id.* at 348-49.

73. *Id.* at 349.

74. 310 U.S. 150 (1940).

75. *E.g.*, Kieffer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1950); United States v. Univis Lens Co., Inc., 316 U.S. 241 (1941).

goods rather than personal services, there seems to be no logical reason for refusal to extrapolate the rule to cases involving prices of personal service.

If the Court decides that the reserve rule should not be classified as illegal per se, the next question presented is whether the rule creates an unreasonable restraint of trade. The arguments advanced by organized baseball concerning the necessity of the reserve agreement are substantially the same reasons that gave rise to its adoption in 1879—that such an agreement is vital to promote even competition on the playing field, and to preserve team stability.[76] The issue with which the Court will be confronted is whether in light of these considerations the reserve rule is unduly restrictive.

The reserve clause is incorporated into a uniform player's contract which is used by all major league clubs.[77] This contract, standard in all material terms except salary, is imposed on the players by virtue of a "basic agreement" between the major league clubs, acting in concert as the National and American Leagues, and the Major League Baseball Players Association.[78] That the contract is purportedly a product of collective bargaining between the opposing interest groups would on first impression appear to favor a finding of reasonableness. Nonetheless, even aside from considerations of the relative bargaining positions of the parties, in the area of antitrust, agreements reached by collective bargaining and arbitration are not ipso facto reasonable. In *Paramount Famous*

76. Flood v. Kuhn, 316 F. Supp. 271, 275 (1970).

77. Uniform Player's Contract, National League of Professional Baseball Clubs, ¶ 10 in COUNSELING PROFESSIONAL ATHLETES AND ENTERTAINERS 424, 428 (1970) (Practising Law Institute, Tax Law and Practice, Course Handbook Series No. 17). The pertinent portion reads as follows:

> ¶ 10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto . . . . If prior to March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice, provided, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 75% of the rate stipulated for the preceding year.

78. Basic Agreement of 19 February 1968 in COUNSELING PROFESSIONAL ATHLETES, *supra* note 77, at 418.

Lasky Corp. v. United States[79] the Supreme Court ruled that an agreement effecting a concerted refusal to deal except by a standard form contract containing unreasonably restrictive terms constituted an unreasonable restraint of trade notwithstanding the fact that the agreement was reached only after six years of bargaining and discussion.[80] Since the baseball "basic agreement" promotes a concerted refusal to deal except by standard contract, it follows that the authority of *Paramount Famous* should render immaterial the proposition that the reserve clause was collectively bargained for. The reasonableness of the clause should be determined solely in light of its restrictive effect on the player's bargaining ability and its justification, if any.

The restrictive effect of the reserve clause was intensified in 1965 when the major leagues adopted a player draft rule providing for a draft of new players every six months.[81] By this new rule if a draftee fails to reach an agreement with the drafting club, he cannot bargain with other clubs but must await a period of six months until the next draft.[82] Since few prospective players are willing to remain idle for six months at the risk of later being drafted by a club that may offer no better terms, the draft rule, taken in conjunction with the reserve clause, has the practical effect of foreclosing the player from ever bargaining with more than one club at a time.

Nor do the minor league clubs offer a practical bargaining alternative, as the great majority of these clubs are tied through integration agreements, known as "farm systems," to the major league clubs. Consequently the minor league farm teams use the same uniform contract as the major league parent clubs, with the same reserve clause. The result is that these minor league clubs cannot bargain with a player who is reserved by another club.

Once under a reserve agreement, if a player fails to arrive at terms with the reserving club for the following year, the club is allowed to set the player's salary for that year, limited to a minimum of seventy-

79. 282 U.S. 30 (1930).

80. The Court observed that "[i]t may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal." *Id.* at 43.

81. Major League Rules 4(h)-(j), 1966 BLUE BOOK 519-22.

82. The repressive effect of the draft rule is tempered somewhat by the provision that a team which has drafted a player and failed to reach an agreement with him cannot redraft that player in the succeeding draft. Major League Rule 4(1), 1966 BLUE BOOK 523.

five per cent of his current salary.[83] If the player refuses to play for this club he is "blacklisted" by mutual agreement between the leagues. No club in organized baseball will deal with a blacklisted player for fear of league reprisals.[84] Blacklisting by a professional sports organization is not in itself illegal, and has been upheld by the courts when used to protect the legitimate interests of the organization.[85] It is doubtful, however, that organized baseball could establish a legitimate interest in blacklisting a player simply because he refused to accept an offer to play for another year at a twenty-five per cent reduction in salary.[86] In fact, blacklisting a player for such reason arguably amounts to price manipulation within a competitive level, a practice which, as noted above, is held to be illegal per se.[87]

The reserve rule and its attendant means of enforcement, the blacklist, combine to restrict—in fact to negate—free trade among the players and clubs. The sweeping effect of the restraint, absent a compelling reason for its existence, appears to render the reserve agreement unduly restrictive and therefore illegal when measured against the rule of reason test.

Any arguments submitted by organized baseball that there is a compelling justification for such a restrictive rule, such as those propounded by the defendants in *Flood*,[88] can be countered by analogy to other organized team sports. Football and basketball, for example, not having had the benefit of the antitrust exemption, have devised less restrictive means of player control.[89] There is no evidence that the exigencies of professional baseball justify harsher controls, nor have the less stringent methods employed by the other team sports fostered anarchy among the players.

In summation, it appears that but for the antitrust exemption the

83. Note 77 *supra*.

84. *See generally* Comment, *supra* note 8.

85. Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961), wherein the court held that league blacklisting of a player for violation of a league anti-gambling rule was not violative of the Sherman Act.

86. In the hands of unscrupulous team management, the implications of this seventy-five per cent forced renewal agreement are suprisingly far-reaching. For example, a player who originally contracts for a $24,000 salary could find his salary "renewed down" to about $7500 by his fifth season, should the club choose to force him to the allowable seventy-five per cent salary each year.

87. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

88. 316 F. Supp. 271, 275 (1970).

89. *See* notes 90, 91 *infra*.

reserve rule is violative of the Sherman Act whether viewed through the per se doctrine or the rule of reason test.

Alternative Player Controls

Even if Flood were to fail in his effort to persuade the Supreme Court to overrule *Toolson*, it appears certain that the exemption will be abolished, either judicially or through legislation, in the near future. Such a glaring and foundless anomaly in the law will not be allowed to survive indefinitely. It is therefore timely to consider possible alternative controls which could be adopted by organized baseball to achieve the same beneficial result as the reserve rule, yet which would not be so restrictive as to violate the Sherman Act. Legitimate objectives to be pursued are the preservation of team stability and continuity, and the balancing of strength among the clubs. Depression of salaries, as mentioned above, is not a legitimate objective, because any agreement with a view toward depressing salaries has the restraint of trade as its dominant purpose.

Since the other team sports which are not presently exempt from antitrust enforcement have player control problems similar to those faced by organized baseball, it is appropriate to begin with an examination of their solutions. It must be observed at the outset, however, that these controls have not been reviewed by the Supreme Court, so their legality cannot be conclusively presumed.

Professional football[90] and basketball[91] employ an "option clause," which on its face is not as restrictive as the reserve rule. Essentially, the contract term is one year, with the club retaining the option to renew unilaterally for a second year at a minimum of ninety per cent of current salary if the parties fail to reach a new agreement. If the club exercises its option, the second term contract contains no option clause and the player is free of all restraints by the club after the contract's expiration. In the case of football, however, this freedom is to a great extent illusory, since in the event a club acquires a player who has played out his option, the Commissioner of Professional Football is

90. Standard Player Contract for Major Professional Football Operations as Conducted by the National Football League and the American Football League, ¶ 10 in Counseling Professional Athletes, *supra* note 77, at 377, 381; Canadian Football League, Standard Player's Contract, ¶ 15 in Counseling Professional Athletes, *supra* note 77, at 369, 377.

91. American Basketball Association, Uniform Player Contract, ¶ 15 in Counseling Professional Athletes, *supra* note 77, at 390, 396.

empowered to assign the contract of a player on the acquiring team to the club which lost the player.[92] As it is impossible to ascertain which player will be assigned, the fear of an unfavorable "forced trade" operates to discourage clubs from bargaining with "renegade" players. The legality of this discretionary assignment provision is questionable because, arguably, the effect is to promote a secondary boycott, viz., to coerce the clubs to boycott players who have played out their options.[93] Absent this provision, the option for a term of years seems to be a reasonable alternative for organized baseball. The option could be extended to two years, and made assignable to permit trades. As part of the bargained-for exchange, the option would be supported by consideration, and given the unique nature of athletic service agreements, injunctive relief would be available to prevent a player who has breached his contract from playing for another club.[94]

A provision of this nature does not appear to be unduly restrictive, as the player would have a real opportunity to bargain for salary increases during the option's expiration year. Continuity and stability would be preserved by virtue of the overlapping terms during which the various players were under option agreement with the club, and as a practical matter, a player would incur ties in the club city which would tend to bind him to the club, so long as he was offered a fair salary.

Professional hockey has developed an unusual method of player control. The uniform player contract[95] binds the parties for one year, but it contains a clause by which the player agrees to enter into another contract, identical but for salary, for the succeeding year. The salary term for the second year is left open, with the provision that if the parties fail to agree on salary the matter will be submitted to the President of the National Hockey League, whose decision will be accepted as final. The effect is a perpetual agreement to contract, with a provision for salary arbitration. Although the arbitration provision is certainly more reasonable than the twenty-five per cent maximum salary cut provided in the reserve clause, the indefinite duration of control would probably render the hockey contract unduly restrictive.

92. Professional Football Const. and By-Laws, art. XII, § 12.1 (H) (1968).

93. *See* Anderson, *supra* note 68; Comment, *The Sherman Act: Football's Player Controls—Are They Reasonable?*, 6 CAL. WEST. L. REV. 133 (1969).

94. *See generally* Brennan, *Injunction against Professional Athletes Breaching their Contracts*, 34 BROOKLYN L. REV. 61 (1967); Comment, *Enforcement Problems of Personal Service Contracts in Professional Athletics*, 6 TULSA L. J. 40 (1969).

95. National Hockey League, Standard Player's Contract, ¶ 17 in COUNSELING PROFESSIONAL ATHLETES, *supra* note 77, at 384, 388.

Another possible alternative, suggested by the Players Association, consists of allowing the player free agency status after a three-year term, with a right of first refusal retained by the original club, which would presumably have the option to match any offer tendered by another club and thereby retain the player.[96] Although this proposal was initially rejected by the clubs,[97] there is no reason to suspect that it would have a deleterious effect on the stability of the sport. Moreover, by allowing a periodic interval in which players could bargain with other clubs, it would counter the salary-depressing tendency of the present reserve rule.

Still another means of control which could be implemented is the adoption of a contract for a definite term of years with a provision for annual salary arbitration after the first year. In this way, if the player improved dramatically and could therefore justifiably demand a higher salary, such salary could be set by an objective tribunal should the parties fail to arrive at terms. Conversely, if the ability of the player suffered a marked decline, the tribunal could determine a proper diminution of salary or the parties could negotiate a release allowing the player to bargain in the free market. A five-year uniform contract should be both reasonable and of sufficient duration to preserve continuity among the clubs.

Of course these proposals do not comprise a definitive catalogue of possible alternative means of player control,[98] but merely serve to illustrate the plethora of available methods by which organized baseball could legally accomplish its legitimate objectives should the antitrust exemption be abolished.

Conclusion

For nearly five decades the business of organized baseball has flourished under the shelter of a 1922 decision exempting the industry from federal antitrust regulation. Consequently the baseball industry has been allowed to develop certain operating procedures, such as the controversial reserve system, which but for the exemption are of dubious legality. The reserve system sprung from a period in which the bare survival of the sport necessitated a stringent player control device. In modern times, however, the presence of other professional team sports which

96. Flood v. Kuhn, 316 F. Supp. 271, 283 n.18 (1970).

97. *Id.* at 283.

98. Several additional proposals were submitted by Flood. *See id.* at 275 n.12.

thrive without resort to such restrictive control indicates that the reserve system is no longer a categorical necessity. Furthermore, subsequent economic developments in the area of organized baseball, together with judicial expansion of federal antitrust jurisdiction, demand a review of the viability of the exemption. The pending appeal of outfielder Curt Flood should present the opportunity for such a review.

Although the merits seem to favor an overruling of the exemption decisions, such an outcome, at the cost of destroying the economic and athletic stability of organized baseball, from which Flood and thousands of other players derive their sustenance, would indeed represent a Pyrrhic victory. Accordingly, several alternative methods have been suggested by which organized baseball could accomplish its legitimate objectives of athletic balance and team stability and still meet the standards imposed by the Sherman Act. There is no reason to believe that the justifiable demands of club and player are irreconcilable. Hopefully, the final disposition of *Flood v. Kuhn* will afford an opportunity for a compromise agreement wherein the legitimate interests of the player as well as the industry are protected.

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