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Trade Regulation and Professional Sports

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TRADE REGULATION AND PROFESSIONAL SPORTS

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Many businesses, small and large, have felt the lash of the federal antitrust statutes. These businesses have paid for restraining trade in interstate commerce. But when one surveys professional sports, he sees a policy of non-enforcement on a wide scale. There is no doubt that professional sports is also "big business." Most people in America know something about their favorite team, their favorite player, and the inimical Howard Cosell. Millions of dollars of revenue have come into the cities which house professional sports. "It has been estimated that the Giants baseball club generated more than $325 million in commerce in one year in San Francisco."[1] Very clearly, there are numerous unfair trade practices which occur in professional sports and equally obvious is the fact that there is a public policy of non-enforcement of antitrust laws applicable to the violations. This policy is regrettable since, as a commercial enterprise, the activities of the leagues should also be measured against the antitrust laws.[2]

This article will survey the various unfair trade practices which occur in professional sporting activity. Particular attention will be paid to baseball, football, basketball, and hockey, with occasional references to other professional sports. Both sides of the issue will be examined with references to significant antitrust decisions which concern the practice under examination. Finally, some conclusions will be drawn and suggestions made concerning viable alternatives to the present practices and possible future developments as to "trade regulation" and professional sports.

I. GENERAL ANTITRUST POLICY

The main impetus for the federal antitrust laws, expressed by the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, is a national desire for free enterprise and unrestrained competition. "Strict interpretation of the Sherman Act dictates that, with the exception of vertical agreements fixing the price of fair-traded items, all agreements in restraint of trade are illegal."[3] However there are two criteria upon which

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1. Comment, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATHOLIC U. L. REV. 403, n.3 (1973).

2. *Id.* at 403.

3. *Id.* at 404.

the courts judge restraints of trade. The first is called the "rule of reason" test and was first expounded by the Supreme Court in the landmark case of *Standard Oil Company of New Jersey v. United States*.[4] There the United States Supreme Court ruled that the Sherman Act prohibited only *unreasonable* restraints of trade and that all factors concerning the industry would be taken into account in determining the reasonableness of the restraint. The second criterion upon which courts base their judgement is called the "per se" rule. In numerous cases the Supreme Court has declared that certain arrangements are so contrary to public policy that they are classified as per se illegal, *i.e.*, illegal simply because the arrangement embarked upon and attributed to the defendant exists. In such cases there is no standard of reasonableness employed by the courts. Some arrangements considered illegal per se are price fixing,[5] group boycotts[6] and concerted refusals to deal.[7] In this spirit, "the reach of the federal antitrust laws has been interpreted to extend across the entire spectrum of market activities."[8] Obviously the truth of the above statement is questionable when one surveys the history of trade regulation and professional sports.

II. League Structure

One of the main defenses to alleged antitrust violations which is often raised by apologists for professional sports is that the league structure simply does not lend itself to antitrust regulation. It is argued that this structure is a "special problem" for the antitrust laws.

> Application of this policy to professional sports, however, presents special difficulties because, while the teams are in some respects normal individual economic units seeking to sell a service to the public, economic competition between teams is clearly not acceptable as the sole determinant of their behavior. Professional sports leagues present a unique form of economic organization, whose members must compete fiercely in some respects and cooperate in others.[9]

It would appear, then, that there exists in professional sports a cooperative spirit between competitors caused by the nature of the industry. Thus the advocates of a lax antitrust policy toward professional sports raise an argument similar to the "reasonable restraint" justification held by the Supreme Court in *Board of Trade of the City of Chicago v. United States*.[10]

4. 221 U.S. 1 (1911).
5. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
6. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
7. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930).
8. Comment, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. Ind. & Com. L. Rev. 737 (1971).
9. Comment, *Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 Harv. L. Rev. 418, 419 (1967).
10. 246 U.S. 231 (1918).

Speaking of the restrictive rules found in professional sports, the advocates of the lax policy state that

> rules of this type are essential to a league structure, and although this cooperation involves a certain deviation from the ideal of free competition, it is justified because it makes possible a product which unlimited competition could not produce.[11]

In other words, the otherwise unlawful restraints are necessary in order to continue the existence of the league structure, and if the league structure collapses the industry collapses. Arguably, the existence of these restraints, even though illegal per se, are better than the collapse of an entire industry. However, there have been many alternatives suggested to the restraints now used which will not interfere with the league structure. Thus far, however, none of these alternatives has been accepted either by the various professional leagues or by the courts.

III. Unfair Trade Practices

At this point some of the unfair trade practices found in professional sports will be discussed. Each practice will be discussed generally. Then application of those practices to the professional sports of baseball, football, basketball, and hockey will be analyzed with reference to court decisions concerning the individual sports and also toward general antitrust policy. At the conclusion of each discussion of a particular unfair trade practice a summary of the main points will be given in order to more concisely illustrate the beneficial or injurious effect of such practice upon sports and its relationship to general antitrust policy.

A. Reserve Systems

The reserve systems in professional sports are the most publicized and restrictive of the restraints imposed by professional sports leagues. "All sports leagues exercise rigid control over the industry's labor market by reserve or option clauses in standardized player contracts and by the player draft."[12] The most common justification for the existence of the reserve systems is that the arrangements are necessary to preserve competition and thus maintain a balance among the league teams which will, in turn, make the industry profitable.

The reserve system in baseball is commonly called the "Reserve Clause" and is the most publicized and litigated practice in professional sports. As a result of the publicity surrounding baseball star Curt Flood's suit against organized baseball[13] many sports fans are now somewhat knowledgable

11. Comment, *supra* note 1, at 405.
12. Comment, *supra* note 9, at 420.
13. Flood v. Kuhn, 407 U.S. 258 (1972).

about the reserve system in baseball. Basically defined, baseball's reserve system is a

> system composed of a series of clauses in the standard player contract providing that a club may renew the player's contract for the ensuing season, that those players whose contracts have been renewed may not play for any other club and that a club may not negotiate with a player who has a contract with another club.[14]

Baseball's reserve system may be best understood in the light of its origin and history. It must be remembered that "in the early years of federal antitrust law, the athletics industry was in its neophyte stage and consequently did not warrant the close governmental scrutiny and regulation directed against the more highly developed industries."[15] In the late 19th century organized baseball was under threat of financial ruin because of a lack of competition between the teams. This situation had come about because too much money was in the hands of just a few teams which were thereby able to purchase the best players. The owners of the several teams decided upon the reserve system in order to insure greater competition.

The reserve system as it was then adopted has been used since that time with few, if any, modifications.

The reserve system in baseball has been challenged unsuccessfully several times over the years for violations of the federal antitrust laws. Although the decisions were based upon baseball's exemption from the antitrust laws, there can be little doubt that the reserve system in baseball is an illegal restraint of trade under the Sherman Act.[16] Under the reserve system in baseball

> [a]ll players must sign a Uniform Player Contract which provides *inter alia* that if a player does not sign a contract by the first of March with the club that he played for during the previous season, the club may unilaterally renew his contract and cut his salary no more than 20%. Any renewal contract will contain another renewal provision, thus binding the player perpetually. If the club so desires it may assign the plzyer's contract to any of the other clubs. The teams have also agreed that no club may negotiate with a player reserved by another club. Finally any player who fails to report to his club is placed on a Restricted List, and if he violates his contract of "Reservation" he is placed on the Disqualified List.[17]

Thus players have three alternatives: (1) play for the team that holds their contract; (2) quit baseball; or (3) try to obtain an unconditional release from the teams which holds their contract, thereby gaining the right to

14. Comment, *supra* note 1, at 407.

15. Comment, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859 (1971).

16. 15 U.S.C. §§1-7 (1970).

17. Comment, *supra* note 1, at 408 n.30.

negotiate with the clubs of their choice. The third alternative is quite difficult to obtain for players of average caliber or above.

Acting only for itself, a team's refusal to deal pursuant to the reserve system does not violate the antitrust laws. In *United States v. Colgate & Co.* the Supreme Court stated:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[18]

This broad principle was narrowed somewhat in *United States v. Parke, Davis & Co.*[19] There it was determined that if a business attempted in any way to force acceptance of its policy, it would violate the antitrust laws. Coercion became the key to the legality of a refusal to deal.

The teams in baseball, however, are not acting as independent units, but together in a league structure. As such, the actions of the teams constitute a group boycott. The group boycott has been held to be per se illegal under the antitrust laws. As stated by the Supreme Court in *Klor's Inc. v. Broadway-Hale Stores, Inc.*:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality."[20]

As it is currently constituted, the reserve system in baseball represents a group boycott, or a concerted refusal to deal, and except for the antitrust exemption, is illegal per se.

Professional football has a variation of the reserve system called the option clause. At first glance the option clause appears more liberal than baseball's reserve system but the appearance is deceiving. Without a doubt the reason for this seemingly more liberal plan is the result of *Radovich v. National Football League*,[21] in which the Supreme Court held that only baseball was exempt from the antitrust laws. The option clause in football

> allows a club to renew a player's contract unilaterally for one year at a reduction in salary of not more than 10%. The player may either play that year or sit it out, but in any event he is bound to the original club for one year beyond his contract year. At the end of the year he is denominated a "free agent" and is theoretically able to negotiate his own deal with any club.[22]

18. 250 U.S. 300, 307 (1919).
19. 362 U.S. 29 (1960).
20. 359 U.S. 207, 212 (1959).
21. 352 U.S. 445 (1957).
22. Comment, *supra* note 1, at 412.

Prior to 1963 the option clause appeared reasonable because it could only bind a player for one year beyond the expiration of his contract year while baseball's reserve system could bind a player perpetually to his team. In an early test case, *Dallas Cowboys Football Club v. Harris*, the court stated that the option clause was not "so unreasonable and harsh as to be unenforceable in equity."[23]

In 1963, however, a provision was added to the option clause which in effect made the option clause as restrictive as baseball's reserve clause. It has become known as the Rozelle Rule, after the Commissioner of football. Under this provision after a player plays out his option and negotiates a contract with another club,

> [t]he Commissioner may name and then award to the former club one or more players from the Active, Reserve or Selection List (including future selection choices) of the acquiring club as Commissioner, in his sole discretion, deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.[24]

The effect of this provision is to restrain the bargaining opportunities which the free agent supposedly possesses. It follows logically that only players of above average skills would still benefit from the option clause because no other teams would take the chance of giving up one or more highly skilled players for a mediocre player.

Because of the "fixed trade" aspects of the option clause it also constitutes a group boycott and a concerted refusal to deal. In *Paramount Famous Lasky Corp. v. United States*[25] a refusal by the motion picture industry to deal other than under a standard form contract was held violative of the Sherman Act as being an unreasonable restraint of trade. The group boycott is of a secondary and not primary nature.

> The situation with professional football would most likely be termed a secondary boycott, the perpetration of an injury through pressure on a third party to prevent the person from doing business with the one being pressured. The secondary boycott which is found in professional football is one motivated by fear.[26]

Of course, that fear is of the Rozelle Rule.

Thus, it can be seen that football's option clause, although appearing less restrictive than baseball's reserve clause, nevertheless leads to the same violations as its counterpart in baseball, a group boycott and a concerted refusal to deal.

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23. 348 S.W.2d 37, 47 (Tex. Civ. App. 1961).
24. NFL Constitution and By-Laws, Art. XII, §3 (as amended Jan. 29, 1963).
25. 282 U.S. 30 (1930).
26. Comment, *The Sherman Act: Football's Player Controls-Are They Reasonable?*, 6 CALIF. WESTERN L. REV. 133, 142 (1969).

Basketball, which has been held non-exempt from the antitrust laws,[27] also employs the option clause. It is similar in application to football's option clause. The effect of the basketball option clause is somewhat minimized by the fact that there are two independent competing leagues in basketball. The proposed merger of the professional basketball leagues has been blocked both in the courts and in Congress because of possible antitrust problems. Players are thus free to "jump" leagues without the threat of a secondary boycott or concerted refusal to deal because the two independent leagues have not been mergered into one league which could enforce the option clause. However, among the teams in each league, the basketball option clause has the same restrictive effect as in football, creating a per se illegal group boycott and concerted refusal to deal.

Hockey employs a reserve system known as the "Reserve Clause." It is similar to the system adopted by professional baseball. Like football and basketball, hockey has been held not to be exempt from the antitrust laws[28] As a result several test cases attacking the reserve system in hockey have reached conclusions contrary to holdings in similarly constituted factual situations involving baseball. Also, as in basketball, there are two separate and independent hockey leagues and when the well established National Hockey League tried to use the reserve system to keep their superstars from "jumping" to the rival league, the reserve system was defeated.

> Insofar as the aforementioned reserve clause operates to exclude the WHA and its member teams from entering the field of major league professional hockey through the player restraints, it is a violation of Section 2 of the Sherman Act. At this preliminary injunction stage, the Court does not decide whether the NHL's agreements constitute *per se* violations of the Sherman Act.[29]

It can be seen that hockey, not unlike basketball, is guilty of using an illegal restraint on trade—the reserve system known as the "Reserve Clause." This restraint, again, as in baseball, is considered a group boycott or a concerted refusal to deal and is illegal per se. Perhaps, because of the non-exempt status of hockey under the antitrust laws, courts will follow the lead of the aforementioned decision and strike down the reserve system in hockey in the same manner that per se illegality has been treated in other industries.

In summarizing the material covering the reserve systems, it must first be noted that each of the major sports in America has attempted to practice a form of group boycott and has engaged in a concerted refusal to deal. Both the group boycott and concerted refusal to deal have been found violative of the antitrust laws. Sidestepping baseball's exempt status from

27. Robertson v. National Baksetball Ass'n, 1970 Trade Cas. ¶73,282 (S.D.N.Y.).

28. Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972).

29. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 518 (E.D. Pa. 1972).

the antitrust laws, there is no logical reason why the courts should permit these practices to continue. Professional sports should not be treated differently from other high profit industries.

> It is the duty of those engaged in alleged violations of the antitrust laws to conform their actions to the requirements of those laws. It is not the duty of the courts to conform the antitrust laws to fit a restrictive system of commerce.[30]

B. Player Drafts And Eligibility Rules

The player draft has augmented the restrictive effect of the reserve and option clauses used by professional sports organizations. The player draft is applied in essentially the same way in baseball, football, basketball, and hockey. Teams are given a select number of players to be chosen from graduating high school or college seniors, each team choosing an equal number of players. Teams select in reverse order of their league standings.[31]

The antitrust implications of such policies are many. The present draft system allows only one team in the league the right to negotiate with the drafted player. This result is alleviated somewhat in basketball and hockey where there are two independent leagues and thus a drafted player has the right to negotiate with two teams. However, regardless of whether the drafted player has the right to negotiate with one or two teams, the draft forecloses a substantial portion of the available market to the player. The Supreme Court has stated that such arrangements in other industries are per se violations of the antitrust laws. It is a foregone conclusion that, to a certain degree, each professional sports league has monopoly power. Addressing itself to this issue in *United States v. Griffith*, the Supreme Court declared: "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[32] Additionally, the drafted player faces a concerted refusal to deal because the other teams will not negotiate with him unless he deals in the manner prescribed by the league. The player draft is an arrangement by which the competitive parts of the league (the individual teams) agree not to compete in the available market of new players. A similar marketing arrangement was held illegal per se by the Supreme Court in *Timken Roller Bearing Co. v. United States*.[33]

Thus, under several areas of antitrust law, the player draft should be considered illegal as a group boycott or a concerted refusal to deal, as a

30. Comment, *supra* note 1, at 415.

31. It should be noted that

> [b]aseball's draft is somewhat less restrictive in that if the player does not wish to play for the club which drafted him he may refuse to sign; he is then placed back into the eligible draft pool for the next year. *Id.* at 416 n.62.

32. 334 U.S. 100, 107 (1948).

33. 341 U.S. 593 (1951).

use of monopoly power to foreclose competition, and, overall, as a clear restraint of trade.

The eligibility rules, another aspect of the player draft, have also come under antitrust scrutiny. The eligibility rules are basically designed to protect the educational status of future draft choices. The rules provide that a high school or college player may not play in professional sports until his "eligibility" period is up. This "eligibility" period usually consists of the time of the player's varsity sports career in high school or college. The rationale is that the player usually finishes his educational requirements during his "eligibility" period and before he plays in a professional sport. Two professional leagues, however, have varied from these rules. The World Hockey Ass'n allows high school and junior hockey hockey league players to be drafted while the rival National Hockey League does not allow such practice. The American Basketball Ass'n allows players to play before their "eligibility" period is up if the player can qualify as a "hardship case," *i.e.*, as being in desperate need of the financial assistance that a professional salary could give the player.

The eligibility rules should be deemed a group boycott. One case dealing with professional basketball has stated that the National Basketball Ass'n's four-year college rule constitutes a "primary" concerted refusal to deal.[34] The leagues have argued that *Silver v. New York Stock Exchange*[35] authorizes group boycotts where there is a legislative mandate for self-regulation or otherwise, thus negating the per se rule in some group boycott situations and permitting application of the rule of reason. But the leagues fail to realize that under *Silver* there is a requirement of procedural due process if a concerted refusal to deal is to be upheld by the courts as justifiable.[36] Thus, only where procedural due process is afforded the aggrieved party, can the rule of reason rather than the per se rule apply to group boycotts or concerted refusals to deal. However, there is no opportunity for the player to present his case to any professional sports league in order to explain his rationale for desiring to play professional before the "eligibility" period has expired. Procedural due process has not been met and the lack of procedural safeguards in player drafts with eligibility rules should result in the compulsory determination that the practice is illegal per se under the antitrust laws.

C. *Blacklisting*

Blacklisting has been used for harmful and beneficial purposes in professional sport. Blacklisting is the permanent banning of a player from a league. It has been used in professional sports as a punishment for violation of league rules and to uphold league integrity.

34. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).
35. 373 U.S. 341 (1963).
36. *Id.* at 243.

Courts have upheld blacklisting in some circumstances. In *Molinas v. National Basketball Ass'n*[37] the court held that the indefinite suspension of a professional basketball player for gambling on the outcome of basketball games in violation of contract and league rules, and the subsequent refusal by the league to reinstate the player, thus amounting to a blacklisting of the player, were not unreasonable restraints of trade within the antitrust laws. The court stated: "A rule, and a corresponding contract clause, providing for suspension of those who place wagers on games in which they are participating seems not only reasonable, but necessary for the survival of the league."[38]

However, the practice has led to abuses. For example, some professional baseball players have been blacklisted for playing in a competitive league.[39] In *Gardella v. Chandler*[40] the court held that the charge of blacklisting for playing in a competitive leage was sufficient to state a cause of action. Unfortunately the case was settled out of court and no ruling was ever made. There have also been charges of blacklisting made by the World Hockey Ass'n against the National Hockey League.

Blacklisting must be considered a violation of the antitrust laws. It is a form of self-regulation or self-government which may lead to serious abuse. Since the blacklisted player is often not granted notice or hearing, the practice violates the procedural due process requirement of self-regulating bodies found in *Silver v. New York Stock Exchange*.[41] Blacklisting is the use of professional sport's monopoly power to foreclose competition and commercial activity because the teams in the league agree to ban the player. Such activity was held unlawful in *Fashion Originators' Guild of America, Inc. v. FTC*.[42] Thus blacklisting, publicly described as necessary and beneficial to professional sports, is in practice a harmful restraint of trade and personal freedom.

D. Restraints Of Owners And Potential Owners

There is no question that the owners of professional sports teams are at the root of many antitrust problems. Owners and potential owners, however, are also victims of unfair trade practices. The unfair trade practices are found in three situations: (1) when a group or person desires to enter a team into the league structure of a professional sport; (2) in sales of franchises; and (3) upon movement of franchises.

It is very difficult for a potential owner to enter a team into a league structure. "Generally, however, entry into professional sports leagues is conditioned upon acceptance of the applicant by a high percentage of the

37. 190 F. Supp. 241 (S.D.N.Y. 1961).

38. *Id.* at 243.

39. Martin v. National League Baseball Club, 174 F.2d 917 (2d Cir. 1949); Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

40. 172 F.2d 402 (2d Cir. 1949).

41. 373 U.S. 341 (1963).

42. 312 U.S. 457 (1941).

existing clubs."[43] This practice is contrary to an important objective of the antitrust laws—the promotion of free entry and expansion of supply as the demand rises. The leagues argue that professional sports leagues are comparable to trade associations which can set rules and regulate competition among the units in the industry. The leagues cite the peculiar nature of their industry as the rationale for the restrictive measures they employ to carefully regulate the entrance of new teams into the leagues. The Supreme Court, however, spoke to the situation of trade associations and antitrust in *Associated Press v. United States*, holding "that arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose."[44] Applying that holding to professional sports, free entry into a professional sports league should be mandatory under the law. The position of the courts, however, has been to the contrary. *In Deesen v. Professional Golfers' Ass'n of America*[45] the court held that free entry into the Professional Golfers' Ass'n of America was not guaranteed to a professional golfer because of the special tour structure of professional golf. The decision is astounding when one considers other opinions dealing with the same antitrust problem in other industries.[46]

There are also restrictions when a group or person desires to buy an already existing sports franchise. "Restrictions on the sale of franchises are of two types: an absolute prohibition of certain classes or owners, and a requirement that all sales be approved by the league."[47] Under league rules, the present owner selects the buyer from an approved list and then negotiates the transaction which is then approved by the league. Buyer selection by a manufacturer has been upheld where there is an availability of competitive products to the party not selected,[48] but there is no availability of competitive products in professional sports. The only alternative would be to organize a new professional league with substandard players and build from there. This is not a very attractive or financially rewarding alternative. Therefore, sale of franchise restrictions must be considered an illegal restraint of trade under the antitrust laws.

The third situation involves the practice of moving a franchise from one location to another through the decision of the owner. Sometimes there are valid reasons for the move, other times not. Nevertheless there are restrictions on the movement of franchises in every sport. "One league prohibits moving teams altogether; the others require that moves be approved by an extrodinary majority of the owners."[49] These rules should be classified as

43. Comment, *supra* note 1, at 418 n.73.
44. 326 U.S. 1, 19 (1945).
45. 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).
46. *See* United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912).
47. Comment, *supra* note 9, at 428 n.50, n.51.
48. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
49. Comment, *supra* note 9, at 429 n.54, n.55.

territorial restrictions or division of markets. Territorial restriction have been held to be illegal per se.[50]

IV. RATIONALE OF NON-ENFORCEMENT

From the foregoing material it is evident that professional sports organizations have violated the antitrust laws in numerous ways. It is also evident that the courts and Congress have generally turned their backs on these violations. This policy of non-enforcement is unique in antitrust law. When one surveys the history of trade regulation and professional sports it must be concluded that there is no logical rationale for the policy of non-enforcement.

One can understand the policy of non-enforcement in regard to baseball; it has been held exempt from the antitrust laws through a series of questionable decisions. The policy cannot be explained, however, with respect to football, basketball, and hockey, all of which have been held subject to the regulation of the antitrust laws.

Even though the policy of non-enforcement can be explained for baseball, it is more difficult to understand why baseball was originally held exempt from the antitrust laws and why the sport has been recently held to be still exempt. "It is submitted that the baseball exemption is unique because it does not fall within either the statutory or non-commerce category of antitrust exemptions."[51] Baseball was first held exempt from the antitrust laws in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*[52] in which the Court held that the business of giving baseball exhibitions was not interstate commerce and thus could not fall under the federal antitrust laws. It is difficult to see how baseball could not constitute interstate commerce when exhibitions and league games were being held in various cities across the United States. Today it is conceded that baseball is engaged in interstate commerce, but the same conclusion should have been reached by the Supreme Court when the above case was decided in 1922, thus eliminating the problem at its inception. Unfortunately the *Federal Baseball* decision has been upheld by the Supreme Court in several subsequent cases. The irony is that the Supreme Court has concluded that baseball today constitutes interstate commerce, which was the key to the original decision. The Supreme Court has stated other tenuous reasons for upholding the antitrust exemption of baseball.

In 1953, baseball's exemption was again challenged in *Toolson v. New York Yankees, Inc.*[53] The court, after concluding that baseball constituted

50. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

51. Comment, *supra* note 8, at 740.

52. 259 U.S. 200 (1922).

53. 346 U.S. 356 (1953).

interstate commerce, nevertheless affirmed *Federal Baseball* on the rationale that the baseball industry has flourished, secure in the knowledge that it was exempt from antitrust legislation, and that Congress had acquiesced by its non-action on the antitrust exemption. Basically the Supreme Court strictly applied the doctrine of stare decisis. Baseball's exemption has been challenged twice since the *Toolson* decision and in both cases the doctrine of *stare decisis* was relied upon to uphold baseball's antitrust exemption. In *Salerno v. American League of Professional Baseball Clubs* the Court stated:

> However, putting aside instances where factual premises have all but vanished and a different principle might thus obtain, we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom.[54]

The most recent case, *Flood v. Kuhn*,[55] has attrated a great deal of national attention. However, the decision sounded like a copy of the earlier opinions of the courts cited above.

> Accordingly we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. . . . If there is an inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.[56]

Thus the common threads through all of the decision involving baseball are the doctrine of stare decisis and the role of Congress. The doctrine of stare decisis has been misused.

> 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 the reasoning no longer valid, blind adherence to the doctrine of stare decisis can only lead to a state of legal atrophy.[57]

Congress has failed in its task of trade regulation through the enforcement of the antitrust laws. "Over fifty bills have been introduced in Congress concerning the relationship of baseball to the antitrust laws without Congress passing any of the bills."[58] The non-enforcement of the antitrust laws with regard to baseball has been based upon the exemption of baseball from the antitrust laws; an exemption created by the combination of the

54. 429 F.2d 1003, 1005 (2d Cir. 1970).
55. 407 U.S. 258 (1972).
56. *Id.* at 284.
57. Comment, *supra* note 15, at 867.
58. Note, *Antitrust Exemptions—Professional Baseball's Immunity from Antitrust Regulation Upheld*, 43 Miss. L.J. 718, 720 n.18 (1972).

misuse of the doctrine of stare decisis and Congressional apathy.

There can be no rationale whatsoever for non-enforcement of the antitrust laws for football, basketball, and hockey as these sports were held to be non-exempt from the antitrust laws. Despite some recent decisions in the lower courts to the contrary, non-enforcement of the antitrust laws in these sports is still the rule. The option clause in football and basketball has not been held illegal while the reserve clause in hockey has been the basis of conflicting decisions in the lower courts.[59] Congress has not helped. In granting the American and National League merger an exemption from the antitrust laws, it has given its stamp of approval to the unfair trade practices of football. The total result of the non-enforcement policy by the courts and Congress is an evasion of the objectives of antitrust law—free enterprise and unrestrained competition and a gross disregard of the freedom of the individual, a result which would not be tolerated in any other part of American industry today.

CONCLUSION

Our principal effort here has been to survey the various problems of trade regulation and professional sports. These problems exist today and will exist in the future unless some positive steps are taken to curb the use of the various unfair trade practices found in professional sport. What can be done? The main solution will be to treat professional sports exactly as any other large industry in America is treated. Professional sports do not need help from outside sources which condone the illegal practices. In reality professional sports organizations are major high profit industries and should not be treated as new and struggling industries whose survival depends upon certain suspect rules and procedures. Professional sports organizations are resourceful, and they will find legal alternatives to their illegal practices if forced to do so. The courts and the Congress must realize that they lose respect every time they condone an illegal practice which results in unequal treatment especially where the practice is nationally known.

Once the courts and the Congress accept professional sports as just another industry which is violating the antitrust laws the first major hurdle will be passed and enforcement should logically follow. The end result would then be the fulfillment of the objectives of the antitrust laws of the United States, that is, free enterprise and unrestrained competition in all areas of business activity.

59. *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Nassau Sports v. Peters, 352 F. Supp. 867 (E.D.N.Y. 1972).