341 Antitrust Counselor NL 1

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By Paul M. Kaplan and Jason Kosek

It's Past Time to End the National Pastime's Antitrust Exemption

Professional baseball in the U.S. has enjoyed exponential growth since Justice Oliver Wendall Holmes' flawed decision in Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898, 26 A.L.R. 357 (1922) (the "FBC decision"). In that case, Justice Holmes, upholding a federal appeals court decision, held that Baseball [*] was exempt from the Sherman Act and allowed Baseball's restrictive trade and monopoly practices to remain in place, as they have now for over 100 years.

The key premise laid out in the unanimous FBC decision is that "exhibitions of baseball" are "purely state affairs," and that while league play entailed interstate travel, "the transport is a mere incident, not the essential thing," and "exhibitions of baseball" are not commerce. Those holdings, questionable in 1922, seem particularly out of place now, when teams are worth as much as $6 billion and play half of their season, 81 games, on the road both internationally and throughout the Continental United States. (When the FBC decision was decided, there was no team in Canada.)

For more than 50 years, the most consequential effect of the antitrust exemption (the "exemption") was the survival of baseball's reserve clause, which barred players from selling their services to a new team when a contract expired, unless the player's current team released him from his contract. While the reserve clause withstood court challenges in *Toolson v. New York Yankees* (1953) and *Flood v. Kuhn* (1972), it was nullified by negotiation in a collective bargaining agreement in 1976 between Major League Baseball ("MLB") and the players association. The Curt Flood Act of 1998 ended the exemption as it relates to owner-player relations.

But the exemption still shapes the business of MLB, which encompasses the National and American Leagues, in important ways, allowing MLB to continue to act outside the scope of the Sherman Act. Most recently, MLB activity enabled by the exemption has had a profound effect on the ecosystem of minor league teams that develop talent and provide entertainment in smaller cities and towns throughout the country.

Nostalgic Partners Litigation: Latest Challenge to Baseball's Antitrust Exemption

From 1903 until 2020, the relationship between MLB teams and Minor League Baseball teams (the "Minors") was governed by the Professional Baseball Agreement. In 2020, the Professional Baseball Agreement expired. The MLB and their teams "jointly agreed to implement a new minor league system" called the "Professional Development League," which changed both how many and which Minors teams could affiliate with the MLB. The new system removed 40 teams from the Minors, which had a significant impact on the markets in which those 40 teams were located. Those teams lost the ability to play against other Minors teams. As a result, these teams could no longer attract promising talent because they lacked affiliation with a major league team and there was no opportunity for advancement within the organization. Any player with a dream to play in the MLB would no longer be willing to play for one of the eliminated 40 teams. Without those talented players, attendance and sponsorships have experienced a significant decline.

Those 40 Minors teams brought suit, arguing that the agreement to form the "Professional Development League" violated the Sherman Act and involved a horizontal group boycott among MLB teams against the 40 eliminated Minors teams. Nostalgic

Partners, LLC v. Office of Commissioner of Baseball, 2022 WL 14963876 (S.D. N.Y. 2022). In dismissing the Complaint, the Court found that "Since 1922 … the Supreme Court has recognized a judicially created exemption from antitrust regulation for the business of baseball." *Nostalgic Partners, LLC v. Off. of Comm'r of Baseball*, No. 21-CV-10876 (ALC), 2022 WL 14963876, at *7 (S.D.N.Y. Oct. 26, 2022). MLB's Motion to Dismiss focused heavily on the antitrust exemption to win dismissal of the Complaint.

As Senator Bernie Sanders noted when introducing the Save Baseball Act in March 2022, MLB owners "eliminated their affiliation with over 40 minor league teams, not only causing needless economic pain and suffering, but also breaking the hearts of fans in small and mid-sized towns all over America."

The MLB is the Only Professional Sports League that Maintains an Antitrust Exemption to the Antitrust laws

MLB is the only professional sports league exempt from the Sherman Act. Every other professional sports league, and even collegiate sports, have failed to obtain an exemption to the antitrust laws. Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957) (holding that the Federal Baseball ruling "at best was of dubious validity" and therefore, the NFL was not exempt from the Sherman Act); United States v. International Boxing Club of N.Y., 348 U.S. 236, 244-45, 75 S. Ct. 259, 99 L. Ed. 290 (1955) (Boxing not exempt from the Sherman Act); Haywood v. National Basketball Ass'n, 401 U.S. 1204, 1205, 91 S. Ct. 672, 28 L. Ed. 2d 206 (1971) ("Basketball … does not enjoy exemption from the antitrust laws."); Flood v. Kuhn, 407 U.S. 258, 282-84, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972) ("Other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.").

Why the MLB Argues for the Maintenance of the Antitrust Exemption

Commissioner of MLB, Rob Manfred, has stated that the reason the MLB needs the antitrust exemption is to prevent franchise relocation, adding, "I can't think of a place where the exemption is really meaningful, other than franchise relocation, right now."

Despite this, there are additional ways the MLB benefits from the antitrust exemption. Due to the antitrust exemption, the MLB can collectively assign their trademark rights to a central league office to grant exclusive league-wide licenses for apparel manufacturing, as well as allowing MLB to provide statistics for individual teams to gambling websites—a major advantage given the growth of online sports betting. In any event, these advantages can be achieved by less restrictive means. Perhaps more importantly, by possessing the exemption, the MLB is vested with limitless authority to restrict relocations as they wish without concern of any possible antitrust liability. With the exemption eliminated, the MLB would have to be mindful to incurring antitrust liability, whether through an action for monopolization or price fixing. In short, Commissioner Manfred is disingenuous about the advantages that MLB receives from the exemption: immunity or protection from legal actions by MLB Teams or from Minor League Teams immediately comes to mind.

Why the Antitrust Exemption is No Longer Necessary

The key argument that Commissioner Manfred has advanced is that the antitrust exemption provides the MLB with the ability to control the relocation of current teams. In 2005, the Montreal Expos relocated to Washington, D.C. and became the Washington Expos. Since 2005, professional teams in other sports have relocated at only a modestly more frequent pace. In 2016 and 2017, the National Football League (the "NFL") allowed two teams to relocate, the San Diego Chargers and the St. Louis Rams both to Los Angeles, and in 2020 the Oakland Raiders relocated to Las Vegas. In the National Basketball Association, the New Jersey Nets relocated to Brooklyn in 2012 and the Seattle Supersonics relocated to Oklahoma City in 2008. In the National Hockey League, only one team has relocated since 2005, when the Atlanta Thrashers relocated to become the Winnipeg Jets. Other than MLB, all of the above professional sports teams were allowed to relocate by their respective leagues, all without securing an antitrust exemption.

Given the above history, team relocation is not an ever-present issue in professional sports, and does not support the MLB continuing to have an exemption to the antitrust laws. The MLB should not be allowed to engage in restricted trade practices and be a lawful monopoly, especially when none of its competitors for national sports audiences are provided the same benefit. Under Article 4.3 of the NFL's Constitution and Bylaws, for a team to relocate it must obtain an affirmative vote of three-fourths of the member clubs before a club may transfer its franchise or playing site to a different city, either within or outside its existing home territory. Article 4.3 also confirms that no club has an "entitlement" to relocate simply because it perceives an opportunity for enhanced club revenues in another location. Indeed, NFL traditions disfavor relocations if a club has been well-

supported and financially successful and is expected to remain so. Relocation under Article 4.3 may be available, if a club's viability in its home territory is threatened by circumstances that cannot be remedied by diligent efforts of the club working, as appropriate, along with the NFL Office, or if compelling NFL interests warrant a franchise relocation. These bylaws make relocation an arduous process, and an antitrust exemption is unnecessary to prevent teams from relocation on a whim.

Efforts to End the Exemption Have Stalled in the U.S. Congress

In 2021, the United States Senate began a fresh cycle of grappling with the fallout from an inherently flawed U.S. Supreme Court decision authored a century ago. Senator Mike Lee (R-UT) along with cosponsors Sens Ted Cruz (R-Tx), Josh Hawley (R-MO), Marco Rubio (R-FL), and Marsha Blackburn (R-TN) introduced S.1111 the Competition in Baseball Act (the "CIBA"). CIBA seeks to remove MLB's exemption by repealing Section 27 of the Clayton Act, 15 USCA Section 26b. For purposes of this legislation, the term "antitrust laws" mean laws to protect against unlawful restraints and monopolies (Sherman Act) as adopted by the Clayton Act, 15 USCA Section 12(a) and to protect against unfair methods of competition (Federal Trade Commission Act, Section 5), 15 USCA Section 45. In the U.S. House of Representatives, H.R.2511 - Competition in Professional Baseball Act (the "CIPBA"), was introduced by Rep. Jeff Duncan (R-SC) with 33 cosponsors on April 14, 2021. After the legislation was introduced, it was referred to the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law on October 19, 2021. However, since that referral, there has been no subsequent action concerning CIPBA.

As noted above, Senator Bernard Sanders (I-VT) introduced the Save Baseball Act (S.3833) on March 14, 2022. This bill also seeks to remove the exemption from the antitrust laws for persons in the business of organized professional baseball. For purposes of this legislation, the term "antitrust laws" denotes laws to protect against unlawful restraints and monopolies (Sherman Act) and to protect against unfair methods of competition (Federal Trade Commission Act, Section 5). *See,* Save Baseball Act.

Conclusion: Recommendation

There is no basis for an antitrust exemption for MLB because, as demonstrated above, the only purpose of the antitrust exemption, as defined by Commissioner Manfred, can be achieved through less restrictive means. The lack of other professional sports teams relocating on a whim is proof positive. The antitrust exemption is thus unnecessary. National Collegiate Athletic Association v. Alston, 141 S. Ct. 2141, 2144, 210 L. Ed. 2d 314, 391 Ed. Law Rep. 45 (2021) (No need for an antitrust exemption if there is a less restrictive means of achieving the same procompetitive benefits).

Moreover, leagues like the NFL grant exclusive league wide licenses for apparel manufacturing. Many brands produce apparel for every NFL team, which is proof that the MLB does not require the antitrust exemption to obtain this result. Further, online gambling sites provide up-to-date statistics for every sport, and not just baseball. Accordingly, this justification can also be achieved by less restrictive means. Finally, providing preferential treatment to MLB over other professional sports by way of immunity from the antitrust laws is unwarranted and indefensible as a public policy.

As such, the time to knock the MLB's antitrust exemption out of the park is now, as the same benefits that the MLB enjoys can be achieved by less restrictive, contractual means.

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Paul M. Kaplan is a shareholder in the New York office of Anderson Kill P.C. and co-chairs the firm's Antitrust and Unfair Competition Group.

Jason Kosek is an attorney in Anderson Kill's New York office. He focuses his practice on commercial litigation, as well as insurance recovery and white collar defense.

Footnotes

* “Baseball” is referenced as a generic term for the professional baseball organization now known as “Major League Baseball” or “MLB.”

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