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Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?

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Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?

Professional sports leagues[1] are comprised of individual teams[2] which have banded together for the purpose of creating regularly scheduled competitive exhibitions between the teams within the leagues. The leagues differ, of course, due to the different sports involved, but the make-up is generally similar. Each has a set number of teams, most of which are individually owned. The teams have agreed to establish a league which will uniformly regulate the actions of its members. The team owners elect a president or commissioner, who is responsible for the administration of the league and its efficient and profitable operation.

Although the leagues necessarily affect the relations of the teams and the players, they also have a significant influence upon our society. Immediately recognizable, of course, is the impact of professional sport on our leisure activity. Professional sport is also big business. The impact of professional sports leagues extends far beyond those directly involved, and significantly affects the commercial life of the cities in which the teams play.[3] It seems that the leisure aspects of professional sports have had the effect of overshadowing their commercial nature. As a commercial enterprise, the activities of the leagues must be measured against the antitrust laws.[4] This com-

1. For the purposes of this article professional sport is limited to the major league professional sports existing within the United States; included within the definition are: National Football League (hereinafter referred to as the NFL); National Basketball Association (hereinafter referred to as the NBA); American Basketball Association (hereinafter referred to as the ABA); Major League Baseball; National Hockey League (hereinafter referred to as the NHL); World Hockey Association (hereinafter referred to as the WHA).

2. There are 24 Major League Baseball teams; 26 NFL teams; 17 NBA teams; 10 ABA teams; 16 NHL teams; 12 WHA teams;

3. Witness the extremes gone to by Mayor John Lindsay to keep the Yankees in New York. The Mayor convinced the City Council to purchase Yankee Stadium and then spend $25 million to refurbish it. This activity, on the part of the city, came soon after the Yankees had let it be known that they were considering a move to New Jersey. It has been estimated that the Giants baseball club generated more than $325 million in commerce in one year in San Francisco. FACTS, BASEBALL IN THE COMMUNITY C 3 (1965) (issued by the Commissioner of Baseball). Even using a more conservative evaluation method, it was found that $15 million of out of town commerce was brought to Minneapolis by the Twins. *Id.*

4. *See* Sherman Act, 15 U.S.C. §§ 1-7 (1970); Clayton Act, 15 U.S.C. §§ 12-27 (1970).

ment will attempt to analyze the problems which exist, in an antitrust context, as a result of the present relationship of the leagues to players and teams. More specifically, it will deal with restraints on the players' ability to bargain and restraints upon the independent operation of the teams.

Antitrust Policy

The enactment of the antitrust laws was an expression of the national belief that free enterprise and competition are the most effective and productive methods of regulating economic activity, and that the classic rule of "supply and demand" should determine the price and quantity of goods available.[5]

Strict interpretation of the Sherman Act dictates that, with the exception of vertical agreements fixing the price of fair-traded items,[6] all agreements in restraint of trade are illegal. Indeed, this interpretation was prevalent in the early years of antitrust enforcement.[7] However, the Supreme Court, in *Standard Oil Company of New Jersey v. United States*,[8] ruled that the Sherman Act proscribed only unreasonable restraints of trade: thus was born the socalled "rule of reason" test which governs most antitrust decisions:

> . . . [T]he 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 agreements will generally be held legal. In short, the legality of agreements in this type of situation is determined on a case-by-case basis.[9]

However, the Supreme Court has found that certain activities are so contrary to the public policy favoring competition that they have been declared per se illegal.[10] Among these activities which have been declared per se illegal

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5. *See* REPORT ON THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (March 1, 1955).

6. This exception was added by Act of Aug. 17, 1937 ch. 690, tit. VIII, 50 Stat. 693 *amending* 15 U.S.C. § 1 (codified at 15 U.S.C. § 1 (1970)).

7. Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n, 152 F. 864 (3rd Cir. 1907). The court stated:

> Every vontract or combination, therefore, whether reasonable or unreasonable, which directly restrains or which necessarily operates in restraint of trade or commerce among the states, is denounced and made unlawful by the act.

Id. at 868.

8. 221 U.S. 1 (1911).

9. Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of Anachronism*, 12 WM. & MARY L. REV. 859, 869 (1971).

10. The per se rule requires that the question to be answered first by the court is whether the restraint complained of by the plaintiff constitutes a specific type of ac-

are: division of markets,[11] group boycotts, and concerted refusals to deal.[12]

League Structure

Housekeeping Rules

The league structure poses a unique problem for the antitrust laws. While our antitrust policy was formulated to encourage competition within a defined market by economically independent units,[13] the leagues encourage a certain amount of cooperation among competitors. Although the goal for which the teams strive is competition on the playing field, it is necessary for the teams to cooperate with each other on administrative matters. Cooperation is necessary because professional teams have found that organized league play generates more excitement and sustained fan interest than do random individual games. League play lends itself to a race for league championships and the generation of allegiance to particular teams by the fans. To make the race realistic, teams must play an equal number of games with nearly identical schedules of opponents under identical rules. There is also a need for cooperation in scheduling, and in formulating rules of play:

> The basic 'housekeeping' arrangements of league sports such as scheduling, limits on team rosters, and uniform playing rules throughout the league are the deviations from a purely competitive model which are most clearly necessitated by the nature of the industry.[14]

It is submitted 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. A similar rationale was upheld in *Chicago Board of Trade v. United States*.[15] There, the Supreme Court was faced with a rule of the Board of Trade which fixed bids at the closing price until the opening of the next session. The purpose of the rule was to promote the convenience of Board members, by restricting their hours of

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tivity classified illegal, *e.g.* group boycott. If it is proven that, in fact, one of his forbidden practices exists the per se rule applies and there is no defense of reasonableness in the situation. If there is no proof that a certain activity constituted a per se activity the activity may still be found to be an unreasonable restraint of trade under the rule of reason.

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

12. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

13. *See supra* note 5.

14. *The Super Bowl and the Sherman Act: Professional Team Sports and The Antitrust Laws*, 81 HARV. L. REV. 418, 419 (1967).

15. 246 U.S. 231 (1918). *See also* Standard Oil Company v. United States, 283 U.S. 163 (1931); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

business, and to break a grain trade monopoly which had been acquired by four or five warehousemen in Chicago. As stated by Mr. Justice Brandeis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.[16]

In *Board of Trade*, there was a stimulation of commerce. The formation of organized leagues in professional sports yields the same result. The rules standardizing play should be upheld in the same fashion as the rules in *Board of Trade*:

> Where it is alleged that the structure of an industry makes such combination economically desirable, the courts have generally decided the lawfulness of its arrangements under the antitrust laws by balancing the alleged economic benefits against the potential evils and have allowed reasonable restraints, even when they fall into a category usually regarded as per se illegal.[17]

Restrictive Measures

However, in addition to the housekeeping arrangements necessary for their operation, the leagues have adopted more restrictive arrangements controlling the players and the teams, specifically, the reserve system, player drafts, and blacklisting. Each of these arrangements, as they are found within the respective sport league, will be examined and the antitrust aspects discussed.

Reserve Systems

1. Baseball

Contained in every contract signed by a major league baseball player is a reserve clause.[18] This clause, as it applies to major league baseball, is more than a single clause affecting that player and his team.[19] In actuality

16. 246 U.S. at 238.
17. *Supra* note 14, at 419.
18. BASEBALL BLUE BOOK 512 (1971) (hereinafter referred to as BLUE BOOK) Rule 3(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 preceeding year.

19. H.R. REP. No. 2002, 82nd Cong., 1st Sess. 11 (1952).

it 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.[20] As stated by one commentator:

> Once a player initially signs a contract to play professional baseball . . . , he is relegated to negotiating with and playing for one organization unless he decides to retire from active participation, or his contract is assigned to another club, or he is released as a free agent.[21]

Major league baseball has used this reserve system since 1879. During the 1870's a furious bidding war for players developed among the existing professional baseball teams in the National League. The results of the bidding war were predictable. The wealthy clubs from the populous urban areas continually outbid their less affluent rivals, and thereby attracted the best players. The poorer clubs were outclassed on the field and one by one experienced loss of fan support. The better clubs faced the prospect of escalating bidding, and the fans were becoming bored by the dominance of certain teams. Spiraling player salaries, combined with declining gate receipts, rendered it impossible for any team to show a profit, and as a result

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The reserve clause is popularly believed to be some provision in the player contract which gives the club in organized baseball which first signs a player a continuing and exclusive right to his services. Commissioner Frick testified that this popular understanding was essentially correct. He pointed out, however, that the reserve clause is not merely a provision in the contract, but also incorporates a reticulated system of rules and regulations which enable, indeed require, the entire baseball organization to respect and enforce each club's exclusive and continuous right to the services of its players.

20. The following provisions of the reserve clause of professional baseball appeared in Flood v. Kuhn, 316 F. Supp. 271, 274 nn.5, 6 (S.D.N.Y. 1970).

> 3(g) Tampering. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, . . . unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.

The reserve rule, Major League Rule 4-A, provides in part:

> On or before November 15 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding forty (40) active and eligible players, whom the club desires to reserve for the ensuing season; and also a list of all its players who have been promulgated as placed on the Military, Voluntary Retired, Restricted, Disqualified, Suspended or Ineligible Lists; and such players signed under Rule 4 who do not count in the club's under control limit . . . [N]o player on any list shall be eligible to play for or negotiate with any club until his contract has been assigned or he has been released.

21. Note, *The Balance of Power in Professional Sports*, 22 MAINE L. REV. 459, 462.

the National League had lost eight of its original 15 teams to bankruptcy by 1879.[22] It was under the threat of financial ruin that the surviving seven teams of the National League met in 1879 and secretly agreed to "reserve," free from economic competition, five players apiece for the approaching season.[23] As evidenced by the financial position of major league baseball today,[24] the secret meeting in 1879 proved to be a most fortuitous event in the history of the league.

Today, once a player reaches the position of negotiating with a team, he must follow a prescribed procedure. The teams within the league have formulated an agreement among themselves whereby they agree not to deal with players except upon certain conditions.[25] All players must sign a Uniform Player Contract[26] 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%.[27] Any renewal contract will contain another renewal provision, thus binding the player perpetually. If the club so desires it may assign the player's contract to any of the other clubs.[28] The teams have also agreed that no club may negotiate with a player reserved by another club.[29] 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.[30]

This system seriously curtails the player's bargaining position, for although club management may feel the urge to reward an individual player for a particularly good season, the team need not be bargained into that position by the player. A player unsatisfied with a final contract offer has only two alternatives, play for the unsatisfactory sum or quit. Only when a player is given his outright release does he have the opportunity to negotiate with the clubs of his choice.

Strictly speaking, the actions of the teams in imposing the requirements of the reserve system result in the threat of group boycott[31] if the require-

22. H.R. REP. No. 2002, 82d Cong., 1st Sess. at 18-22 (1952).
23. *Id.* at 22.
24. U.S. Bureau of the Census, *Statistical Abstract Of the United States: 1968*, at 777 (89th edition.) Washington, D.C., (1968) reports that 158 baseball establishments grossed $68 million in 1968.
25. *See* BLUE BOOK 512-14, Rules 3(a), (g).
26. BLUE BOOK 512, Rule 3(a).
27. *Id.* at Section 10(a).
28. *Id.* at Section 6(a).
29. *Id.* at 513-14, Rule 3(g).
30. *Id.* at 545, Rule 15,
31. A group boycott is generally defined, in an antitrust context, as a confederation to prevent the carrying on of business with a certain individual, thus in antitrust

ments are not followed. It seems basic to the principle of free competition that a team should be free to refuse to deal with a player. Possibly his salary demands are too high, or his personality doesn't fit with the management of the team, or he cannot play at a competitive level. Whatever the reason, the team should be free to refuse to deal, and the player would have to look to another team. Acting as an independent unit, a team's refusal to deal would not run counter to antitrust policy. In *United States v. Colgate & Co.*,[32] the Supreme Court ruled that businessmen are free to refuse to deal with customers or suppliers absent combination, conspiracy, or purpose to monopolize. This broad pronouncement was narrowed in *United States v. Parke, Davis & Co.*[33] The *Colgate* principle of customer selection was limited to situations where if a certain policy is announced by X and Y violates that policy, X may *unilaterally* refuse to deal with Y.[34] The Court proscribed any activity by which X would attempt to *force* acceptance of its policy and in so doing exercise a control over the free flow of commerce. Such control would be inherently anti-competitive. Thus the presence or absence of coercion, in a refusal to deal, may be determinative of its legality.

In *Simpson v. Union Oil Co.*,[35] the Supreme Court ruled that defendant's refusal to renew the lease on plaintiff's service station was coercive since the decision was the result of plaintiff's price-cutting of gasoline supplied by defendant. Being a coercive response, to force acceptance of defendant's policy, it was found to be outside the bounds of *Parke, Davis* and therefore an illegal restraint on trade.

The effect of the reserve system is to force the player to accept the prescribed conditions of employment or be banned from playing major league baseball.[36] The group boycott has been held per se violative of 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.

terms a concerted refusal to deal. Such activity has been proscribed since Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

32. 250 U.S. 300 (1919).

33. 362 U.S. 29 (1960).

34. In *Parke, Davis* the activity which the Court proscribed consisted of Parke, Davis' coercive attempts to set a retail price maintenance scheme. In enforcing its suggested retail price policy, Parke, Davis went beyond refusing to deal with price-cutting retailers and used the threat of refusing to deal with the wholesale suppliers of such price cutters, thus bringing the wholesalers to pressure the price-cutters.

35. 377 U.S. 13 (1964).

36. *See* BLUE BOOK at 545, Rule 15. The player may be placed on either the Restricted List of the Disqualified List for disobeying the provisions of the reserve system. The teams have thus agreed not to deal unless their terms are accepted and the player enters the negotiations under the threat that he will not be allowed to play anywhere unless he agrees to the reserve system.

> 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.'[37]

The Major League Book of Rules known as the Blue Book, contains a plan to boycott those who do not contract in the manner prescribed.[38] Therefore, the group boycott found in major league baseball should be declared illegal.

Labor Exemption.

It has been argued by some[39] that baseball's reserve system is immune from attack under the antitrust laws since it is incorporated into a collective bargaining agreement between the players and the league:

> There is, however, no reason to think that as between employers and employees engaged in collective bargaining the antitrust laws either have or ought to have any application whatsoever to the determination of terms and conditions of employment.[40]

The argument continues that if the players are not satisfied with the reserve clauses, their relief must be sought at the bargaining table or under the National Labor Relations Act. There is merit in the proposal to employ collective bargaining to remedy some of the differences between the players and the owners. However, because certain matters can be subjects of collective bargaining, it does not follow that this susceptibility to bargaining must bar application of the Sherman Act. In the antitrust area, agreements reached by collective bargaining have not been held to be ipso facto reasonable. In *Paramount Famous Lasky Corp. v. United States*,[41] the Supreme Court held that an agreement which effected a concerted refusal to deal except by a standard form contract which was unreasonably restrictive, constituted an unreasonable restraint on trade even though the agreement was the product of six years of bargaining and discussion. The Court stated:

> It 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.[42]

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37. 359 U.S. 207, 212 (1959).
38. *Supra* note 30.
39. Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).
40. *Id.* at 21. The authors are raising a jurisdictional impediment to the application of the antitrust laws in those areas which *require* collective bargaining. *See* 39 U.S.C. § 151-68 (1964). This thesis rests on the proposition that the NLRA offers the only relief in the area of mandatory subjects of bargaining.
41. 282 U.S. 30 (1930).
42. *Id.* at 43.

Mr. Justice Goldberg's written brief to the Supreme Court in *Flood v. Kuhn*,[43] arguing for a finding of per se illegality, also expressed this same reasoning:

> But even here, Baseball's sudden enthusiasm for "collective bargaining" on this issue is beside the point. This is an antitrust suit challenging a per se antitrust violation, a concerted group boycott—the kind of unlawful employer conduct which this court has repeatedly refused to immunize from judicial scrutiny under the antitrust laws, just as the hypothetical susceptibility to collective bargaining of an unlawful employer practice does not insulate from judicial redress failure to pay a legally prescribed minimum wage, or racial discrimination in employment, or any other violation of the law.[44]

It seems that Mr. Justice Goldberg has pointed to the weakness in the labor argument. If one were to follow the argument of the labor exemption in the antitrust area, what is to prevent the exemption of civil rights laws, voting rights, etc. in the same type of situation. Therefore, with the authority of *Paramount Famous* rendering immaterial the proposition that collective bargaining should prevent antitrust enforcement, the reasonableness or unreasonableness of baseball's reserve system should be determined in light of its restrictive effect on the player's bargaining ability.

2. Football

The device by which professional football maintains personnel continuity is an option clause, which is, in effect, a variation of the reserve system.[45]

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43. Petitioner's Reply Memorandum at 3-4. Flood v. Kuhn is discussed more fully *infra* text at notes 87-103. Concededly, Mr. Justice Goldberg may be charged with a certain amount of inconsistency if we view his concurring opinion in Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965):

> [t]he National Labor Relations Act . . . declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions. The Act further provides that both employers and unions must bargain about such mandatory subjects of bargaining. This national scheme would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon employers and unions engaged in such collective bargaining. To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme.

It must be remembered, however, that Justice Goldberg was speaking of wages and hours, if he were to rule on the reserve clause, the majority opinion of Justice White in *Jewel Tea* would be more in line with his brief in the *Flood* case. Justice White ruled that the correct test of antitrust immunity is to balance the labor policies at stake in the collective agreement against the antitrust policies threatened by the specific provision.

44. *Id.* at 4.

45. *See* Standard Player Contract for Major Professional Football Operations as conducted by the National Football League, §§ 10 COUNSELING PROFESSIONAL ATH-

This seemingly more liberal plan is no doubt the result of *Radovich v. National Football League*,[46] where the Supreme Court limited the antitrust exemption to baseball and held that professional football was subject to the antitrust laws.

The option clause 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. To this point the option clause seems a favorable replacement of the reserve system. It gives the teams a certain stability with reference to personnel and yet allows for negotiations and bargaining as encouraged by the spirit of the antitrust laws. Thus, when the system was attacked in *Dallas Cowboys Football Club v. Harris*,[47] the Court held that the option clause was not so unreasonable and harsh as to be unenforceable in equity.[48] However, in addition to the basic provisions of the option clause, there has been added a provision known as the Rozelle Rule. The rule is as follows:

> Any player, whose contract with a League Club has expired, shall thereupon become a free agent and shall no longer be considered a member of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the 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 the Commissioner, in his sole discretion, deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.[49]

LETES AND ENTERTAINERS 377, 381 (1970):

> The Club may, by sending notice in writing to the Player, on or before the first day of May following the football season referred to in Par. 1 hereof, renew his contract for a further term of one (1) year on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said further terms, which rate of compensation shall not be less than ninety percent (90%) of the sum set forth in Par. 3 hereof, and shall be payable in installments during the football season in such further term as provided in Par. 3; and (2) after such renewal this contract shall not include a further option to the Club to renew this contract.

46. 352 U.S. 445 (1957).

47. 348 S.W.2d 37 (Tex. Civ. App. 1961). *See also* Hennigan v. Chargers Football Company, 431 F.2d 308 (5th Cir. 1970).

48. *Id.* at 47.

49. Due to the tremendous power given to the Commissioner in these circumstances the rule has been named after Pete Rozelle, the present Commissioner of the NFL.

Aside from various problems this system encounters under contract law, the Rozelle Rule is clearly a restraint upon the bargaining opportunities which the free agent supposedly possesses. The Rozelle Rule effectively vitiates the free operation of the option clauses and thus eliminates any harmony that the option clause had with the antitrust laws.

The *Harris* decision was handed down some time before the players had, as a group, begun to assert their economic rights. Thus, the restrictive effect of the option clause coupled with the Rozelle Rule was not truly known. However, as of training camp 1972, 32 free agents had filed suit against Commissioner Pete Rozelle and the NFL owners charging violations of the antitrust laws. The players specifically alleged that the owners refused to ". . . deal and negotiate with any player who has become, in theory, a free agent."[50] Thus, the players are alleging that the same per se antitrust violations found in the operation of the reserve system in baseball[51] exist in professional football. Existence of the Rozelle Rule strongly suggests that they do.

3. Basketball

Basketball has also operated under a form of the reserve system,[52] and as the standard contract was written it provided the team with a perpetual

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Art. XII, § 3, National Football League Constitution and By Laws (as amended Jan. 29, 1963). The operation of the Rozelle Rule was demonstrated in the case of David Parks. Parks had played out his option with the San Francisco 49'ers and negotiated a contract with the New Orleans Saints. The teams were unable to reach terms on a suitable compensation for the acquisition of Parks by the Saints. The Commissioner awarded San Francisco the first round draft choice of New Orleans for 1967 (Kevin Hardy) as well as the first round pick for the following year. Measured by the standards of a normal trade, this award was a severe penalty upon New Orleans. The award was also a clear warning to other clubs to maintain a hands off policy on free agents, thus forcing free agents to remain with their original teams and rendering the option clause ineffectual.

50. The Washington Post, July 27, 1972, § D at 7, col. 1.

51. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 593 (1959).

52. As it appeared in Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979, 981 (M.D.N.C. 1969) the NBA Uniform Contract provides:

> On or before September 1 next following the last playing season covered by this contract and renewals and extensions thereof, the Club may tender to the Player a contract for the next succeeding season by mailing the same to the Player at his address shown below, or if none is shown, then at his address last known to the Club. If the Player fails, neglects, or omits to sign and return such contract to the Club so that the Club receives it on or before October 1st next succeeding, then this contract shall be deemed renewed and extended for the period of one year, upon the same terms and conditions in all respects as are provided herein, except that the compensation payable to the Player shall be the sum provided in the contract tendered to the Player pursuant to the provisions hereof, which compensation shall in no event be less than 75% of the compensation payable to the Player for the last playing season covered by this contract and renewals and extensions thereof.

right to the player's services. The reserve system was changed to an option clause through the interpretation of the Cuyohoga County (Ohio) Court of Common Pleas in *Central New York Basketball, Inc. v. Barnett.*[53] Barnett played for the Syracuse Nationals of the NBA, and in 1959 had signed an NBA Uniform Player Contract which contained the reserve clause. In 1961, Barnett entered into a contract to play with the Cleveland Pipers of the now defunct American Basketball League. The Nationals brought suit to enjoin Barnett from playing with any other team. The irony of the case is in the fact that Barnett argued that a reserve system bound him perpetually, and the contract therefore should be declared void. The club, however, argued that if a player did not sign a new contract, the club had the right to renew the contract for only one year, and at the end of the renewal year, the contract was completed. Thus, the Nationals argued for the more liberal interpretation of the contract in their attempt to retain Barnett. The court agreed with the Nationals and enjoined Barnett from playing for anyone but the plaintiff during the 1961-62 season. This decision in effect incorporated the option clause into the NBA contract.[54] This inclusion of an option clause in the NBA contract was supported in *Lemat Corp. v. Barry.*[55] Plaintiff, Rick Barry,[56] alleged that the NBA reserve clause was a contract of adhesion.[57] The court of appeals supported this allegation and ruled that "any agreement that limits a person's ability to follow his vocation must be strictly construed. . . ."[58] Since contracts of adhesion are strictly construed against

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> The Club's right to renew this contract, as herein provided, and the promise of the Player not to play otherwise than for the Club and its assignees, have been taken into consideration in determining the amount of compensation payable under paragraph 2 hereof.

53. 19 Ohio App. 2d 130, 181 N.E.2d 506 (1961).

54. The court relied on the legal maxim that if the language of the contract is susceptible of two constructions, one which will render the contract valid and give effect to the obligations of the parties, and the other will render it invalid and ineffectual, the valid construction is to be adopted. 19 Ohio App. 2d at 133, 181 N.E.2d at 509.

55. Cal. App. 2d 671, 80 Cal. Rptr. 240 (Ct. App. 1969).

56. Barry initially signed with the San Francisco Warriors of the NBA for the 1965-66 season. Subsequently, he renewed his contract for the 1966-67 season, and the contract contained the standard NBA reserve clause. In September 1967, Barry signed a contract with the Oakland Oaks of the ABA. Under the contract, Barry was to begin playing with the Oaks in the 1967-68 season. However, Lemat obtained an injunction and Barry did not play for anyone during the 1967-68 season. He began to play for the Oaks in the 1968-69 season. Lemat appealed his one year injunction, but the court found the NBA contract, as written, to be a contract of adhesion and Lemat was limited to the one year injunction. *See supra* note 55.

57. Generally, a contract of adhesion is defined as a standardized contract, imposed and drafted by a party of superior bargaining strength, that leaves to the subscribing party only the opportunity to adhere to the contract or reject it. *See generally* Corbin, CONTRACTS 221 et seq. (1952).

58. Cal. App. 2d at 678, 80 Cal. Rptr. at 247.

the superior party, Uniform Player Contracts should be interpreted in favor of the players, whenever possible. This position is in line with the majority of decisions in this type of case.[59]

Summary

Viewed strictly in terms of harmony with the antitrust laws, each of the professional sports leagues has attempted to practice a form of group boycott. The leagues argue that the reserve systems, which in effect force the players to accept league terms or no terms, are essential to the operations and very existence of the leagues. The baseball owners argue that without the reserve system the rich teams would necessarily buy all the best talent. The league structure would weaken and fan support would evaporate. The same arguments are espoused by the professional football owners. At first glance these arguments do have weight and there is no question that league domination by the richest clubs would be detrimental to the maintenance of parity among the teams and consequently continued fan support. However, the experience of basketball has shown that a league will not necessarily fail if the players are given more economic freedom. Under the present circumstances, basketball players enjoy the greatest freedom to negotiate. This is the result of an option clause unburdened by a Rozelle Rule and the existence of two separate leagues.

The reserve system has had the questionable effect of restraining the player's right to negotiate, and of stabilizing player salaries at levels which are unquestionably lower than they would be in a more liberal economic atmosphere. These restraints are the actual effects of the existing system, whereas the owners' arguments against alteration of the system are based on their fears of what *could* happen. The courts should not be in the position of protecting the special economic interests of those involved in possible antitrust violations. 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. Therefore, the group boycotts found in professional sports must be treated as any other group boycott and found per se violative of the antitrust laws.

59. *E.g.*, Adams v. Adams, 156 Neb. 778, 790, 58 N.W.2d 172, 179 (1953) held that, "the law does not look with favor upon restrictions against competition, and an agreement which limits the right of a person to engage in a business or occupation will be strictly construed and will not be extended by implication or construction beyond the fair or natural import of the language used." *See also* Fleischer v. A.A.P., Inc., 163 F. Supp. 553 (S.D.N.Y. 1958), Securities Acceptance Corporation v. Brown, 106 N.W.2d 456, 171 Neb. 406 (1960).

Player Drafts

The restraining effect of the reserve and option clauses upon the bargaining positions of the players has been further intensified by the uniform player drafts. A form of player draft is currently used by all the professional sports leagues. Due to the existence of two rival leagues in basketball and hockey, these sports actually have two drafts, one by each league. This affords the drafted player the limited choice of the league he would like to play with. This, of course, gives the player the benefit of bargaining one league against the other.[60] This limited choice, however, does not exist in either baseball or football, where there is a single draft within each sport.

Basically, the draft system operates in the following manner in all sports: teams are allocated a certain number of selections, an equal number for all teams; the teams then select, in reverse order of their league standings, graduating high school or college athletes.[61] Baseball'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.[62] Despite its less restrictive nature, the baseball draft has the same net result as football's, the virtual elimination of bonuses. The draft, which ostensibly was created to equalize player talent and avoid bidding wars that prohibited effective competition for new players by the poorer clubs, has eliminated economic competition for new players and has taken from the player his economic lever, the bonus. For these reasons,

60. The value of even a limited right to bargain is unquestionable. Basketball players, as a result of the competitive bidding situation existing between the two leagues, are the highest paid professional athletes. This is true in both salary and bonuses for signing. *See* 531 ATRR A-12 (9/28/71).

61. The rule restricting draft selections to graduating college students has been altered in basketball due to the competitive situation existing between the two leagues. Hardship drafts, the drafting of economically needy students, are now permitted. An analysis which offers a possible reason for the college rule, as well as a reason to drop it is found in Schneiderman, *Professional Sport: Involuntary Servitude and the Popular Will*, 7 Gonzaga L. Rev. 63, 78 (1971).

> Professional sport, with a pretense of concern that each talented youngster should secure a college education, had decreed, conspiratorily, that a football or basketball playing boy cannot be "drafted" from out of the collegiate Minor League until his college class has been graduated. If the Class has been graduated, it is, of course immaterial whether or not the boy himself graduated. It is fairly transparent that the entire scheme is a matter of sport's economics that stands unrelated to the educational purpose. Under this tolerated system, not only can professional sport management have fair assurance that the young athlete will have received preprofessional training during his collegiate years, but also it can plan its annual "player draft" in the knowledge that the number of draft eligibles to be "scouted" and "bid-for" will be limited and will be readily identifiable.

This view may have support in the fact that concern over college education has evaporated as the competitive situation changes.

62. BLUE BOOK 517-22, Rule 4.

the draft is open to attack on antitrust grounds. The potential player is again faced with a concerted refusal to deal unless he deals in the manner prescribed by the league and in a manner which is injurious to him economically.

The draft system is an agreement among the competitive units in the league (the individual teams) not to compete in a specified market (new players). Each of the teams is given the exclusive right to negotiate with the drafted player free from economic competition of the other teams. Competition among the contracting parties is eliminated even more completely than if the parties had agreed on price but still competed in the relevant market. Agreements of this type only result in the elimination of competition. A player is restricted to bargaining with one team, rather than given the opportunity to bargain with twenty. This is clearly a restraint on trade; *cf.* the holding of the Supreme Court in *Timken Roller Bearing Co. v. United States*[63] finding a similar non-competitive agreement per se illegal should apply.

Blacklisting

The club owners have enforced their rules by the use of the blacklist. Simply stated, the blacklist is the banning of a player from a league.[64] Its existence has been justified as an effective means of preserving league integrity. Despite antitrust objections, namely a conspiracy to restrain the free entrance of a player into league exhibitions, the blacklisting of players for the purpose of maintaining public respect for professional sports by the elimination of gamblers has been upheld.[65] Undeniably, there is a legitimate interest to eradicate the danger of gambling influences in the area of competitive sports. However, the possibility of abuse is overwhelming, and this danger is not merely speculative. The leagues have used the blacklist improperly. Professional football owners reportedly blacklisted Bernie Parish, former All-Pro, for attempting to organize football players into a union.[66] Players have been blacklisted for performing in a competitive league.[67] In the *Gardella v. Chandler* case,[68] the circuit court ruled that an allegation of blacklisting was sufficient to constitute a cause of action. However, the suit was settled

63. 341 U.S. 593 (1951). *See also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
64. *See* Note, *The Balance of Power in Professional Sports,* 22 MAINE L. REV. 459, 465 n. 32 (1970).
65. Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961).
66. *Supra* note 14, at 426.
67. *See* Martin v. National League Baseball Club, 174 F.2d 917 (2d Cir. 1949); Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).
68. 172 F.2d 402 (2d Cir. 1949).

prior to any court ruling. Baseball owners seemingly used the blacklist against All-Star third baseman Clete Boyer after he made public a disagreement with Atlanta Braves General Manager Paul Richards.[69]

The blacklist is the means of enforcing the other restrictive devices[70] employed in professional sports. The blacklist involves antitrust problems, since it is the use of monopoly power to force elimination of commercial activity,[71] in that the teams agree not to allow a certain player to remain in the league. However, its use also involves limitations upon the personal freedoms of the players. It is a system of private criminal law; practiced without procedural safeguard, at the fiat of the owners. Since there is no precise definition of what constitutes an activity which is punishable by blacklisting, any innocent activity by the player which does not meet with owner satisfaction may fit into the category.

> Potentially, the most serious area of abuse through use of the blacklist involves a player's personal freedoms. There is no question that a star performer's ability to become involved in controversial issues is much greater than that of the journeyman player. The average player may be labeled as a troublemaker and therefore undesirable whereas the star performer is usually considered untouchable. One's right to exercise his personal civil rights off the field may in some cases be directly related to his ability to perform on it.[72]

Restraints on Owners and Potential Owners

In addition to the above restrictions which involve the relationship of the league to the player, there are restraints imposed upon owners and potential owners which also have antitrust implications.

It has been a long-standing objective of the antitrust laws to promote free entry and expansion within a market as demand arises. Generally, however, entry into professional sports leagues is conditioned upon acceptance of the applicant by a high percentage of the existing clubs.[73] The league is an organization which makes possible a product no single unit could produce and as such is comparable to a joint venture.[74] A league is also com-

69. For a further treatment of the Clete Boyer case, *See* Keeffe, *Positively, Mr. Kipling? Absolutely, Mr. Kuhn!* 58 A.B.A.J. 651 (June, 1972).

70. *See supra* at note 18 to 63 and accompanying text.

71. In Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) such activity was deemed violative of the antitrust laws.

72. *Supra* note 64, at 466-67.

73. *E.g.*, American League Const. art. 3.1 (b) (1966) (3/4 of existing teams); NFL Const. art. 3.1 (b) (1966) (vote of 13 of 16 members); NHL Const. art. 3.5 (1947) (3/4 of existing clubs).

74. The Supreme Court, in United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964), described a joint venture as, "the chosen competitive instrument of two or

parable to a trade association, in that it sets standards for the industry and regulates competition among the clubs. When the structure of an industry justifies anti-competitive cooperation through trade associations, it is required that the organization be equally open to all reasonably qualified applicants.[75] This rule is based on the premise that it should be the needs of the market which will determine market size, and not economic self-interest. However, the position taken with regard to professional sports is contrary to this. *Deesen v. Professional Golfers' Association of America*[76] stated that free entry into a professional sports league could not be required. The general requirement could not be maintained due to the necessary relationship required by scheduling and revenue sharing, which would necessarily fail if the new entrant were a completely independent unit. A further justification of entry controls arises from the problem of maintaining a balance of team strengths which requires stocking new teams from existing teams. Thus, there seems to be a legitimate purpose in establishing reasonable rules for entry. However:

> The exercise of this legitimate control over entry should . . . be carefully examined, for there would seem to be a built in bias against expansion, which would bring dilution of the existing teams' position as one of a very few suppliers of a highly demanded service.[77]

It seems that the leagues should be required to formulate decisions regarding expansion after a reasonable determination of how fast the league could expand without serious injury to the sport, and to allocate new franchises on the basis of a valid comparison among the applicants. Presently there are no such guidelines in the area of professional sports.

The sale of franchises is another area directly regulated by the respective leagues. Immediately three justifications for this form of regulation can be seen: first, to insure that those seeking to purchase a team have sufficient finances; second, to prohibit gambling interests from gaining control of a team; third, to prevent conflicts of interest. However, it is open to question whether the league could or does attempt to detect a failure in any of the three areas.[78] Besides the seeming inability of the leagues to enforce the

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more corporations previously acting independently and usually competitively with one another," *Id.*, at 169 and as such may foreclose actual or potential competition among the parent companies and the progeny. In the context of professional sports the separate teams (parent corporations) agree to form a league (progeny), which forcloses a portion of the competition among the teams.

75. *See* Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912).

76. 358 F.2d 165 (9th Cir. 1966) *cert. denied,* 385 U.S. 846 (1966).

77. *Supra* note 14, at 427.

78. The policy against conflicts of interest did not prevent the sale of the New York Yankees to the Columbia Broadcasting System. The desire to promote financial

objectives, the sales restrictions are easily subject to abuse and the power over sales has been used to punish league mavericks and to interfere with the business decisions of potential buyers.[79] One commentator has stated:

> The tenuousness of the alleged legitimate purposes, the availability of alternatives, the serious restrictive effects on entry, and the possibility of abuse all suggest that these restraints on sale are not sufficiently justified by the peculiarities of the industry to survive antitrust challenge.[80]

The Supreme Court has declared that a manufacturer may select whom he will sell his goods to, where competitive products are readily available to those not selected.[81] The availability of competitive products within a particular sport is non-existent. For this reason and to avoid possible discriminatory control over sales, the restraints on sales in professional sports are unreasonable. The Supreme Court in *United States v. General Motors Corp.*[82] has declared a similarly unreasonable control over sales illegal.

The final regulatory measure results in the curtailment of the owner's ability to move his franchise. Basically, the restrictions covering franchise movement are divided into two categories: first, an owner must receive approval from an extraordinary majority of the owners;[83] second, the proposed move must be beyond the protected territory of one of the existing teams.[84] Antitrust law holds market divisions and territorial restraints to be per se illegal,[85] for these activities necessarily have the effect of eliminating competition. There is a certain justification, however, for this restriction in the case of a team wishing to move into a city already occupied by another team, since the incumbent team might be sufficiently weakened by

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stability for the team must have been overlooked, when the American League allowed Bob Short to purchase the then Washington Senators.

79. Organized baseball has repeatedly shunned the efforts of Bill Veeck, former owner of the Chicago White Sox, to regain status as an owner. While he was in Chicago, he continually called for changes in the structure of the game. The sale of the old Philadelphia Athletics is an example of the use of the veto power to force the sale of the team to a man who would move the team, rather than to a group that would have kept the team in Philadelphia. *See* New York Times, Oct. 16, 1954, at 20, col. 1; Oct. 18, 1954, at 1, col. 7; Oct. 29, 1954, at 30, col. 1; Nov. 5, 1954, at 25, col. 1; Nov. 9, 1954, at 332 col. 1.

80. *Supra* note 14, at 428-29.

81. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

82. 384 U.S. 127 (1966), *rev'g* 234 F. Supp. 85 (S.D. Cal. 1964).

83. National League Const. & Rules art. 3.1. (1962) (3/4); American League Const. art. 3.2 (1966) (3/4). The NHL prohibits any team move, NHL Const. art. 4.2 (1947). Football and basketball follow the baseball requirement of three-fourths.

84. National League Const. & Rules art. 3.2 (1962) (ten miles); American League Const. art. 3.2 (1966) (one hundred miles); NFL Const. arts. 4.1, 4.3 (generally an exclusive right to play football within 75 miles); NHL Const. art. 4.1(c) (1947) (fifty miles). Standards for the NBA and the ABA are unavailable.

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

the competition to threaten the entire league. The leagues have also argued that the prohibition against team movement is primarily for the fan. It would be unfair to the fan to have a team which he faithfully supported move away. However, within the last ten years several team owners offered the chance to move to virgin territory have seized the opportunity.[86] Again, because the present system is unregulated, it is easily subject to abuse.

Non-Enforcement

The reserve system, the draft, blacklisting, and owner restraints seem to be clear violations of the antitrust laws, whether taken individually or collectively. However, there has not been a single instance of governmental action to enforce the antitrust laws in the sports area. The reason for this non-enforcement is not entirely clear. Although baseball enjoys an exemption from the antitrust laws,[87] this exemption does not apply to other professional sports which operate under similarly restrictive systems. As stated by Michael Schneiderman:

> One finds, in the United States, a general willingness to permit the athlete to sacrifice his personal freedoms in order that the public may take its sporting pleasure. In this sense the American public is parasitic upon its professional athlete. . . . As a result of this general non-enforcement view, the formal distinction between the position of baseball and the other professional sports under the antitrust laws becomes immaterial. In practice, all professional sport is treated as if it were exempt from the antitrust laws.[88]

This analysis suggests the dilemma facing the professional athlete. He is faced with a structure which restricts his economic freedoms. When he seeks enforcement of the laws enacted to prohibit this type of activity he is faced with either an exemption, or a general unwillingness on the part of the government to protect his rights due to the possible interruption of the entertainment of the fans. And if he initiates action on his own, he runs the danger of being blacklisted from his chosen profession.

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86. Some of the teams which have moved in this period are:

formerly	now
Kansas City Athletics	Oakland A's
Milwaukee Braves	Atlanta Braves
Washington Senators	Texas Rangers
Seattle Pilots	Milwaukee Brewers
Washington Senators	Minnesota Twins
St. Louis Hawks	Atlanta Hawks
Cincinnatti Royals	Kansas City-Omaha Kings

87. Major league baseball has enjoyed an exemption from the antitrust laws since 1922. *See* Federal Baseball Club of Baltimore, Inc. v. National League, 259 U.S. 200 (1922); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). *See* discussion *infra* at notes 96-103 and accompanying text.

88. *Supra* note 61, at 64-66.

The recent ruling by the United States Supreme Court retaining baseball's antitrust exemption is notable as a clear statement that the Court will not assert its power to enforce the antitrust laws in this sphere. The case of Curt Flood offers an interesting context in which to discuss the illogic of maintaining a non-enforcement policy.

In 1922, the Supreme Court in *Federal Baseball Club v. National League*,[89] ruled that the business of giving baseball exhibitions was exempt from the antitrust laws. Mr. Justice Holmes writing the opinion for a unanimous Court stated:

> The business is giving exhibitions of base ball, which are purely state affairs . . . But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of the words.[90]

Mr. Justice Holmes based his opinion upon the interpretation of interstate commerce existing in 1922. It is important to note that the basis of the Holmes opinion was this concept of interstate commerce and his belief that baseball fell outside the classification.

In 1953, the Supreme Court again agreed to hear an attack upon the reserve system. The grant of certiorari, in *Toolson v. New York Yankees Inc.*,[91] came after the basis of the original decision on the reserve system had disintegrated. *Paul v. Virginia*,[92] upon which the Court in *Federal Baseball* relied for its interpretation of interstate commerce, was overruled in *United States v. South-Eastern Underwriters Ass'n*.[93] The *Paul* case had held the insurance business outside the commerce clause because of its local nature. Justice Holmes had applied this same rationale to baseball. However, in *South Eastern* the Court stated:

> No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.[94]

The Court felt that the exemption from the Commerce Clause had been due solely to the fact that Congress had not attempted to regulate the field, and

89. 259 U.S. 200 (1922).
90. *Id.* at 208-209.
91. 346 U.S. 356 (1953).
92. 8 Wall. 168 (1868).
93. 322 U.S. 533 (1944).
94. *Id.* at 553.

thus the *Paul* case was sanctioning state regulation of an interstate business in the absence of federal legislation. The same rationale could have been applied to the exemption granted baseball. It was not that the activity of baseball was beyond the power of Congress, but the Court in *Federal Baseball* was giving the states an opportunity to legislate where Congress had failed to do so; it did not bar future federal action. The Court in *Toolson,* however, by per curiam opinion, affirmed the earlier holding in *Federal Baseball.* The Court expressed strong concern that there had been a lack of Congressional action to change the exemption granted by *Federal Baseball* that baseball had developed in reliance on the earlier decision for 30 years.

From the ruling in *Toolson* to the recent *Flood* case, there have been a number of attempts to apply the antitrust exemption to other professional sports and businesses built around the performance of local exhibitions; in every case the Court has refused to grant an exemption.[95] In *Radovich v. National Football League,* the Court specifically limited *Toolson* and *Federal Baseball* and declared that football was within the ambit of the antitrust laws:

> . . . [S]ince Toolson and Federal Baseball are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i.e., the business of organized professional baseball.[96]

Basketball was included within the ambit of the antitrust laws by *Haywood v. National Basketball Association.*[97]

Thus, when the Curt Flood case reached the Court, the antitrust exemption had been limited strictly to baseball and the basis of the exemption had been weakened due to the broadened view of interstate commerce. However, the Supreme Court, Justice Blackmun writing for the majority, refused to disturb the holdings of *Toolson* and *Federal Baseball.* Speaking of the exemption he said:

> It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis,* and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and acceptance of baseball's unique characteristics and needs.[98]

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95. *See* United States v. Shubert, 348 U.S. 222 (1955) (theatrical productions); United States v. International Boxing Club, 348 U.S. 236 (1955) (boxing); Radovich v. National Football League, 352 U.S. 445 (1957); Haywood v. National Basketball Association, 401 U.S. 1204 (1971) (professional basketball).

96. 352 U.S. 445, 451 (1957).

97. 401 U.S. 1204 (1971).

98. — U.S. —, 92 S. Ct. 2099, 2112 (1972).

What the unique characteristics and needs are which distinguish major league baseball from the other professional sports was not disclosed. The decision was based upon Congressional inaction in face of *Federal Baseball* and a strict application of stare decisis due to major league baseball's reliance on the original decision. Mr. Justice Blackmun seemed undeterred by his own finding that, "professional baseball is a business and it is engaged in interstate commerce."[99] This finding obviates any validity in applying stare decisis since it destroys the basis of *Federal Baseball.* The reliance of major league baseball upon the original decision should not deter the Court from applying the antitrust laws. It has never been the law that particular decisions, even on consent, were contracts between courts and litigants.[100] To hold that the Court must protect business interests built in reliance on prior decision could dangerously limit the adaptability and growth of the law, to say nothing of the one-sided nature of this approach when considering the interests of the other parties involved.

Justice Blackmun discussed congressional inaction in the following manner:

> We continue to be loathe, 50 years after Federal Baseball and almost two decades after Toolson, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.[101]

This belief that congressional inaction evinces a desire to maintain the exemption is based solely on the failure of Congress to pass any legislation ending the exemption. However, this view fails to take cognizance of the fact that Congress has failed to enact legislation broadening the exemption to include other professional sports. Furthermore, congressional inaction is inherently devoid of interpretation, it can only be viewed as inaction.[102]

> Nor does want of specific Congressional repudiations . . . serve as an implied instruction by Congress to us not to reconsider, in the light of new experience . . . those decisions. . . . It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. . . . Various considerations of parliamentary tactics and strategy might be suggested for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand

99. *Id.* at 2112.

100. United States v. Swift & Co., 286 U.S. 106, 115 (1932). *See also* United States v. Lucky Larger Brewing Co., 209 F. Supp. 665 (D. Utah 1962); United States v. Savannah Cotton & Naval Stores Exchange, Inc., 192 F. Supp. 256 (S.D. Ga. 1960); United States v. Owens-Corning Fiberglass Corp., 178 F. Supp. 325 (N.D. Ohio 1959).

101. — U.S. —, —, 92 S. Ct. 2099, 2112 (1972).

102. Helvering v. Hallock, 309 U.S. 106 (1940).

> when we try to find in the absence of corrective legislation a controlling legal principle.[103]

The decision is an unfortunate one. The Court had the opportunity to overrule the "aberration" granted in *Federal Baseball* and bring baseball into line with the other sports. The Court could have remanded the case to the District Court for a trial on the issues of per se violations, reasonableness, and the labor exemption. However, the Court avoided the issues, and by so doing has seemingly eliminated itself as a forum where the problem can be rectified.

Equal Protection

This analysis of professional sport leagues has shown that at the present time the most restrictive sport is baseball, followed by football and basketball.[104] Due to its exemption from the antitrust laws, baseball has been free to practice group boycott,[105] market division,[106] and lesser antitrust violations. Both football and basketball violate the antitrust laws, and neither enjoys an exemption from the law. Except for isolated attacks, the league structures have stood firm in the face of antitrust policy. As stated previously,[107] there has been a non-enforcement policy with regard to professional sports which has in effect exempted all league sports from the antitrust laws. As a result, athletes, because of their profession, have been afforded second class rights. This discrimination varies depending upon which sport the athlete plays. Thus, through non-enforcement athletes have effectively been denied equal protection of the laws. Profession Michael Schneiderman has stated:

> In those areas where constitutional mandate is itself involved, clearly any administrative view with regard to the popular will to enforce is irrelevant. Although the more leeway persists in the area of statutory interpretation, there remain two important limitations upon interpretive and administrative discretion: (1) the Constitution itself must be seen to require fair and equal interpretation and enforcement of the laws, and (2) it may be necessary to recognize that the federal antitrust (and labor) laws themselves have constitutional dimensions. The rights those laws elaborate originate not in the statutes but in the Constitution and, consequently, the rights themselves enjoy an entrenchment that is not subject to the vagaries of ordinary statutory interpretation.[108]

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103. *Id.* at 119-21.
104. *Supra* note 59 and accompanying text.
105. *Supra* notes 31 to 38 and accompanying text.
106. *Supra* notes 73 to 75 and accompanying text.
107. *Supra* notes 84 to 86 and accompanying text.
108. *Supra* note 61, at 66.

The enforcement of the antitrust laws against the illegal operations of the leagues seems mandated by the equal protection clause of the fourteenth amendment. The antitrust laws should be applied equally in all sports, and the application should be equal to the enforcement of those laws outside sports.[109]

Conclusion

The answer to the problems plagueing professional sports seems to lie not in the formation of a Federal Sports Commission, which some have suggested, but in the treatment of professional sport as a normal commercial activity, subject to the normal standards of behavior. All leagues should be competitive, *i.e.*, each league within a specific sport would be separate, thus offering the players the opportunity to negotiate their services among competitors. Placing sports on this plane will end protection for the privileged and open sports to the test of competitive activity which can insure protection of the rights of the athletes. A step in this direction is currently being considered in Congress. Senator Sam Ervin has introduced a bill[110] which will end all antitrust exemptions and bar the proposed basketball merger. As has been stated by one commentator:

> . . . fostering the creation of new leagues may be a useful contribution which antitrust law enforcement could make to insuring that the extensive restraints on competition required in professional sports do not prevent the satisfaction of consumer desire for more sports and player desire for a more favorable bargaining position.[111]

An application of the antitrust laws to all professional sports must be followed by a criminal enforcement policy which will be equal to the application in other commercial endeavors involving such a substantial amount of commerce and such a tremendous impact upon the American people.

James F. Foley

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109. As stated by Congressman Emmanuel Celler:
". . . The important thing is to once and for all end unwarranted privilege and place all professional sports on equal footing. In the past the sports monopolists have come before this sub-committee defending their claimed exemption from the antitrust laws because the health of professional sports is in the community interest. But when these community-minded gentlemen have left the halls of Congress, too often their actions have exhibited utter disregard for the communities that support them. Ticket prices skyrocket, television reception is blacked out, greedy threats of franchise moves are made upon municipal officials, teams jump from city to city betraying life long supporters.

110. S. 373.

111. *Supra* note 14, at 434.