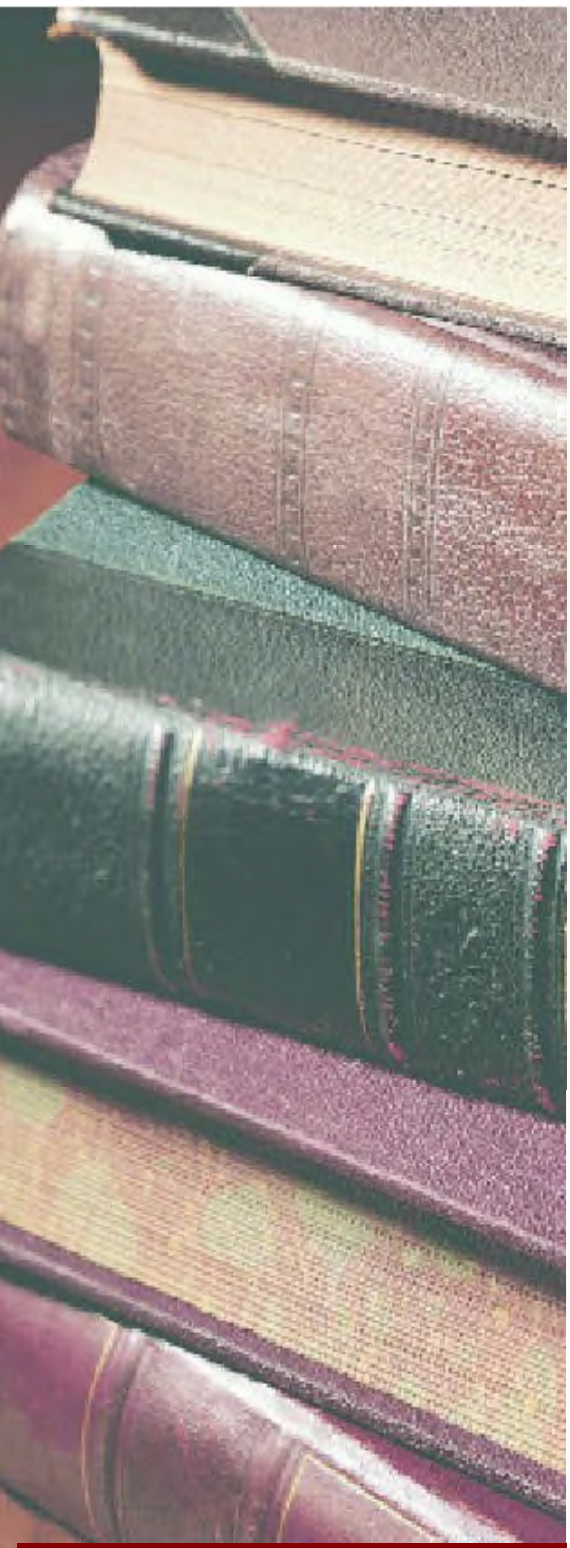

Winter 2014

E&I UPDATE

A publication of the Exemptions & Immunities Committee of the Section of Antitrust Law, American Bar Association

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MESSAGE FROM THE EDITOR

Welcome to the Winter 2014 edition of *E&I Update*.

In this edition, you will find an excellent article by our frequent contributor, Carrie Amezcua, addressing the appropriate sham litigation test to employ when considering a series of lawsuits. The Fourth Circuit recently joined the Second and Ninth Circuits in holding that the analysis in *California Motor* provides the proper framework. While not every court to address the issue has come to the same conclusion, the article argues in favor of the *California Motor* approach, with a gloss of the analysis found in *Professional Real Estate*. Our Young Lawyer Representative, Stephen Medlock, has also prepared a great recap of our committee's recent program on the baseball exemption.

This edition also includes case summaries circulated on our committee's list-serv and Facebook page since the last publication of *E&I Update*. Contributors Nathaniel Brower, Mario Richards, Carrie Amezcua, and Keith Klovers provide summaries of important recent cases in the areas

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of state action, the FTAIA, the filed rate doctrine, and the baseball exemption.

Our committee is always interested in new volunteers to summarize important judicial and legislative developments, prepare articles for the newsletter, and assist with Section publications. If you are interested in contributing to the E&I Committee, please contact me or any of the other Vice Chairs.

Greg Garrett

Spring Training: The Baseball Exemption

Stephen M. Medlock, Mayer Brown LLP

Since 1922, the business of baseball has been exempt from antitrust scrutiny.[1] Since then, the rationale for this exemption has changed.[2] The Supreme Court has observed that the baseball exemption is "unrealistic, inconsistent, or illogical," and indicated that if it "were . . . considering the question of baseball for the first time upon a clean slate," the exemption would not exist.[3] Moreover, economists recognize that potentially anticompetitive agreements amongst professional baseball teams can result in welfare losses.[4] Despite these recognized flaws, the exemption endures.[5] Courts have held that the exemption applies to the structure of major league baseball, including the number of clubs,[6] compensation to minor league clubs,[7] contracts with umpires,[8] franchise relocation,[9] and player contracts.[10]

On December 20, 2013, the Exemptions and Immunities Committee, in cooperation with the Trade, Sports & Professional Associations Committee, presented a panel discussion of the baseball exemption. After discussing the history of the exemption, the panel debated the scope and vitality of the exemption by focusing on two developments: (1) *City of San Jose v. Office of Commissioner of Baseball*,[11] and (2) *Piazza v. Major League Baseball*.[12] The panel was moderated by **Karen Hoffman Lent**, a partner at Skadden, Arps, Slate, Meagher & Flom LLP and counsel to NBA and four of its teams in litigation brought by the Spirits of St. Louis regarding Spirits' rights to NBA television revenues. Two panelists contributed their view on the baseball exemption: **Brad Ruskin**, a partner at Proskauer Rose LLP, and counsel to Major League Baseball in *City of San Jose*; and **Hon. Bruce Kauffman,** counsel to the plaintiffs in *Piazza*.

The History of the Exemption: The Supreme Court Trilogy

Mr. Ruskin began by discussing the history of the baseball exemption. Succinctly stated, the baseball exemption is: "[t]he business of baseball is exempt from the antitrust laws, as it has been since 1922, and as it will remain until Congress decides otherwise. Period."[13]

The exemption was created by judicial fiat in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[14] That case arose from the failure of the Federal League. In 1913, John T. Powers created the Federal League, a new minor league.[15] In 1914, the Federal League declared itself to be the third major league.[16] At its inception, the league included teams in Baltimore, Brooklyn, Buffalo, Chicago, Indianapolis, Kansas City, Pittsburgh, and St. Louis.[17]

Like other upstart professional sports leagues,[18] the Federal League sued the National League and the American League, arguing that they monopolized professional baseball and conspired to destroy the Federal League.[19] Ultimately, the Federal League settled with the American and National Leagues. As a result of the settlement, the Federal

League was disbanded. Two of the Federal League owners were allowed to buy major league teams, leading to the creation of the Chicago Cubs and St. Louis Browns.[20]

The Baltimore Federal League team, the Terrapins, refused to take part in the settlement.[21] In 1916, they filed their own antitrust lawsuit, which challenged the National League's and American League's player contracts and the structure of major league baseball.[22] The case went to trial.[23] The Terrapins obtained a verdict of $80,000, which was trebled to $240,000.[24] In 1916, the Court of Appeal for the District of Columbia overturned the verdict, holding that baseball was not interstate commerce.[25] In 1922, the Supreme Court decided *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[26] Writing for a unanimous court, Justice Holmes held:

> The business is giving exhibitions of base ball [*sic*], which are purely state affairs. It is true that in order to attain for these exhibitions a great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. 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.[27]

Despite the *Lochner* era logic of *Federal Baseball*, the Court continued to apply the exemption. In 1953, the Supreme Court revisited *Federal Baseball* in *Toolson v. New York Yankees, Inc.*,[28] an antitrust challenge to minor league player contracts.[29] In a single paragraph *per curiam* opinion, the Court affirmed *Federal Baseball*.[30] The Court offered a new justification for the exemption, focusing on *stare decisis* concerns and positive inaction by Congress:

> Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.[31]

The third case in the Supreme Court's baseball exemption trilogy was *Flood v. Kuhn*.[32] After being traded from the St. Louis Cardinals to the Philadelphia Phillies in 1969, Curtis Flood filed an antitrust suit challenging the reserve clause in Major League Baseball contracts.[33] Again, the Supreme Court upheld the exemption on the basis of *stare decisis* and Congressional inaction.[34] While the Court expressed doubt that it would have reached the same result as *Federal Baseball* if it were considering the case as a matter of first impression, it acknowledged that "the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century."[35] Therefore, the Court concluded, "[w]e continue to be loath, 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."[36]

The Future of the Exemption

The panelists disagreed on the scope and continued vitality of the exemption. Drawing on the recent opinion in *City of San Jose v. Office of Commissioner of Baseball*,[37] Mr. Ruskin noted that, since *Flood*, courts have applied the baseball exemption in several cases.[38] According to Mr. Ruskin, the exemption has been distinguished or limited set of cases where the defendant sought to apply the exemption beyond the business of baseball.[39] *Piazza v. Major League Baseball*,[40] limited or distinguished the Supreme Court's holdings in *Federal Baseball*,[41] *Toolson*,[42] and *Flood*.[43]

He observed that the Curt Flood Act of 1998[44] gives further credence to the exemption. In the Act, Congress determined that "conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws" to the same extent as conduct in other professional sports leagues.[45]

Judge Kauffman argued that, since its inception, the exemption has been bad law. While he acknowledged that the exemption presents a high burden at the motion to dismiss stage, Judge Kauffman stated that *Federal Baseball* is a derelict in the stream of law, an anomaly, and an aberration. He observed that judicial exemptions should be read narrowly.[46] He argued that *Federal Baseball*,[47] *Toolson*,[48] and *Flood*[49] could be distinguished because those cases exclusively dealt with the reserve clause in Major League Baseball player contracts.[50]

Judge Kauffman pointed to *Piazza* as a case where the combination of this distinction and egregious facts could enable a plaintiff to avoid the baseball exemption. In *Piazza*, Vincent Piazza and Vincent Tirendi attempted to purchase the San Francisco Giants and move the team to Tampa, Florida.[51] Piazza and Tirendi alleged that after it became clear they planned to move the team, Major League Baseball officials made libelous comments about their Italian heritage, including statement that "associated them with the Mafia and/or other criminal or organized criminal activity."[52] Assessing these facts at the motion to dismiss stage, the district court determined that *Flood* "stripped from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, i.e., the reserve clause."[53] After surviving a motion to dismiss, Major League Baseball and the plaintiffs reached a confidential settlement before the district court could rule on Major League Baseball's motion for summary judgment.[54]

Conclusion

The panel discussion left little doubt that the baseball exemption poses a significant obstacle at the pleading stage to antitrust claims regarding the business of baseball. However, the panelists were divided on the scope of the exemption and its continued vitality.

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[1] Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922) (Holmes, J.) ("The business is giving exhibitions of base ball [*sic*], which are purely state affairs.").

[2] *Compare Fed. Baseball*, 259 U.S. at 208, *with* Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam) ("Congress has had the ruling under consideration but has not seen fit to bring such business under [the antitrust] laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to antitrust legislation.").

[3] Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957).

[4] *See* Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 134 (2001) ("The result is an artificial scarcity of franchises, resulting from lower output as well as higher prices that communities must pay in order to persuade a league to expand or an existing owner to relocate or remain in the community. . . . [U]nchecked by quality competition, leagues can pursue profits at the expense of a number of business practices that would render their product more responsive to consumer demand.").

[5] City of San Jose v. Office of Comm'r of Baseball, Case No. C-13-02787 RMW, 2013 WL 5609346, at *1 (N.D. Cal. Oct. 11, 2013) (analyzing prior baseball exemption case law); *see also* Flood v. Kuhn, 407 U.S. 258, 282 (1972) ("the aberration is an established one").

[6] *See* Major League Baseball v. Crist, 331 F.3d 1177, 1183 (11th Cir. 2003) (baseball exemption applies to team contraction).

[7] *See* Portland Club, Inc. v. Kuhn, 491 F.2d 1101, 1103 (9th Cir. 1974) (citing *Flood* and holding that "the plaintiff's claim for relief under the antitrust laws was properly dismissed.").

[8] *See* Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) (holding that "we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions," and affirming dismissal of antitrust claims).

[9] *See* City of San Jose v. Office of Comm'r of Baseball, Case No. C-13-02787 RMW, 2013 WL 5609346, at *5-7 (N.D. Cal. Oct. 11, 2013) (dismissing antitrust claims related to Oakland A's planned relocation to San Jose, California). *But see* Piazza v. Major League Baseball, 831 F. Supp. 420, 433 (E.D. Pa. 1993) (distinguishing prior Supreme Court precedent and holding that "the exemption either does not apply in this case, cannot be applied as a matter of law to the facts of this case, or should no longer be recognized at all.").

[10] *Toolson*, 346 U.S. at 357 (per curiam) (applying exemption to reserve clause in player contracts); Flood, 407 U.S. at 283 (same). *But see* 15 U.S.C. § 26b (a) (repealing baseball exemption for "conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level").

[11] Case No. C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013).

[12] 831 F. Supp. 420 (E.D. Pa. 1993).

[13] Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316, 1331 (N.D. Fla. 2001), *aff'd sub nom*., Major League Baseball v. Crist, 331 F.3d 1177 (11th Cir. 2003).

[14] 259 U.S. 200 (1922).

[15] ROBERT PEYTON WIGGINS, THE FEDERAL LEAGUE BASE BALL CLUBS: THE HISTORY OF AN OUTLAW MAJOR LEAGUE 6-7 (2008).

[16] *Id.* at 6-7.

[17] *Id.*

[18] *See* U.S. Football League v. Nat'l Football League, 842 F.2d 1335 (2d Cir. 1988) (affirming jury verdict granting USFL $1 in damages).

[19] *Fed. Baseball*, 259 U.S. at 207.

[20] WIGGINS, *supra* note 15, at 305, 311.

[21] *Id.* at 298-301.

[22] *Id.*

[23] *Fed. Baseball*, 259 U.S. at 207.

[24] *Id.*

[25] Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 685 (C.C.D.C. 1920) (reasoning "[s]uppose a law firm in the city of Washington sends its members to points in different states to try lawsuits; they would travel, and probably carry briefs and records, in interstate commerce. Could it be correctly said that the firm, in the trial of the lawsuits, was engaged in trade and commerce?").

[26] 259 U.S. 200 (1922).

[27] *Id.* at 208-09.

[28] 346 U.S. 356 (1953).

[29] *See, e.g*., Toolson v. New York Yankees, Inc., 101 F. Supp. 93, 93 (S.D. Cal. 1951) (discussing facts of one of three cases consolidated and heard by Supreme Court).

[30] 346 U.S. at 356-57.

[31] *Id.*

[32] 407 U.S. 258 (1972).

[33] *Id.* at 264-66.

[34] *Id.* at 283.

[35] *Id.*

[36] *Id.* at 283-84.

[37] Case No. C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013).

[38] *See supra* notes 6-10.

[39] *See, e.g.*, Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 271 (S.D. Tex. 1982) (in a dispute regarding the television rights to Houston Astros games, concluding that "[t]o hold that a radio station contract to broadcast baseball games should be treated differently for antitrust law purposes than a station's contract to broadcast any other performance or event would be to extend and distort the specific baseball exemption, transform it into an umbrella to cover other activities outside baseball and empower defendants' radio station and 'network' to use that umbrella as a shield against the statutes validly enacted by Congress.").

[40] 831 F. Supp. 420 (E.D. Pa. 1993).

[41] 259 U.S. 200 (1922).

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

[43] 407 U.S. 258 (1972).

[44] 15 U.S.C. § 26b.

[45] *Id.*

[46] *Piazza*, 831 F. Supp. at 438 ("It is well settled that exemptions from the antitrust laws are to be narrowly construed.").

[47] 259 U.S. 200 (1922).

[48] 346 U.S. 356 (1953).

[49] 407 U.S. 258 (1972).

[50] Postema v. Nat'l League of Prof'l Baseball Clubs, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) ("It is thus clear that the baseball exemption does immunize baseball from antitrust challenges to its league structure and its reserve system, the exemption does not provide baseball with blanket immunity for anti-competitive behavior in every context in which it operates."); *see also Piazza*, 831 F. Supp. at 436 (holding that *Flood* "stripped from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, i.e., the reserve clause."). *But see* Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316, 1324 (N.D. Fla. 2001) ("The assertion that [*Federal Baseball*] was solely a reserve clause case is simply not true. *Federal Baseball* held that professional baseball, not just the reserve clause, was outside the scope of the antitrust laws.").

[51] *Piazza*, 831 F. Supp. at 422-23.

[52] *Id.* at 423.

[53] *Id.* at 436.

[54] Although the terms of the settlement were confidential, several sources reported that Major League Baseball paid the plaintiffs $6 million and Bud Selig wrote a letter of apology to the plaintiffs. *See, e.g.*, Michael Bamberger, *Baseball Apologizes to Rejected Investors: The Two Valley Force Businessmen Also Got a Check for More than $6 Million in the Settlement*, PHILA. INQUIRER, Nov. 3, 1994, *available at* http://articles.philly.com/1994-11-03/sports/25867611_1_formal-apology-comments-giants-move.