

Sports & Antitrust



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The Big Issues

- § *Copperweld* and the Single Entity Defense
- § The Labor Exemptions
- § Per Se or Rule of Reason
- § The Baseball Exemption

The Single Entity Defense

- § *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984): commonly owned entities cannot conspire
- § Always an issue in litigation against sports leagues
- § Defense generally rejected: *e.g.*, *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005)
- § But not always: *e.g.*, *Jack Russell Terrier Network of Northern Ca. v. American Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005); *Chicago Prof'l Sports v. NBA*, 95 F.3d 593 (7th Cir. 1996).

What's the Test?

- § Are league or association members separate entities pursuing different, divergent economic goals?
- § Are they actual or potential competitors?
- § Do they act as a single combined entity with a common unified purpose?

The Labor Exemption: Statutory

§ The statutory labor exemption: Restraints of trade resulting from a collective bargaining agreement enjoy antitrust immunity if the union acts in its legitimate self-interest and does not combine with non-labor groups. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

Labor Exemption: Non-statutory

§ The non-statutory labor exemption: A restraint of trade imposed under a collective bargaining agreement is immune from antitrust if it (1) affects only the parties to the CBA; (2) is a mandatory subject of collective bargaining; and (3) results from bona fide arms' length bargaining. *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

Effect of Exemptions

- § Allows agreement, through collective bargaining, of restraints otherwise *per se* illegal: price fixing, market divisions
- § That's how we get *per se* arrangements
- § Salary caps
- § Player drafts
- § Divisions of markets

Brown v. Pro Football, Inc.

- § 518 U.S. 231 (1996)
- § CBA expired and negotiations at impasse
- § NFL owners agreed among themselves to implement their last offer in collective bargaining
- § Held: owners' agreement protected from antitrust claims by non-statutory labor exemption

Per Se or Rule of Reason

- § Sports mostly gets a pass on *per se*
- § *NCAA v. Board of Regents*, 468 U.S. 85 (1984): rule of reason applied because sports leagues require some degree of cooperation to exist at all
- § Generally the rule
- § But “quick look” can be applied where appropriate: *Board of Regents; Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998)

Baseball

- § According to most experts, the best measure of a player's value is
- § (1) Slugging percentage (total bases divided by at bats) times
- § (2) On base percentage (times reached base divided by at bats).
- § This is called SLOB.

Antitrust

- § The so-called baseball exemption under the antitrust laws is non-statutory.
- § It is based on Congressional inaction, not Congressional action.
- § The exemption exists only because the Supreme Court admittedly blew the call on whether baseball is covered by the antitrust laws.

Baseball

- § According to SLOB:
- § Mickey Mantle in his prime was better than Willie Mays in his prime.
- § Tim Lincecum is more deserving of the Hall of Fame than is Pete Rose, character issues aside.
- § Barry Bonds may be the greatest hitter in the history of baseball, Babe Ruth second, Ted Williams third, Frank Thomas sixth.

Antitrust

- § The Supreme Court blew the call on baseball three times:
- § *Federal Baseball Club, Inc. v. National League*, 259 U.S. 200 (1922; Holmes, J.; baseball not commerce).
- § *Toolson v. New York Yankees*, 346 U.S. 356 (1953; Congress has to fix our mistake in *Federal*).
- § *Flood v. Kuhn* (1972; same).
- § How does the Court square these cases with *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, ___U.S.___, 127 S.Ct. 2705 (2007)?

Baseball

- § Why aren't Jim Kaat (283 wins, 16 gold gloves), Bert Blyleven (287 wins, 60 shutouts, top 5 in strikeouts), and Tommy John (288 wins) in the Hall of Fame?
- § These three were at least the equal of Don Sutton, Phil Niekro, and Gaylord Perry.

Antitrust

- § So could baseball contract the Twins out of existence without worrying about the antitrust laws?
- § What the answer really turns on is not the baseball exemption, but the statutory and non-statutory labor exemptions to the antitrust laws.
- § This issue of contraction was and will be handled in the next collective bargaining agreement, if there is one.

Baseball

- § The most famous game in baseball history, the 1951 Giants-Dodgers playoff, the Bobby Thompson home run game, may have been won by cheating.
- § The Wall Street Journal reported that the Giants had a spy with binoculars in the centerfield clubhouse stealing the catcher's signs, which were then tipped to the hitter from the rightfield bullpen.
- § Thompson has never flatly denied being tipped off.

Antitrust

- § The CBA negotiations have made and will make contraction a non-issue for antitrust.
- § The Players Union and owners have agreed that contraction is a mandatory subject of collective bargaining.
- § It was so treated in the current CBA and will be again
- § Unless steroids kill the golden goose, contraction is likely a dead issue

Baseball

- § Some unbreakable records
- § Joe DiMaggio's 56-game hitting streak (1941)
- § Ted Williams's .406 (1941; 27 strikeouts);
Rogers Hornsby's .424 (1924)
- § Hack Wilson's 191 RBIs (1930)
- § Cal Ripken's consecutive game streak (cf., Lou Gehrig)
- § Nolan Ryan's seven no-hitters
- § Barry Bonds's 73 homers (no more juice)

Antitrust

- § In any CBA, the owners will want protection from antitrust liability, and will include whatever provisions are negotiated regarding contraction within the CBA.
- § Affected outsiders will therefore probably have no antitrust claims because of the CBA and the labor exemptions.

Baseball

- § Notwithstanding the claims of Bud Selig and the owners, there is evidence that the competitive balance of baseball has improved over time.
- § Today, there are far fewer teams playing above .600 and below .400 than in the past.
- § In 2000, for the first time, there were none.

Antitrust

- § Let's suppose that in the absence of a CBA baseball contracts by eliminating teams.
- § In almost any other industry, there would be serious antitrust issues raised by an agreement among competitors to restrict output, allocate markets, and refuse to deal with other potential entrants.

Baseball

- § What are the rarest events in baseball since 1880?
- § Unassisted triple plays (13; 12 regular season, 1 World Series)
- § Four home runs in one game (15; 2 pre-1900)
- § Perfect games (17; 2 pre-1900; 16 regular season, 1 World Series)

Antitrust

- § What is the scope of baseball's antitrust exemption? Would it protect contraction?
- § The traditional statement: The exemption applies to (1) player-owner relations, e.g., the old reserve clause; and (2) matters involving the structure of baseball. *Postema v. National League*, 799 F. Supp. 1475, 1488-89 (S.D.N.Y. 1992); *State v. Milwaukee Braves*, 144 N.W.2d 1 (Wis. 1966).
- § Looks bad, doesn't it.

Baseball

- § In his career from 1936 to 1951, Joe DiMaggio hit 361 home runs and struck out only 369 times.
- § In 1941, when he hit in 56 consecutive games and batted .357, DiMaggio struck out only 13 times in the entire season.

Antitrust

- § The courts, however, are *not* especially fond of the baseball exemption, and have found the following not to be exempt:
- § Dealings with concessionaires. *Twin City Sportservice v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975).
- § Dealings with broadcasters. *Nishimura v. Dolan*, 599 F.Supp. 484 (E.D.N.Y. 1984).

Baseball

- § These are the saddest of possible words,
Tinker to Evers to Chance.
- § Trio of Bear Cubs fleeter than birds,
Tinker to Evers to Chance.
- § Gracefully pricking our gonfalon bubble,
making a Giant hit into a double, words
that are loaded with nothing but trouble,
- § Tinker to Evers to Chance.
- § Franklin P. Adams

Antitrust

- § Non-exempt activities, cont.:
- § Relations with umpires. *Postema v. National League*, 799 F.Supp. 1475 (S.D.N.Y. 1992); but see, *Moore v. Nat'l Ass'n*, No. C78-351 (N.D. Ohio, July 7, 1976).
- § Relocation of teams. *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993); *Butterworth v. National League*, 644 So.2d 1021 (Fla. 1994). But, see, *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003).

Baseball

- § So who is the only team to turn two triple plays in the same game?
- § Our Twins
- § July 17, 1990 v. Boston Red Sox
- § Gaetti-Newman-Hrbek (4th, 8th innings)
- § Final score: Boston 1, Twins 0

Antitrust

- § Two final thoughts:
- § (1) Exemptions and immunities from the antitrust laws are disfavored and to be narrowly construed. *E.g.*, *Group Life & Health v. Royal Drug Co.*, 440 U.S. 205 (1979).
- § (2) Watch out for baseball's avoiding section 1 by successfully invoking the single entity defense.

Baseball

- § Why do we care?
- § Jacques Barzun: “Whoever wants to know the heart and mind of America had better learn baseball...”
- § Sinclair Lewis, Babbitt: “A sensational event was changing from the brown suit to the gray the contents of his pockets. He was earnest about these objects. They were of eternal importance, like baseball or the Republican party.”