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The Phoenix Phillies v. the Philadelphia Phillies: A Recently Discovered Opinion on Baseball and the Antitrust, The Exemption

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Students of late twentieth century law now suffer from the lack of accurate records that arose when so much of the legal materials of the time were put on “computers.” Even the term “computers” is something of a puzzle as, so far as we know, most legal materials had nothing to do with computation, and with the loss of such devices we have rather little idea why so much of the legal materials of the time were “computerized.” Be that as it may, we do know that computerization led to the neglect of written records. As a result, the loss of the “computers” has posed a real problem for historians generally, and for legal historians in particular. Still, sometimes we discover court opinions that puzzle and intrigue us. The following is such an opinion.

I recently uncovered the following hitherto unpublished opinion during my excavations in the region formerly called Pennsylvania. Among the many puzzles in this opinion is its origination in the Twelfth Circuit, a court of which we have no other record — indeed, I do not find any other reference to this court in other legal materials. Nor do we have a precise date for the opinion, although the internal references indicate that it was probably delivered in 1996 or 1997. I publish the opinion here in full because, even with its arcane references to an obscure game, its style and structure are unusual, although not entirely unprecedented. In particular, we have parts of the Supreme Court’s opinion in the case of Flood v. Kuhn,* referred to in this case. In Flood, the style of the opinion is somewhat similar, although the structure of that opinion appears to be altogether more traditional.

The opinion published below clearly attempts to reflect the flow of the game that forms the subject matter of the dispute. Apart from Flood and the case published below, we know very little about this game which once apparently was so central to the lives of our ancestors. The international importance of the game is suggested by records indicating that “Babe Ruth” was used as some sort of battle cry by the Japanese during their war against the United States, even though these two cases clearly indicate that she was an American. Her name also turns up on a candy bar, the recipe for which has survived to this day. Whether she invented the recipe for that bar, owned the company that made it, or was simply being honored in some strange way is unknown. As we cannot determine the source or significance of such iso-

lated facts, it is no wonder that some of the terms used in the opinion below remain puzzles. For example, does anyone know what the term “line score” signifies? And what is an “infield fly” and what possible role could an insect play in “the national pastime”?

Both Flood and the following case deal with the issue of whether professional sports leagues, that generate almost unimaginable amounts of money, should be subjected to the same government regulations as were applied to other businesses of the time. The sort of regulation in question is almost as puzzling as the game involved in the disputes. We are entirely unclear why the government should seek to ban “trust” from business conduct. Perhaps these laws reflect the rule of caveat emptor that some historians insist was the guiding law of the marketplace until our own enlightened times. The following case in particular gives us a much clearer picture of that area of law, demonstrating that the caveat emptor theory is not correct. Much work remains to be done to develop adequately the full scope and significance of “antitrust” law. Nothing in this case helps to clarify the puzzle of the name of this area of law.

For myself, I am drawn to a somewhat different problem presented by these opinions. The opinion that follows suggests that if we can understand the game, we can understand our ancestors. Even allowing for a certain customary hyperbole in the opinion, it seems worth the effort to attempt to recapture the nature and history of the game. I propose to do so using these two cases as starting points, while searching through other records for additional information. We know that the game had something to do with diamonds, but we do not know how they were used. Nor do we know if other jewels were used in the game. The role of diamonds and the amounts of money involved in the case below suggest that an important aspect of the game was the materialism for which that era is known. I would welcome any information others might be able to provide in this effort. Who knows, we might even enjoy playing the game if it really is as fascinating as so many apparently thought at one time.

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September 28, 2424

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UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

The PHOENIX PHILLIES, INC.

Appellant,

v.

The NATIONAL LEAGUE OF BASEBALL CLUBS, INC., the PHILADELPHIA NATIONAL BASEBALL CLUB, and PHILADELPHIA BASEBALL RENAISSANCE, INC.

Appellees

Before KENESAW MOUNTAIN LANDIS, Chief Judge, A.B. CHANDLER, Circuit Judge, and FORD FRICK, District Judge sitting by designation.

LANDIS, Chief Judge:

I. THE LINE SCORE

This case comes to us on an appeal from the order of District Judge William Eckert entering a summary judgment in favor of the appellees. The appeal arises from a suit brought by the Phoenix Phillies, Inc., against the present owners of the several baseball clubs in the National League in general and two groups whom the League recognizes as the past and present owners of the Philadelphia Phillies — the Philadelphia National League Baseball Club, Inc., and the Philadelphia Baseball Renaissance, Inc. This case raises questions about the purported exemption of professional or "organized" baseball from the application of the antitrust laws of this nation and, upon our finding that the industry is no longer immune, of whether the activities of the National League of Baseball Clubs, Inc., are the operations of a single business entity that therefore cannot constitute an illegal conspiracy to restrain trade. This suit grows out of the abortive sale of the team known as the Philadelphia Phillies to a corporation that now styles itself the Phoenix Phillies, Inc.
Our opinion opens with the field on which the events giving rise to this suit were (and are to be) played out, followed by the line-up of players, and a play-by-play description of the events leading up to this litigation. The facts as set forth in this admittedly lengthy introduction are taken from the stipulations of the parties, or from information known to any knowledgeable baseball fan. The latter facts are sufficiently well-known and such a matter of public record that we take judicial notice of them. After setting forth these undisputed facts, we proceed to the disputed call by the trial judge, the official ruling of this court and the protest to that ruling by a dissenting member of this court.

II. THE FIELD OF PLAY

Litigation has often been described through analogies to sporting contests. The metaphor is particularly well-suited to this case. As in all sporting contests, one must begin by becoming familiar with the field of play. Here the field is the arcane lore of baseball as a special institution in the American life and psyche. As we shall see, so special is the sport of baseball that it has received unique treatment under the law controlling this litigation. More than a few jurists and commentators have decried the resulting privileged status of professional baseball, a status that undoubtedly has contributed to the current malaise afflicting the sport in general, a malaise that has converted many a fan's field of dreams into a field of screams.

Baseball, that uniquely American invention, is a game of time and memory, redolent of home, of family, of civic pride and of personal and communal disappointment. Baseball originated on the playing fields of northern New Jersey before the Civil War, grew into the national sport during that conflict and emerged after the war as the first sport in the world to have professional athletic teams. Today, children and adults alike still thrill to the now collective memories conjured up by names such as Hank Aaron, Grover Cleveland Alexander, Walter Alston, Sparky Anderson, Cap Anson, Ernie Banks, Johnny Bench, Yogi Berra, Vida Blue, Wade Boggs, Tommy Bond, Ken Boyer, George Brett, Lou Brock, Dan Brouthers, Three-Finger Brown, Pete Browning (the "Louisville Slugger"), Roy Campanella, Max Carey, Steve Carlton, Joe Carter, Jack Chesbro, John Clarkson, Roger Clemens, Roberto Clemente, Rod Carew, Ty Cobb, Mickey Cochrane, Eddie Collins, Sam Crawford, Dizzy Dean (and his brother Daffy), Ed Delahanty, Bill Dickey, Joe DiMaggio, Bobby Doerr, Don Drysdale, Hugh Duffy, Bob Feller,

In their day, these players, pitchers and managers (and many more) were better known to more people than most public officeholders. Today their exploits are remembered (and studied) in greater detail by devotees who considerably outnumber the historians and political scientists who study the accomplishments of our greatest statesmen. We have even seen a law review dedicate an issue to Mickey Mantle after his death. John J. Dabney, Mickey Mantle: An American Legend, 7 Seton Hall J. Sport L. 1 (1997). With a history of more than 125 years, many of the old-time players are now merely names on paper, of whom few of us have any personal recollection; yet they are storied in verse, song, fiction and the copiously detailed statistical records that fascinate many of us, to the occasional dismay of others. Baseball has been the backdrop, and more, for movies from the silent era to such classics as Joe E. Brown’s bringing to life Ring Lardner’s “Alibi Ike” in 1933, “Death on the Diamond” in 1934, Gary Cooper as Lou Gehrig in 1941’s “Pride of the Yankees,” the charming 1951 original of “Angels in
the Outfield" or 1958's "Fear Strikes Out." More recently, audiences have been delighted by films such as "The Bad News Bears," "The Natural," "Field of Dreams," "Bull Durham," "A League of Their Own," "Eight Men Out," "Mr. Baseball," and "Major League (I, II & III)." Indeed, in 1994, Ken Burn's "Baseball" treated us to an eighteen-hour documentary on the history of the game.

The hold of baseball on the national imagination has been captured by such comments as those of Walt Whitman, who once called baseball as important an institution to the molding of our nation as our Constitution, or of French philosopher Jacque Barzun, that "whoever wants to know the mind and heart of America ha[d] better learn baseball." Thomas Picher, *Baseball's Antitrust Exemption Repealed: An Analysis of the Effects on Salary Cap and Salary Taxation Provisions*, 7 Seton Hall. J. Sport L. 5, 6 (1997). The accuracy of such comments is manifest in the many artistic representations of baseball games, players or events. There have been poems, stories and novels focusing on the sport. The examples are so numerous there is hardly any point to citing them. They include the novels on which several of the above referenced movies were based. There are also many reputable histories of the sport. Even the legal imagination has been captured by the sport. There is of course a small body of legal literature specifically directed to the legal status of baseball, principally regarding the very issues involved in this case.²


More interesting as an expression of the importance of the sport is the burgeoning legal literature that uses baseball as a metaphor for law or legal issues, or even as models for the major social changes of the last decades. There is even a small but impressive

body of literature on the jurisprudential lessons to be drawn from the infield fly rule.\(^4\) It even turns out that the adoption of the first Canons of Judicial Ethics was a reaction to the refusal of Judge Kennesaw Mountain Landis to resign from the bench after he was selected as the first Commissioner of Baseball. See Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards 549 (1997); John P. MacKenzie, The Appearance of Justice 180-82 (1974). Only rarely has someone criticized the recourse to baseball imagery in legal reasoning. See Chad M. Oldfather, The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions, 27 Conn. L. Rev. 17, 18 (1994) ("The fact that baseball metaphors have not

been employed in any systematic fashion does not mean that they
can do no harm.

The ease with which occasional legal scholars refer to baseball
events as part of the common knowledge of the community is per-
haps the most eloquent illustration of the importance of the game.
For example, David Currie felt comfortable introducing his article,
466 (1983), with the following:

Insignificance, as every Chicago Cub supporter knows, is
in the eye of the beholder. Yet every baseball town has its
particular favorites: the shortstop who regularly threw the
ball into the lower grandstand; the pitcher who habitually
walked batters when the bases were loaded; the slugger
who struck out whenever he came up with men on base.

Nor, one might add, is there any sport in which such appar-
etly normal persons could excel. While any sport might have its
“Dizzies” or its “King Kong,” only in baseball are there genuine all-
stars with nicknames such as “Pee-Wee,” “Skeeter” or “Tiny” without
being ironic. One could go on for pages just ruminating over ac-
tual baseball nicknames, such as “Lady,” “Schoolboy” or “She.”
One does not even dare to attempt to compile a list of judicial opin-
ions in which baseball metaphors played a significant role. See
Oldfather, supra; Michael J. Yelnosky, If You Write It, (S)he Will Come:
Judicial Opinions, Metaphors, Baseball, and the “Sex Stuff,” 28 Conn. L.

Regrettably, baseball recently has been more notable for the
mistakes made off the field than for the plays on the field. The
current malaise that afflicts baseball is epitomized
by
the new
names that have recently become so prominently associated with
the game: Fehr, Finley, Giles, Miller, Ravitch and Steinbrenner.5 As
the noted baseball executive Bill Veeck once commented,
“[b]aseball must be a truly wonderful sport to survive all that is
done to it.”

Baseball’s troubles derive from its enormous and continuing
popularity. As supposedly amateur teams began to provide “supple-
ments” of one sort or another to ensure that they would keep their
best players, the best teams were gradually transformed into fully

5. See generally Diamonds Are Forever: The Business of Baseball (1992);
Gerald W. Scully, The Business of Major League Baseball (1989); Andrew
Zimbalist, Baseball and Billions: A Probing Look Inside the Business of Our
professional teams, a process completed by 1870. These teams, while generally identifying themselves with particular home towns, lived on the road, playing whomever they could line up in a loosely organized National Association of Baseball Players, and sharing the proceeds of their games among the players. When enterprising men began to build large stadiums to house the games, they quickly realized that to assure enough games to enable them to obtain an adequate return on their investment they would have to gain control of the teams and their players. The result was the organization of the National League of Baseball Clubs in 1876, in which the owners of the stadiums owned the teams and employed the players for fixed salaries.

The National League, along with its companion American League (organized in 1901), long maintained strict control over baseball franchises and players. By the end of the nineteenth century, organized baseball had already created a hierarchy of leagues, and by the 1930s, minor league teams had been reduced to little more than appendages of the major league team with which they had “working relationships.” From 1876 to 1976, the centerpiece of league control was the “reserve clause,” whereby a player was bound for life to the team with which he had signed a valid contract. The only way a player could change teams would be through the assignment of his contract by the team to which he was bound, known as a “sale” or a “trade,” or by an “unconditional release” by the team to which the player was bound — this was a possibility seldom realized unless the player was no longer capable of significant athletic achievement. See Philadelphia Ball Club, Ltd. v. Lajoie, 51 A. 973 (Pa. 1902). In other words, baseball, for most of its history, has been organized in a rigid monopoly structure that enables the owners of the teams to divide the markets for their product, while exercising near complete dominance over its production and distribution and related activities on and off the field.

Recent years have seen considerable changes in this structure, beginning with the divorce, in most cities, of team ownership from stadium ownership. With this change, the major capital invest-
ment in the sport was no longer the physical structure (which is now generally financed by the taxpayers), but the cost of buying an existing team or of buying into the closed club of one of the major leagues on those rare occasions when a league expands. Following this change, the reserve clause system was discarded as a result of collective bargaining by the Major League Baseball Players' Association. The reserve clause system was replaced by a complex set of rules known as "free agency," that bind players to the first team with which they have signed until they have played for six years in the major leagues and, thereafter, for the duration of generally long-term contracts separately negotiated by each player. Economists and lawyers may continue to debate whether this change actually changed the teams for which stars play, but fans know the answer.


The Leagues continue to enforce the traditional market allocation aspects of their activities as well as the terms and conditions of the free agency system.

Over the years, the two leagues in cooperation with each other have taken on additional major functions. The two leagues jointly elect a "Baseball Commissioner" who, among other functions, administers national television and radio contracts and a national paraphernalia marketing organization. See generally Jonathan M. Reinsdorf, The Powers of the Commissioner in Baseball, 7 Marq. Sports L.J. 211 (1996). The proceeds of the annual All Star Game, the two League Series, and the World Series, as well as a number of nationally televised regular season games (on both broadcast and cable networks) are divided equally among the twenty-eight teams. This income peaked in 1993 at about $1,400,000,000, and, although it has fallen off since 1994, it remains the largest source of income for even the wealthiest teams. A similar, albeit considerably less lucrative, contract pertains to national radio broadcasts. The sale of team baseballs, bats, shirts, hats, helmets, and similar paraphernalia are also licensed by the Commissioner's office, as is the right to use the official baseball logo on various commercial promotions. These licenses are also not as lucrative as the television income. The income from these sales and licenses is also divided equally among the twenty-eight teams. The separate income of the teams, from ticket and concession sales in the stadium in which the game is played and from local radio and television broadcasting rights, is as much as 50% of the total income of the team in a few of the largest markets, around 40% for most teams, and less than 30% for some teams in smaller markets. Thus, even before the recent proposals to share local television and radio revenues, major league baseball was already characterized by a substantial amount of revenue sharing and marketing integration. Some commentators seem to overlook this reality. See, e.g., Jeffrey A. Rosenthal, The Football Answer to the Baseball Problem: Can Revenue Sharing Work?, 5 Seton Hall J. Sport L. 419 (1995).

As this brief description indicates, the structure of organized baseball would appear to the uninitiated to be the kind of classic monopoly structure that the antitrust laws of this country were designed to eliminate, or at least to regulate. Yet, Justice Oliver Wendell Holmes, writing on behalf of a unanimous court in one of his typically brief opinions, has told us that baseball involves the staging of an exhibition for paying customers, an activity that takes place entirely within a single state, and thus does not form part of
interstate commerce. *Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). As Judge Waterman wrote nearly fifty years later, this “was not one of Justice Holmes' happiest days.” *Flood v. Kuhn*, 443 F.2d 264, 266 (2d Cir. 1971). That the result was incongruous to say the least, even when delivered, was apparent from Justice Holmes' opinion itself, in which he twice acknowledged that the discipline of the league required nearly constant travel by players across state lines at the expense of their employers, to play games in cities far from home. See Christopher J. Peters, *Adjudication as Representation*, 97 Colum. L. Rev. 312, 392-95 (1997).

Holmes' conclusion appears even more incongruous in an age of multi-million dollar deals with television networks, of fairly mediocre free agents making in a year as much as Ty Cobb, Lou Gehrig, Rogers Hornsby, Christy Mathewson, Walter Johnson, Babe Ruth and Cy Young made in their entire careers combined, and of cities engaged in bidding wars to entice teams from other cities to pick up and move across state lines. Still, the Supreme Court has affirmed this holding on the three occasions that the issue has reached the Court. *Flood v. Kuhn*, 407 U.S. 278 (1972); *United States v. Shubert*, 348 U.S. 222 (1955); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). The incongruity of this holding is reinforced when one discovers that this exemption of baseball from the antitrust laws of the United States has been denied to professional football and basketball, as well as to "amateur" athletics.

In fact, the Supreme Court itself has described the exemption of baseball from the antitrust laws as "unrealistic," "inconsistent" and "illogical." *Radovich v. NFL*, 352 U.S. 445, 452 (1957). The only reason given for reaffirming the rule in both *Toolson* and *Flood* has been the long continued reliance of baseball owners on the rule, along with the continued acquiescence of Congress in the re-


10. See National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984); Haywood v. NBA, 401 U.S. 1204 (1971); Radovich v. NFL, 352 U.S. 445 (1957); Sullivan v. NFL, 54 F.3d 1091 (1st Cir. 1994); Chicago Prof'l Sports Ltd. Partnership v. NBA, 961 F.2d 667 (7th Cir. 1991); United States Football League v. NFL, 887 F.2d 408 (2d Cir. 1989) (approving award of attorney's fees); Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986); Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979). See generally Chalpin, supra note 7; Robert C. Heintel, Note, The Need for an Alternative to Antitrust Regulation of the National Football League, 46 CASE W. RES. L. REV. 1033 (1996); Michael Tannenbaum, A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL, 3 SPORTS LAW J. 205 (1996).
sult. *Flood*, 407 U.S. at 280-84; *Toolson*, 346 U.S. at 79. To complete the uniquely privileged status of baseball in our legal, as well as, our general culture, lower courts have concluded that notwithstanding the holding that organized baseball did not constitute interstate commerce for purposes of applying the federal antitrust laws, organized baseball was too involved with interstate commerce to enable states to apply their local antitrust laws to the sport. *Flood*, 443 F.2d at 266-68; *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966).

These decisions have created, perhaps unwittingly, a peculiar national institution. Some have argued against the wisdom of deferring to a busy Congress the question of whether the Supreme Court has played the right game or according to the right rules regarding baseball and antitrust. See, e.g., C. Paul Rogers III, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 Hous. L. Rev. 611, 611-12 (1977). Nonetheless, we must confront the parties and their contentions in this case within the rules set down by the Supreme Court.

**III. THE LINEUP**

The parties to this suit are the frustrated would-be owners of the Phoenix Phillies on the one side, and the present owners of the several baseball clubs in the National League and two groups whom the League recognizes as the past and present owners of the Philadelphia Phillies (the Philadelphia National Baseball Club, Inc. and Philadelphia Baseball Renaissance, Inc.) on the other side. We need only note here that the parties named in this suit actually form a team of numerous actual players most of whom, like most baseball players, are more or less anonymous journeymen who play their positions at the margins of fame and upon retirement recede quickly from public consciousness. Few of these lesser players will appear by name in this opinion.

As the names of the two specific teams should suggest, this dispute grows out of an attempted sale of the Philadelphia Phillies to a group of investors based in Phoenix, Arizona. It is worth taking a brief look at the line up of the parties and at how this sorry state of affairs came to pass. We begin with the Phillies, the team which two cities now love to hate.

Philadelphia, Pennsylvania, has been the home of a long and honorable baseball tradition, having fielded a team in the National League in its first year of operation (1876), and, after a brief lapse, having been in the league continuously since 1883. From 1901 to
1954, the city was home to a second team as well — the Philadelphia Athletics (A’s) of the American League. In fact, during this period the Athletics were the major team in the city, twice dominating their league, winning nine pennants and five World Series with teams that still are counted among the best of all time. Philadelphia also had the distinction of seeing its two teams combine for more last place finishes than any other city in organized baseball, including a remarkable (and unmatched) nine years in which both teams finished last in their respective leagues. This peculiar mix of greatness and frustration left Philadelphia fans with a deserved reputation as harsh critics of anything less than perfection on the field, as even the best players on Philadelphia teams have learned when they experienced occasional slumps.

Until World War II, the Phillies in fact were a pretty sad story, rarely rising above the bottom half of the league. In 1930, the Phillies even achieved the highest team batting average, .316, in the twentieth century, while finishing dead last. During a brief interval after World War II, however, the Phillies gathered a group of young players known as “the Whiz Kids,” who managed to win a pennant and keep the team in contention at a time when the Philadelphia A’s were in sharp decline. The timing of this shift in the relative fortunes of the two teams had significant consequences, for this coincided with the opening of the era of franchise shifting. After the 1954 baseball season, Philadelphia lost its then weaker team just as Boston had lost the Braves after 1952, as St. Louis had lost the Browns after 1953, and as Brooklyn and New York would lose the Dodgers and Giants after 1957.

As the only team in town, the Phillies continued to demonstrate extremes of achievement. In several years, the team established marks for futility known throughout baseball: twenty-three consecutive losses in 1961, a late-season collapse of legendary proportions in 1964 and a team that finished dead last with a pitcher who lead the major leagues in victories by a wide margin (in 1972, Steve Carlton, won twenty-seven games). The Phillies’ prospects in the early 1970s were so bleak that Curt Flood, who was then the premiere centerfielder in baseball, was so determined not to become a Phillie, after he was traded by St. Louis to Philadelphia, that he fought all the way to the Supreme Court in an effort to void the reserve clause and obtain the right to determine for himself where he would play. The result was the decision in Flood, that figures so prominently in this suit. He lost and retired, rather than come to Philadelphia.
On the other hand, the Phillies did reward their suffering fans with some outstanding years. These included the Phillies’ only World Series win in 1980 and four other first place finishes between 1976 and 1983. Finally, in 1993, the Phillies surprised themselves, the city and the continent by winning the National League pennant, only to lose the World Series under circumstances that made for yet another emotionally draining failure.

As indicated, the Phillies have been members of the National League of Baseball Clubs for more than a century, and seem destined to continue as a member of the National League (League) regardless of in which city they play. The League was formed in 1876 and operates under the same basic structure today, despite its growth from a low of six teams to the present fourteen. The League is comprised of the owners of the baseball teams, today generally corporations or limited partnerships set up for that specific purpose. The League schedules games, provides umpires and generally enforces a complicated set of rules regarding both on-field and off-field behavior of owners, players and related personnel. These activities enable the League to determine the winners of the two divisions (as the two major leagues were structured during the time the events to be related below occurred), and to organize a National Series to determine the League champion. The League champion, known as “the pennant winner,” represents the League in the World Series that crowns the baseball season every October. The World Series is such a national institution that it was not interrupted for world wars, the depression, or an earthquake, although it was canceled in 1994 because of a players’ strike — a blow that some believe has permanently tarnished the sport’s image.

Probably the most important, and certainly the most controversial, function of the League is to award or withdraw “franchises” from owners, although the latter has not happened since 1943, when the ownership of the Phillies was declared vacant because of gambling by the owner. The team was taken under receivership by the League until the Carpenter family purchased the team. The National League requires that any change of a franchise, including the awarding of a new franchise, be approved by three-quarters of the owners in the League. Before 1992, the National League required unanimous approval. The 1992 reforms also required an approval by a majority of the owners in the American League which similarly has fourteen teams. In addition, the Baseball Commissioner (Commissioner) has the power under his authority to act “in the best interests of baseball,” to intervene in this process to over-
rule a decision of either or both leagues. One court aptly described the Commissioner as having "all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias." Milwaukee Am. Ass'n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931). Organized baseball has even required compensation for the movement of a higher level team into the "territory" of a lower level team. See Peter W. Billings, Sr., Judicial Review of Arbitration Awards Is Limited, 10 Utah B.J. 15 (1997).

Some would treat the ownership of a baseball franchise as a sort of public trust for the benefit of the community to which the franchise is assigned, requiring a strong showing of lack of community support before a move could be approved. See Daniel S. Mason & Trevor Slack, Appropriate Opportunism or Bad Business Practice? Stakeholder Theory, Ethics, and the Franchise Relocation Issue, 7 Marq. Sports L.J. 399 (1997). While that does not appear to be true for other professional sports, moving a baseball team involves overcoming considerable hurdles that are by no means pro forma. More than one proposed move before the one involved in this case has been denied by the responsible league, forcing the sale of the team to a new owner willing to keep the team in place.

For Phoenix or any other city to receive a new franchise through yet another round of expansion would require the affirmative vote of the owners of at least eleven of the fourteen existing National League teams and a majority (eight of fourteen) of the American League owners. The same margins of approval would be necessary to transfer a franchise from one city to another, as was attempted in this case. Finally, the Commissioner would have to refrain from voiding the expansion, sale or transfer. At the present time, the office of Baseball Commissioner is vacant, and thus the powers of the Commissioner have neither been exercised relative to nor called into question in this proceeding.

Finally, we come to the would-be Phoenix Phillies. This is a corporation established by a group of investors centered in Phoenix, Arizona, in the American southwest. The principal investors were two owners of car dealerships in the Phoenix area, who had no personal involvement in organized baseball before the events about to be related. They have been passionate fans of the game since their youth, and long hoped to be able to bring a major league team to their adopted hometown.
IV. THE PLAY-BY-PLAY

The troubles with the Phillies began with the sharp decline in Philadelphia's baseball fortunes after a group of investors, headed by Warren Giles as managing general partner, purchased the team in 1981. At that point, the Phillies, as indicated above, had undoubtedly the most successful decade in their history. They had enough momentum from that period to go to the World Series in 1983, to stay in contention for several years and to finish as high as second in their division in 1986. We need not recite here the series of disastrous trades and failures to sign free agents that dropped the team to last in their division in 1987. Suffice it to say, between 1987 and 1992, the team returned to the tradition of unrelieved failure on a scale unknown in Philadelphia for twenty years.

Fans became verbally and occasionally physically abusive to the teams that Warren Giles put on the field. As attendance fell markedly, Giles let it be known that the team was in dire financial straits. He stated that he would entertain offers to buy a controlling interest in the Philadelphia National Baseball Club by potential owners who would keep the team in the city of Philadelphia. This controlling interest consisted of the shares of Warren Giles and of most of the other partners, altogether some 86% of the present ownership interests.

Apparently no investors interested in keeping the team in Philadelphia came forward. At some point, the Phoenix group entered the game. Secret negotiations began in 1991 and, after fits and starts spread over nearly two years, culminated in a contract of sale that was contingent upon the parties being able to obtain the necessary approval by the National and American Leagues. Sometime during this period, the informally organized group of would-be buyers transformed themselves into a corporation under the name of the Phoenix Phillies, Inc.

The contract was signed by the parties on March 15, 1993, with a price of $212,000,000 to be paid for all the assets of the Philadelphia National League Baseball Club, including its membership in the National League. As the League could not approve the sale and transfer until, at the earliest, the mid-year meeting of the League in July, the parties agreed to keep existence of this contract a closely guarded secret until after the 1993 World Series, in order to avoid the probable adverse effect on Philadelphia's attendance during the coming year. We all know what happened in 1993.11

11. Editor's note: I have been unable to determine what happened in 1993.
With some investors in the Philadelphia club dissenting from the proposed sale, rumors began to circulate in the city during the summer. During 1993, Philadelphia’s Mayor Rendell quietly undertook to find local investors to purchase the Philadelphia National Baseball Club, building on the core of existing investors who did not want to sell, or at least did not want to sell to a group that would leave the city. This effort was just beginning to come to fruition when the Phoenix Phillies, Inc., made a surprise announcement of their deal on Tuesday, October 26, only three days after Mitch Williams’ last pitch as a Phillie. The news conference in Phoenix produced predictable consternation in Philadelphia.

On November 3, a Philadelphia-based group, under the name of Philadelphia Baseball Renaissance, Inc., (Renaissance) made public an offer of $234,000,000 and presented it, with much fanfare, to Warren Giles. This offer was made possible in part by a deal Renaissance made to renegotiate the team’s lease on Veterans Stadium and promises from state and local government to help finance a new “baseball-only” stadium within ten years. The concessions that the city was willing to make to the new buyers were expected to be worth approximately $8,000,000 to $10,000,000 per year for the twenty-five year life of the new lease.

After the announcement of the Renaissance bid, Mr. Giles declared that he personally would prefer to see the team remain in Philadelphia, but that the outcome would depend upon the action of the owners to be taken at their annual meeting in December in Las Vegas, Nevada. Considerable press attention now focused on the impending meeting. Both the Phoenix Phillies and Renaissance made formal presentations on the merits of their respective offers to a joint meeting of the American and National League owners. Sometime later, the two leagues met separately in closed meetings to deliberate the matter, with the American League owners postponing any decision until after the National League owners should vote. Although Warren Giles had absented himself from the meeting in which the formal presentations were made, he did participate in the meeting of the National League owners to debate and decide whether to approve the sale to the Phoenix group. The National League owners ultimately voted to deny approval of the sale by a vote of eight in favor of the sale to six against.

Immediately after this result was announced, Giles met with the Renaissance representatives and signed a contract to sell the team to them for $234,000,000. Thereafter, the National League owners voted unanimously to approve the sale to Renaissance, as
did the American League owners. The entire matter was settled within forty-eight hours of the rejection of the sale to the Phoenix Phillies.

V. THE DISPUTED CALL

The Phoenix Phillies brought this suit to vindicate their claimed rights to purchase the Philadelphia Phillies and to bring them to Phoenix. The Phoenix Phillies allege that the National League owners conspired to restrain trade by excluding the appellant from the Phoenix market area and to establish monopoly control of the marketing of baseball in the entire United States in violation of sections 1 and 2 of the Sherman Antitrust Act, depriving the appellant of its opportunity to engage in the business of baseball in interstate commerce. 15 U.S.C. §§ 1, 2 (1988).

The two statutes plaintiff invokes in this case are deceptively simple in their phrasing. Section 1 of the Sherman Act provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished.

Section 2 provides "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

The appellant prays for an award of damages and an injunction against what it characterizes as a continuing violation of sections 1 and 2 of the Sherman Act. The effect of this injunction, were it to be granted, would be to order the transfer of the Phillies to Phoenix. The appellant joined the Philadelphia National Baseball Club and Philadelphia Baseball Renaissance, Inc., as defendants because the injunction that the appellant seeks will operate directly on those defendants. No reason appears why the appellant did not join the American League; we surmise that appellant considers that it will acquire complete relief by proceeding against the named parties. No one has raised the question of whether the
American League is a necessary party to this proceeding and we do not reach that question.

The appellees denied the allegations against them. After various motions were made, the parties met with District Judge William Eckert in a pre-trial conference in which they agreed to a stipulated set of facts that form the basis for much that has been set forth above. On the basis of these stipulated facts, the appellant and the appellees both moved for summary judgment under section 56 of the Federal Rules of Civil Procedure on the basis that there was no genuine issue as to any material fact and that each movant was entitled to judgment as a matter of law.

After a hearing on the motions, Judge Eckert entered a summary judgment on February 14, 1994, in favor of the appellees. Judge Eckert dismissed the case on the basis of the exemption of baseball from the application of the Sherman Act, and provided an additional ground for his judgment in his conclusion that as a matter of law, the National League operates as a partnership of fourteen “owners” who constitute a single entity, and therefore cannot be found to have conspired with themselves in violation of section 1 of the Sherman Act. Finally, on the basis of San Francisco Seals, Ltd. v. NHL, 379 F. Supp. 966, 971 (C.D. Cal. 1974), Judge Eckert held that the target of any unlawful monopolization under section 2 of the Sherman Act would be any attempt to organize a third major baseball league. As appellant was not a member of a third league and did not plan to join such a league, Judge Eckert held that the appellant lacked standing under section 2. The Phoenix Phillies, perfected this appeal to challenge the dismissal of its antitrust claims.

VI. THE OFFICIAL RULING

We reverse Judge Eckert’s order. Federal Baseball represents an outmoded concept of intrastate commerce thoroughly discredited by the New Deal cases that expanded the scope of the commerce power. We predict that the Supreme Court would so hold today, and thus hold in this case that organized baseball is not immune from the application of the Sherman Act.

We need not rest on this ground, however. Each case to reach the Supreme Court from Federal Baseball to Flood has involved the reserve clause. In Federal Baseball, the plaintiff alleged that the reserve clause was the instrumentality by which the American and National Leagues carried out their conspiracy to exclude the plaintiff from the marketplace. In Toolson and Flood, the plaintiffs were play-
ers seeking to overturn the reserve clause system. The effect of the Flood decision was to limit the precedential value of Federal Baseball to disputes involving the reserve clause. See Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993); Butterworth v. National League of Prof'l Baseball Clubs, 644 So. 2d 1021 (Fla. 1994). Given that the reserve clause no longer exists, this reading of the precedents at last subjects the baseball industry to the same laws that apply to every other industry in the United States.

We also reverse Judge Eckert's decision regarding whether the National League of Baseball Clubs constitutes a single entity. It perhaps goes without saying that one cannot conspire with oneself, yet application of the point is not always self-evident when a corporate structure consists of more than one affiliated corporation. The Supreme Court has made clear that this premise applies to corporate activities involving entities that are organized as separate corporations, yet are integrated in fact into a single firm consisting of a parent and one or more subsidiaries. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); Herbert Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1 (1995).

This case poses the question of whether a professional sports league constitutes a single entity or an unlawful conspiracy. In Los Angeles Memorial Coliseum Comm'n v. NFL, the Ninth Circuit examined that question exhaustively in a suit challenging the National Football League's (NFL) denial of approval to Al Davis' move of the Oakland Raiders to Los Angeles. See Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984). In that case, the court not only concluded that the NFL was not a "single entity," but that its denial of market entry to a particular applicant was a per se unreasonable restraint of interstate commerce in violation of section 1 of the Sherman Act. We are persuaded that this same reasoning applies to the actions of the National League in denying approval to the transfer of the Phillies to Phoenix. Absent any

further considerations not evident on this record, our decision will require the trial court both to award damages and to grant the injunction requested by the appellant.

Nothing in this opinion contradicts the fact that all sports enjoy the same antitrust exemptions that are available to businesses generally, such as the exemption of labor negotiations and agreements.\(^\text{13}\) Given our decision relating to section 1 of the Sherman Act, we do not reach the question of whether Judge Eckert correctly decided the question of standing under section 2 of the Sherman Act.

This case is remanded for further proceedings consistent with this opinion.

FORD FRICK, District Judge sitting by designation, conurs.

A.B. CHANDLER, Circuit Judge (dissenting):

VII. THE PROTEST

I dissent from both conclusions reached by the majority. I here indicate only the barest outline of my reasons.

While the decisions regarding the exemption of baseball from the application of the antitrust laws are difficult to justify today, the rule is far too well established for us to overturn it. Nor can I accept the appellant’s argument that baseball’s antitrust exemption is limited to employment disputes dependent upon the reserve clause. Although the two more recent Supreme Court decisions on this issue (Toolson and Flood) both involved employment disputes, Federal Baseball itself did not. Federal Baseball rather arose from just the sort of franchise dispute involved in this case. There is no ground for finding that the holding of Federal Baseball, or its reaffirmation in Toolson and Flood are limited to litigation involving a non-

existent clause in employment contracts that have been transformed beyond recognition from the contracts involved in the latter two cases.\footnote{See also Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc., 832 F.2d 214 (1st Cir. 1987); Professional Baseball Schs. & Clubs, Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982); Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978); Salerno v. American League of Prof’l Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970); Portland Baseball Club, Inc. v. Kuhn, 282 F.2d 680 (9th Cir. 1960); Postema v. National League of Prof’l Baseball Clubs, Inc., 799 F. Supp. 1475 (S.D.N.Y. 1992); Henderson Broad. Corp. v. Houston Sports Ass’n, Inc., 541 F. Supp. 263 (S.D. Tex. 1982).} I am unimpressed by the two recent decisions limiting the antitrust exemption to the reserve clause. See Piazza, 831 F. Supp. at 420; Butterworth, 644 So. 2d at 1021. These decisions have no precedential authority in this court, and are simply wrong. See \textit{McCoy v. Major League Baseball}, 911 F. Supp. 454, 457 (W.D. Wash. 1995).

Nor can I accept the conclusion that the National League of Baseball Clubs is not a single entity. This question was considered at length by the Third Circuit in other cases involving professional football and in a district court case involving professional hockey. See \textit{Seattle Totems Hockey Club, Inc. v. NHL}, 783 F.2d 1347 (9th Cir. 1986); \textit{Mid-South Grizzlies v. NFL}, 720 F.2d 772 (3d Cir. 1983); \textit{San Francisco Seals, Ltd. v. NHL}, 379 F. Supp. 966 (C.D. Cal. 1974). The football cases involved the denial of an expansion franchise and the hockey case involved the denial of an application to transfer a franchise. In each case, the court concluded that no conspiracy or unlawful monopolization occurred because the actions involved were actions of a single entity rather than of a conspiracy.\footnote{See also Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Levin v. NBA, 385 F. Supp. 149 (S.D.N.Y. 1974); Myron G. Grauer, \textit{Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model}, 82 MICH. L. REV. 1 (1983); Gary R. Roberts, \textit{The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View}, 60 TUL. L. REV. 562 (1986); John C. Weistart, \textit{League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry}, 1984 DUKE L.J. 1013.}

As in the case of professional sports leagues, when what is being marketed is competition itself, there must be rules to govern that competition and some organization not only to provide those rules but also to enforce them. That is all that the National League of Baseball Clubs purports to do here. An additional relevant fact is that the shared-revenue sources make up approximately 70% of the total income of the teams of the league, and these revenues are shared equally among the fourteen teams. I conclude therefore that the League is a partnership designed to assure honest and balanced competition among its members in order to maximize the
income of the entire league as a single enterprise. Given this conclusion, there simply is no possibility of a conspiracy among competitors as opposed to the ongoing management of a single business enterprise.