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BLOCKING HOME: MAJOR LEAGUE BASEBALL SETTLES  
BLACKOUT RESTRICTION CASE; HOWEVER, A  
COLLISION WITH ANTITRUST LAWS IS  
STILL INEVITABLE

*“Make no mistake, this mission is not altruistic, . . . [b]aseball faces fierce competition, including from other sports offerings and an increasing slate of non-sports entertainment and leisure options.”<sup>1</sup>*

I. BLACK ME OUT FROM THE BALL GAME: AN INTRODUCTION TO  
THE MLB’S BLACKOUT RESTRICTIONS

A 2013 Nielsen report stated, “[b]aseball and radio seem to go hand-in-hand.”<sup>2</sup> While this statement may be true, the same is true about baseball and television, and even baseball and the Internet.<sup>3</sup> Major League Baseball’s (MLB) connection to the Internet truly began in 2000, when the MLB acquired the domain name “MLB.com” from the Philadelphia law firm Morgan, Lewis, and Bockius LLP.<sup>4</sup> Two years later, MLB.tv debuted, allowing fans to watch live baseball games over the Internet for the first time.<sup>5</sup>

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1. Jacob Emert, *MLB TV Settlement is ‘Big Win for Baseball Fans’*, WASH. POST (Jan. 19, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/01/19/mlb-tv-settlement-is-big-win-for-baseball-fans/> [<https://perma.cc/6RVC-UF7A>] (internal quotation marks omitted) (quoting MLB’s lawyers). For further discussion of the settlement reached between the MLB and fans, see *infra* notes 162–165 and accompanying text.

2. Kavitha A. Davidson, *Next Big Player in Digital Media: Baseball*, BLOOMBERGVIEW (Jan. 22, 2016, 9:00 AM), <http://www.bloombergvew.com/articles/2016-01-22/next-big-player-in-digital-media-baseball> [<https://perma.cc/67MR-FX3M>] (internal quotation marks omitted) (quoting statement made in 2013 Nielsen report discussing sports’ media presence and baseball’s strong ties to radio).

3. See *id.* (discussing how baseball is now “major player in digital media” and has very strong internet presence).

4. See Ross E. Davies, *The Law Firm and the League: Morgan, Lewis and Bockius LLP, Major League Baseball, and MLB.com*, 39 BASEBALL RES. J. (2010), available at <http://sabr.org/research/law-firm-and-league-morgan-lewis-and-bockius-llp-major-league-baseball-and-mlbcom> [<https://perma.cc/H997-SNW6>] (detailing how Major League Baseball acquired domain “MLB.com” from Morgan, Lewis, and Bockius LLP).

5. See *Ten Years Ago Today, MLB.TV Debuted*, MLB.COM (Aug. 26, 2012), <http://m.mlb.com/news/article/37372302/ten-years-ago-today-mlbtv-debuted/> [<https://perma.cc/76H4-NKUG>] (stating MLB.tv launched ten years prior to this publication).

The first game the MLB live-streamed over the MLB.tv service was the Texas Rangers at the New York Yankees on August 6, 2002.<sup>6</sup> The game drew an online viewing audience of 30,000 fans from over sixty different countries.<sup>7</sup> Upon its debut, the service received high praise from news sources and players alike.<sup>8</sup> Among those giving the service positive reviews was New York Yankees shortstop Derek Jeter who was optimistic about the service, stating, “[w]e may get into a situation where you don’t have to have a specific channel to see a game.”<sup>9</sup>

Over fourteen years after Jeter’s statement, Jeter’s hopes are still only hopes.<sup>10</sup> The MLB’s blackout restrictions on viewing games are the only thing preventing Jeter’s vision from happening, as the MLB “blacks out” games inside the home territories of teams on MLB.tv.<sup>11</sup> While *Garber v. Office of the Commissioner of Baseball*<sup>12</sup> (“*Garber*”) has greatly minimized the MLB’s blackout restrictions, the restrictions still remain in place.<sup>13</sup>

The MLB, and baseball overall, is exempt from antitrust laws and, therefore, has the ability to black out select games in certain

6. See *id.* (detailing how MLB.tv allowed fans to watch Yankees play Texas Rangers online).

7. See *id.* (noting audience size to view game via live stream and where audience members were from).

8. See *id.* (referencing statements made about quality and importance of newly launched MLB.tv service).

9. *Id.* (quoting Yankees shortstop Derek Jeter on his impression of new MLB.tv service). Jeter went on to say, “[i]t will reach more people, because fans that follow teams but can’t see them because they live on the other coast will now have a way to see their team play.” *Id.*

10. See Larry Neumeister, *As Trial Was to Start, Settlement Reached in MLB TV Dispute*, THE BIG STORY (Jan. 19, 2016, 11:54 PM), <http://bigstory.ap.org/article/3d58da5f969a41108ac4d7a384ddb6e/trial-was-start-settlement-reached-mlb-tv-dispute> [<https://perma.cc/PPD2-X3G7>] (explaining even according to settlement reached with fans, a cable subscription will still be required to view team games of which fans are located inside the viewing area). For further discussion of the settlement reached between the MLB and fans, see *infra* notes 162–165 and accompanying text.

11. See Neumeister, *supra* note 10 (explaining how games inside viewing areas of teams would still be blacked out for those fans trying to watch online streams of those games). For further discussion of the MLB blackout restrictions, see *infra* notes 117–131 and accompanying text.

12. 120 F. Supp. 3d 334 (S.D.N.Y. 2014). See generally Second Amended Class Action Complaint, *Garber v. Office of the Comm’r of Baseball*, 120 F. Supp. 3d 334 (S.D.N.Y. 2014) (No. 12-3704 (SAS)) (hereinafter Amended Complaint) (detailing *Garber* case). For further discussion of the settlement reached between the MLB and fans in *Garber*, see *infra* notes 162–165 and accompanying text.

13. See Neumeister, *supra* note 10 (explaining ways that effects of blackout restrictions have been minimized due to recent settlement). For further discussion of the settlement reached between the MLB and fans, see *infra* notes 162–165 and accompanying text.

areas of the country.<sup>14</sup> Baseball's antitrust exemption is almost as old as antitrust law, the Sherman Antitrust Act, itself.<sup>15</sup> Since the early 1900s, the MLB is the only professional sports league to have such a broad exemption.<sup>16</sup> The exemption itself comes from the 1922 Supreme Court case *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*<sup>17</sup> ("*Federal Baseball*"), where the Court declared "the exhibition [of baseball], although made for money would not be called trade of commerce in the commonly accepted use of those words."<sup>18</sup>

Over thirty years later, in 1953, the Supreme Court had the opportunity to rethink its decision in *Federal Baseball* in the case *Toolson v. New York Yankees*<sup>19</sup> ("*Toolson*").<sup>20</sup> In *Toolson*, the Supreme

14. See Emert, *supra* note 1 (stating MLB is allowed to blackout certain games because of its antitrust exemption). For a discussion and example of how baseball's antitrust exemption affects the minor leagues, see *infra* note 227 and accompanying text.

15. See 15 U.S.C. §§ 1–7 (1890) (noting Congress enacted Sherman Antitrust Act in 1890).

16. See David Greenberg, *Baseball's Con Game: How Did America's Pastime Get an Antitrust Exemption?*, SLATE (July 19, 2002, 10:36 AM), [http://www.slate.com/articles/news\\_and\\_politics/history\\_lesson/2002/07/baseballs\\_con\\_game.html](http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html) [<https://perma.cc/8N3R-99K4>] (detailing where MLB's antitrust exemption came from and providing history of MLB's exemption); see also Shayna Goldman, *A Brief History of the Drawn Out Sports Television and Streaming Blackouts Debacle*, SPORTTECHIE (Jan. 25, 2016), <http://www.sporttechie.com/2016/01/25/a-brief-history-of-the-drawn-out-sports-television-and-streaming-blackouts-debacle/> [<https://perma.cc/CZF4-3DXX>] (explaining how blackout restrictions work in various sports and explaining that other sports leagues' broadcasting agreements are also exempt from antitrust laws). "The Sports Broadcasting Act of 1961 exempted professional sports league[s] agreements] from federal antitrust law[.]" *Id.* The Sherman Antitrust Act specifically states that antitrust law

[s]hall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

15 U.S.C. §§ 1291 (1961).

17. 259 U.S. 200 (1922). For further discussion of *Federal Baseball*, see *infra* notes 61–74 and accompanying text.

18. *Federal Baseball*, 259 U.S. at 209. The Supreme Court declared that any effect baseball had on commerce was purely incidental. See Greenberg, *supra* note 16 (explaining exactly where MLB's antitrust exemption came from). For further discussion of *Federal Baseball*, see *infra* notes 61–74 and accompanying text.

19. 346 U.S. 356 (1953). For further discussion of *Toolson*, see *infra* notes 75–84 and accompanying text.

20. See Greenberg, *supra* note 16 (stating Supreme Court had opportunity to remove baseball's antitrust exemption with *Toolson*). For further discussion of *Toolson*, see *infra* notes 75–84 and accompanying text.

Court effectively upheld its decision in *Federal Baseball* by stating that if Congress had any issue with the ruling in *Federal Baseball*, it would have drafted laws to make antitrust laws apply to baseball.<sup>21</sup> Twenty years later in *Flood v. Kuhn*<sup>22</sup> (“*Flood*”), baseball’s antitrust exemption came before the Supreme Court once again.<sup>23</sup> In *Flood*, the Supreme Court once again upheld baseball’s antitrust exemption, this time on the grounds of stare decisis.<sup>24</sup>

Baseball suffered its first antitrust exemption “loss” thirty years after *Flood* with the signing of the Curt Flood Act.<sup>25</sup> Signed into law by President Bill Clinton, the Curt Flood Act made it so that baseball’s antitrust exemption no longer applied to employment related issues.<sup>26</sup> More importantly, the Curt Flood Act did not address the exemption’s application to other areas of baseball’s operation.<sup>27</sup>

One area of operation that the Curt Flood Act did not address was broadcasting agreements.<sup>28</sup> The MLB’s blackout restrictions exist because baseball’s antitrust exemption applies to broadcasting agreements.<sup>29</sup> The original purpose of the blackout restrictions was to get more fans to go to ballparks to watch games in person.<sup>30</sup> Today, however, the apparent purpose of the blackout restrictions

21. See *Toolson*, 346 U.S. at 357 (holding if antitrust laws apply to baseball, Congress should enact effective laws).

22. 407 U.S. 258 (1972). For further discussion of *Flood*, see *infra* notes 85–94 and accompanying text.

23. See Greenberg, *supra* note 16 (detailing how questions of baseball’s antitrust exemption would come before Supreme Court again ten years after *Toolson*); see also *Flood*, 407 U.S. at 259 (“For the third time in 50 years the Court is asked . . . to rule that professional baseball’s reserve system is within the reach of the federal antitrust laws.”). For further discussion of *Flood*, see *infra* notes 85–94 and accompanying text.

24. See *Flood*, 407 U.S. at 276, 282 (stating baseball’s antitrust exemption is entitled to stare decisis).

25. See Greenberg, *supra* note 16 (stating Curt Flood Act was first law to chip away at baseball’s antitrust exemption); see also 15 U.S.C. § 26b (2000) (explaining Curt Flood Act). For further discussion of the Curt Flood Act, see *supra* notes 95–99 and accompanying text.

26. See Greenberg, *supra* note 16 (describing effect Curt Flood Act had on baseball’s antitrust exemption).

27. See *id.* (detailing failure of Curt Flood Act to examine how baseball’s antitrust exemption applied to other areas of baseball’s operation).

28. See *id.* (stating topics Curt Flood Act failed to cover).

29. See Wendy Thurm, *MLB’s Awful Blackout Rules are Finally Under Attack in Court*, DEADSPIN (Feb. 3, 2015, 1:18 PM), <http://deadspin.com/mlbs-awful-blackout-rules-are-finally-under-attack-in-c-1683259431> [<https://perma.cc/BH4U-GNNY>] (explaining how baseball’s antitrust exemption allows MLB’s blackout restriction to exist). For further discussion of how baseball’s antitrust exemption lead to the MLB’s blackout restrictions, see *infra* notes 117–131 and accompanying text.

30. See Lee Rood, *Baseball Blackouts: Who’s Responsible for Viewing Hell?*, DES MOINES REG. (May 5, 2015, 10:02 AM), <http://www.desmoinesregister.com/story/>

is to control competition among broadcasters rather than to get fans to go to games.<sup>31</sup>

The blackout restrictions have been subject to widespread complaint because they are extremely confusing and unpopular among fans.<sup>32</sup> Fans' complaints have not gone unheard, as the MLB stated that they intended to do something about the outdated blackout restrictions.<sup>33</sup> In 2006, former MLB commissioner Bud Selig expressed this intention, stating, "I hear more about people who can't get the game, . . . and, yes, I've already told our people we have to do something about it."<sup>34</sup> Despite the MLB's promises, it took ten years and one massive class action lawsuit to make MLB follow through on Selig's statement.<sup>35</sup>

The MLB, and baseball in general, has had its antitrust exemption in place for just under one hundred years now.<sup>36</sup> The MLB has fought long and hard to keep the exemption in place, defending it before the Supreme Court numerous times.<sup>37</sup> The settlement in *Garber* marks the first time the MLB failed to defend baseball's antitrust exemption.<sup>38</sup> Ultimately, the MLB severely cut back the blackout restrictions, which thrilled fans.<sup>39</sup> However, this may be a

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news/2015/05/04/baseball-blackouts-responsible-viewing/26888559/ [https://perma.cc/7SJD-TECJ] (detailing origins of MLB's blackout restrictions).

31. See Thurm, *supra* note 29 (discussing potential reasoning behind blackout restrictions).

32. See Jeff Passan, *Selig's Promise*, YAHOO! SPORTS (July 11, 2006, 9:11 PM), <http://sports.yahoo.com/news/seligs-promise-011100834—mlb.html> [https://perma.cc/4FEX-P9DC] (summarizing feedback from fans about popularity of blackout restrictions).

33. See *id.* (detailing statements former MLB commissioner Bud Selig made about dealing with blackout restrictions back in 2006).

34. *Id.* (internal quotation marks omitted) (quoting former MLB commissioner, Bud Selig, about issues with blackout restrictions).

35. See Davidson, *supra* note 2 (discussing settlement reached in *Garber* and how settlement affected blackout restrictions).

36. See Greenberg, *supra* note 16 (stating baseball's antitrust exemption dates back to early 1900s).

37. See *id.* (discussing various times Supreme Court has heard cases challenging baseball's antitrust exemption). The cases brought before the Court were, in chronological order, *Federal Baseball*, *Toolson*, and *Flood*. See *id.*

38. See Bob Van Voris & Gerry Smith, *MLB Settlement Gives Baseball Fans New Viewing Options*, BLOOMBERG (last updated Jan. 19, 2016, 6:20 PM), <http://www.bloomberg.com/news/articles/2016-01-19/major-league-baseball-settles-with-fans-over-game-telecasts> [https://perma.cc/259Q-8KYW] (discussing settlement with fans); see also Davidson, *supra* note 2 (stating MLB did not want go to trial in *Garber* case); Greenberg, *supra* note 16 (detailing previous times MLB has defended itself against antitrust claims).

39. See Van Voris & Smith, *supra* note 38 (explaining settlement reached in *Garber* case and new streaming options available to fans). For further discussion of the settlement reached in the *Garber* case, see *infra* notes 162–165 and accompany-

calculated loss for the MLB, as in settling *Garber* the MLB kept baseball's antitrust exemption intact.<sup>40</sup> Lately, the exemption has been the target of a great deal of questioning.<sup>41</sup> There were indications that if the case went to trial, the judge would further narrow the exemption's scope, or worse, take it away altogether.<sup>42</sup>

Baseball's antitrust exemption is a well-documented "anomaly."<sup>43</sup> In fact, it no longer applies to labor disputes, which made its creation necessary in the first place.<sup>44</sup> The exemption constantly faces challengers, as the MLB continues to act in ways that would otherwise violate antitrust law.<sup>45</sup> This article will argue not only that baseball's antitrust exemption should not apply to the broadcasting agreements that allow blackout restrictions to exist, but also that baseball's antitrust exemption requires further narrowing—possibly stripping it away altogether.<sup>46</sup>

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ing text. For further discussion of the new streaming options available to fans, see *infra* note 164 and accompanying text.

40. See Emert, *supra* note 1; see also Van Voris & Smith, *supra* note 38 (detailing how U.S. District Judge Shira Scheindlin's opinion of baseball's antitrust exemption could have hurt MLB if *Garber* went to trial). For further discussion of how Judge Scheindlin would have handled the case had it gone to trial, see *infra* notes 166–169 and accompanying text.

41. See Van Voris & Smith, *supra* note 38 (discussing how U.S. District Judge Scheindlin ruled antitrust exemption would not be accepted defense against antitrust claims brought by fans in *Garber*). For further discussion of how Judge Scheindlin might have handled the case had it gone to trial, see *supra* notes 166–173 and accompanying text.

42. See Van Voris & Smith, *supra* note 38 (detailing possible outcomes of *Garber* based upon rulings and statements Judge Scheindlin made in the past). For further discussion of how Judge Scheindlin might have handled the case had it gone to trial, see *supra* notes 166–173 and accompanying text.

43. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (stating baseball's antitrust exemption is "an anomaly"). See *infra* notes 75–94 and accompanying text (discussing how previous cases have addressed history of baseball's antitrust exemption).

44. See *infra* notes 95–99 and accompanying text (detailing Curt Flood Act). The Curt Flood Act removed the labor issue from the reach of baseball's antitrust exemption, effectively getting rid of the reserve clause in MLB contracts. See *infra* notes 95–99 and accompanying text. The reserve clause was the issue that baseball's antitrust exemption was born from in *Federal Baseball*. See generally *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

45. See *infra* notes 132–155 and accompanying text (describing how MLB allegedly violated antitrust laws in *Garber*).

46. See *infra* notes 114–231 and accompanying text (analyzing MLB broadcasting agreements under antitrust law and current case law).

## II. BUY ME AN ANTITRUST EXEMPTION AND CRACKER JACK: THE HISTORY OF BASEBALL'S ANTITRUST EXEMPTION

### A. Pregame Prep, Antitrust Basics

Generally, the Sherman Antitrust Act of 1890 governs antitrust law in the United States.<sup>47</sup> The Sherman Antitrust Act was passed at a time when monopolies ran rampant, engaging in a wide range of anticompetitive activities.<sup>48</sup> With the passage of the Sherman Antitrust Act, Congress sought to put an end to these types of activities and to the “prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market.”<sup>49</sup> The Sherman Antitrust Act’s goal was to protect consumers injured by these anti-competitive activities.<sup>50</sup>

The Sherman Antitrust Act specifically targets anti-competitive activities that occur between the several states.<sup>51</sup> Section 1 of the Sherman Antitrust Act makes contracts that restrain trade or commerce among the States or with foreign nations illegal.<sup>52</sup> Section 2 of the Sherman Antitrust Act also makes conspiring to monopolize, or to attempt monopolize, trade or commerce among the states or with foreign nations illegal.<sup>53</sup> The Sherman Antitrust Act further

47. See 15 U.S.C. §§ 1–7 (detailing various sections of Sherman Antitrust Act).

48. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492 (1940) (discussing history of Sherman Antitrust Act and circumstances around its enactment).

49. *Apex Hosiery*, 310 U.S. at 493 (examining legislative history of Sherman Antitrust Act and defining reason for its enactment); accord *Anticompetitive*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining anticompetitive as “[h]aving a tendency to reduce or eliminate competition”).

50. See *Apex Hosiery*, 310 U.S. at 493 (discussing further reasoning behind enactment of Sherman Antitrust Act).

51. See 15 U.S.C. §§ 1–4 (defining scope of Sherman Antitrust Act).

52. See *id.* § 1 (laying out first category of illegal activities under Sherman Antitrust Act and laying out penalties). Section 1 of the Sherman Antitrust Act states in full:

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 by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*Id.*

53. See 15 U.S.C. § 2 (laying out second category of illegal activities under Sherman Antitrust Act and laying out penalties). Section 2 of the Sherman Antitrust Act states in full:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any

states that a violation of either section is a felony, punishable to different extents dependent upon whether the person is an individual or a corporation.<sup>54</sup> Ironically, alleged violations of the Sherman Antitrust Act are what led to baseball's antitrust exemption.<sup>55</sup>

## B. Antitrust Exemption Origins

Baseball's antitrust exemption has its roots in labor disputes and agreements.<sup>56</sup> Before there was the MLB, there were several different baseball leagues, including the American League and the National League.<sup>57</sup> In 1904, these two competing leagues eventually reached an agreement, called the National Agreement, which effectively created the MLB.<sup>58</sup> When the two leagues unified, the American League adopted the National League's "reserve clauses" into their contracts.<sup>59</sup> The reserve clauses bound players to a team, and teams could buy or sell players' contracts; however, when a player's contract expired, that player was not free to sign with another team.<sup>60</sup>

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part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*Id.*

54. See 15 U.S.C. §§ 1–2 (defining penalties under Sherman Antitrust Act). Section 3 of The Sherman Antitrust Act extends the coverage of the Act beyond the several states and foreign countries to include "any Territory of the United States or of the District of Columbia." 15 U.S.C. § 3. Section 4 of the Act gives the district courts of the United States jurisdiction over all violations of the Sherman Antitrust Act. See 15 U.S.C. § 4.

55. See *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922) (holding baseball exempt from antitrust laws after baseball leagues allegedly violated the Sherman Antitrust Act). For further discussion of *Federal Baseball*, see *infra* notes 61–74 and accompanying text.

56. See *infra* notes 61–74 and accompanying text (discussing how *Federal Baseball's* holding created baseball's antitrust exemption).

57. See *National Agreement*, BASEBALL-REFERENCE.COM, [http://www.baseball-reference.com/bullpen/National\\_Agreement](http://www.baseball-reference.com/bullpen/National_Agreement) [<https://perma.cc/4KF4-EBNY>] (last visited Jul. 17, 2016) (stating before National Agreement National League and American League were two competing baseball leagues).

58. See *id.* (detailing agreement reached between National and American League to create MLB).

59. See Greenberg, *supra* note 16 (discussing how American League adopted reserve clauses when it unified with National League).

60. See *id.* (explaining how reserve clauses operated). This is starkly different from the way contracts operate today. When a contract ends in the MLB today, players are free to sign with whatever team they wish. See *id.*

### 1. *Accusation Becomes Exemption*

While the reserve clauses caused no problems within the newly unified league, it caused a myriad of problems with other leagues who tried to lure players away from the newly unified MLB.<sup>61</sup> One such league was the Federal League, which attempted to “lure” players to their league by promising higher salaries.<sup>62</sup> However, the reserve clause prevented players from going to the other leagues because the clause bound the players to their respective teams.<sup>63</sup> The Federal League would go on to sue the MLB for “cornering the player[ ] market,” alleging violations of the Sherman Antitrust Act.<sup>64</sup> Eventually, the MLB and Federal League came to a settlement in which the Federal League disbanded and its owners paid off.<sup>65</sup>

Unfortunately, not all the owners of the Federal League were happy with the settlement, such as the owners of the Baltimore Terrapins, who rejected the settlement offer.<sup>66</sup> The Terrapins’ owners continued to pursue the antitrust claims against the MLB all the way to the Supreme Court in *Federal Baseball*.<sup>67</sup>

The Federal League accused the National League and American League of “conspir[ing] to monopolize the base ball [sic] business.”<sup>68</sup> First, the Supreme Court examined the nature of how baseball operated.<sup>69</sup> The Court specifically looked at the travel that occurred during the operation of baseball clubs, finding that “the

61. *See, e.g.*, *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 200–09 (1922) (detailing how one Federal League team was unhappy with reserve clauses in baseball contracts as it prevented them from luring players away). For further discussion of the facts in *Federal Baseball*, see *infra* notes 62–74 and accompanying text.

62. *See* Greenberg, *supra* note 16 (explaining how Federal League attempted to compete with MLB).

63. *See id.* (discussing why Federal League failed to lure MLB players away).

64. *See id.* (explaining fallout of American League adopting reserve clauses into their contracts and how doing so affected other baseball leagues).

65. *See id.* (detailing how majority of Federal League teams agreed to settle with National and American Leagues, but some did not want to settle and went on to bring lawsuits against National and American Leagues).

66. *Nat’l League of Prof’l Baseball Clubs v. Fed. Baseball Club of Balt.*, 269 F. 681, 682–83 (D.C. Cir. 1920) (giving facts of case), *aff’d*, 259 U.S. 200 (1922). The Supreme Court chose not to restate the facts of the case in its opinion. *See Federal Baseball*, 259 U.S. at 200–09.

67. *See Federal Baseball*, 259 U.S. at 200–09 (detailing case and its holding).

68. *Id.* at 207 (explaining reasons suit was being brought against National and American Leagues).

69. *See id.* at 208 (examining how both baseball clubs and leagues operate). The Court stated that baseball clubs were in the business of making money. In order to make money, baseball clubs had to cross state lines to compete against other clubs. *See id.*

transport is a mere incident, not the essential thing.”<sup>70</sup> Additionally, the Court determined that baseball exhibitions were not trade or commerce.<sup>71</sup> After stating that baseball’s core operations did not interfere with interstate commerce, the Court concluded that the restrictions put in place by the reserve clauses did not interfere with interstate commerce either.<sup>72</sup> The Court found that an activity interferes with interstate commerce or “in restraint of trade or commerce among the several States” is essential to proving a violation of the Sherman Antitrust Act.<sup>73</sup> Therefore, the Court concluded that baseball, and its actions, was legally incapable of violating the Sherman Antitrust Act.<sup>74</sup>

## 2. *Those Damned Yankees: The Supreme Court Affirms Federal Baseball*

The Supreme Court revisited its decision in *Federal Baseball* years later in the 1953 case *Toolson*.<sup>75</sup> The plaintiff, George Toolson, argued that, because of an alleged monopoly, he had been “deprived of his livelihood.”<sup>76</sup> Toolson had been playing for the Newark International Baseball Club, Inc. when they assigned him to the Binghamton Exhibition Company, Inc., a team for which he

70. *Id.* at 209 (explaining nature of travel in baseball). The Court went on to state that the travel was incidental to the exhibition, which was the essential thing. *See id.*

71. *See id.* (detailing how baseball’s exhibitions, its games, were not trade or commerce as Supreme Court understood those terms). The Supreme Court stated that baseball’s core operations “would not be called trade or commerce in the commonly accepted use of those words.” *Id.*

72. *See id.* (giving Supreme Court’s reasoning for how other parts of baseball’s operations did not affect interstate commerce either). The Court made somewhat of an overbroad statement here by simply stating that because one part of baseball’s operations did not affect interstate commerce, that no part of their operations did or could affect interstate commerce. *See id.* The Court concluded: “[a]s it is put by defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.” *Id.*

73. 15 U.S.C. § 1 (1890); *see also Federal Baseball*, 259 U.S. at 209 (stating what it takes to prove violation of Sherman Antitrust Act).

74. *See Federal Baseball*, 259 U.S. at 209 (describing reasoning of Supreme Court in stating all baseball operations were exempt from application of and could not violate Sherman Antitrust Act).

75. *See Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (reviewing decision made by Supreme Court years prior in *Federal Baseball* and reaching similar conclusion).

76. *Toolson v. New York Yankees*, 101 F. Supp. 93, 93 (S.D. Cal. 1951) (detailing facts of case and why Toolson sued Yankees and other MLB teams), *aff’d*, 200 F.2d 198 (9th Cir. 1952), *aff’d*, 346 U.S. 356 (1953). The Supreme Court did not recount the facts of the case in its opinion. *See Toolson*, 346 U.S. at 357.

refused to play.<sup>77</sup> Because of Toolson's refusal to play, the MLB placed him on the ineligible list and barred him from playing in all of organized baseball.<sup>78</sup> Subsequently, Toolson brought accusations of antitrust violations against the Yankees and other MLB teams.<sup>79</sup> The specific relief sought in this case was the overturning of *Federal Baseball* and the retroactive application of antitrust laws to the actions of the MLB over the past thirty years.<sup>80</sup>

The Supreme Court was brief in its opinion.<sup>81</sup> Baseball had operated for thirty years without antitrust laws applying to it, and the Supreme Court refused to change that.<sup>82</sup> Instead, the Court suggested that if there were "evils" that would be fixed by antitrust laws applying to baseball, Congress could have, and should, draft legislation to make antitrust laws apply.<sup>83</sup> The Court concluded by affirming *Federal Baseball*, stating that its opinion in that case made it clear that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."<sup>84</sup>

### 3. *Faced with Flood, the Court Clings to Stare Decisis*

In the years after the decision in *Toolson*, Congress took no action, leaving baseball's antitrust exemption unchallenged for another twenty years.<sup>85</sup> That is, until 1972, when the Supreme Court would once again be asked to reconsider baseball's antitrust exemp-

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77. See *Toolson*, 101 F. Supp. at 93 (explaining further facts of case).

78. See *id.* (discussing repercussions of Toolson's refusal to play for Binghamton). Toolson had no other opinions of teams to play for, since, due the reserve clause, the Binghamton Exhibition Company owned his contract. For further discussion of how the reserve clauses operate, see *supra* notes 59–60 and accompanying text.

79. See *Toolson*, 346 U.S. at 357 (detailing accusations Toolson brought against Yankees and other MLB teams and affirming judgments based on authority of *Federal Baseball*).

80. See *id.* (explaining relief Toolson sought in his case).

81. See *id.* (delivering opinion of Supreme Court).

82. See *id.* (stating, briefly, holding and opinion Supreme Court reached in case).

83. See *id.* (detailing reasoning of Supreme Court in refusing to overturn *Federal Baseball*). The Court concluded that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*

84. *Id.* (stating what current Court believed Court in *Federal Baseball* intended).

85. See Greenberg, *supra* note 16 (discussing how after holding in *Toolson* Congress did not create any new legislation to make antitrust laws apply to baseball).

tion in *Flood*.<sup>86</sup> In *Flood*, labor and contract disputes were once again the reason for challenging baseball's antitrust exemption.<sup>87</sup>

In 1969, the St. Louis Cardinals traded one of their players, Curtis Flood, to the Philadelphia Phillies without his knowledge or consent.<sup>88</sup> Due to his dissatisfaction with his new team, Flood sought for the Commissioner of Baseball to terminate his contract and let him become a free agent; however, the commissioner denied his request.<sup>89</sup> Flood's displeasure with his new team caused him to bring allegations of antitrust violations against the MLB for its use of reserve clauses, or the "reserve system."<sup>90</sup>

In reaching its decision, the Supreme Court underwent a lengthy analysis, including a review of both *Federal Baseball* and *Toolson*.<sup>91</sup> Through its review of these and other cases, the Court eventually concluded that baseball's antitrust exemption was an "aberration."<sup>92</sup> The Court acknowledged, however, that despite being an aberration, the exemption was entitled to stare decisis because it "has been with us now for half a century."<sup>93</sup> The Court once again reiterated that if antitrust laws were ever to apply to

86. 407 U.S. 258 (1972) (reviewing decision made by Supreme Court years prior in *Federal Baseball* and *Toolson*).

87. *See id.* at 265–66 (detailing Flood's reasons for bringing lawsuit against MLB).

88. *See id.* (explaining facts of *Flood* and why Flood brought lawsuit against MLB).

89. *See id.* (discussing facts of case and actions taken on behalf of MLB, which Flood believed violated antitrust laws).

90. *See id.* at 265–67 (detailing accusations and allegations Flood brought against MLB in his lawsuit). A full list of accusations Flood brought included "violations of the federal antitrust laws and civil rights statutes, violation of state statutes and the common law, and the imposition of a form of peonage and involuntary servitude contrary to the Thirteenth Amendment." *Id.* at 265–66.

91. *See id.* at 269–82 (examining and citing to precedential cases). Cases that the Court reviewed included *Federal Baseball*, *Toolson*, *United States v. Shubert*, *United States v. International Boxing Club*, and *Radovich v. National Football League*. *See id.* *See generally* *United States v. Shubert*, 348 U.S. 222 (1955); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955); *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).

92. *See Flood*, 407 U.S. at 282 (describing how Court viewed baseball's antitrust exemption).

93. *Id.* (detailing how Court justified baseball's exemption being "aberration"). The Court stated:

[I]t 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 an acceptance of baseball's unique characteristics and needs.

*Id.*

baseball, it would have to be a congressional decision, not a judicial one.<sup>94</sup>

#### 4. *Congress Chips Away at the MLB's Exemption*

Twenty years later, Congress finally answered the Supreme Court's call in 1998 with the passage of the Curt Flood Act.<sup>95</sup> Congress passed the Curt Flood Act in a direct response to the Supreme Court's ruling in *Flood*.<sup>96</sup>

The Curt Flood Act repealed baseball's antitrust exemption, but only with respect to labor-related issues.<sup>97</sup> The Curt Flood Act specifically allows current MLB players to file antitrust lawsuits against the MLB, but only if the lawsuits related to or affected the "employment of major league baseball players."<sup>98</sup> This repeal, however, only applied to litigation initiated by current MLB players and did not apply to minor league players, "any other matter relating to organized professional baseball's minor leagues . . . franchise expansion, location or relocation, [or] franchise ownership issues, including ownership transfers. . . umpires . . . or any . . . persons not in the business of organized professional major league baseball."<sup>99</sup>

#### C. The MLB Stands its Ground After the Flood Act

In 2015, the Ninth Circuit case *City of San Jose v. Office of the Commissioner of Baseball*<sup>100</sup> ("*City of San Jose*") considered a challenge of baseball's antitrust exemption.<sup>101</sup> In *City of San Jose*, the City argued that the MLB violated state and federal antitrust laws when it prevented the relocation of a baseball club.<sup>102</sup>

94. *See id.* at 285 (concluding opinion with statement Court would not make decision on baseball's antitrust exemption).

95. *See* 15 U.S.C. § 26b (delineating Curt Flood Act, which defined how baseball's antitrust exemption applied to MLB labor issues).

96. *See generally* William J. Clinton, former President of the United States of America, Statement on Signing the Curt Flood Act of 1998 (Oct. 27, 1998), *available at* <http://www.presidency.ucsb.edu/ws/?pid=55156> [<https://perma.cc/JLM6-VYZ8>] (detailing statement President Clinton made upon the signing of Curt Flood Act). Congress even named the Curt Flood Act after Curtis Flood, the player who brought the original suit against the MLB. *See id.*

97. *See* 15 U.S.C. § 26b(a) (defining scope of Curt Flood Act).

98. 15 U.S.C. § 26b(b) (stating Curt Flood Act only affected labor issues with MLB players).

99. 15 U.S.C. § 26b(b)(1)–(6) (explaining aspects of baseball operations that are still exempt from antitrust laws).

100. 776 F.3d 686 (9th Cir. 2015).

101. *See id.* at 687–88 (detailing City of San Jose's allegations of antitrust violations by MLB for stalling Oakland Athletics' relocation request).

102. *See id.* (explaining basis for city of San Jose's action against MLB).

The case seemed simple enough; the Oakland Athletics were suffering from declining revenue and attendance in Oakland and wanted to move to San Jose in order to increase revenue and attendance.<sup>103</sup> However, according to the MLB Constitution, each club must play within a certain operating territory, and San Jose was part of the operating territory of the San Francisco Giants.<sup>104</sup> This rule effectively prevented the Athletics from moving to San Jose unless they received the approval of three-quarters of the MLB clubs.<sup>105</sup> In response to the Athletics, the MLB formed a relocation committee to assess the impact of the potential move.<sup>106</sup> After four years of waiting for the MLB's approval, the City of San Jose filed a lawsuit accusing the MLB of violating antitrust laws by protecting what the City saw as the Giants' "local monopoly."<sup>107</sup>

The City, citing *Flood*, argued that *stare decisis* applied only to the reserve clause, not to the exemption laid out in *Federal Baseball* and *Toolson*.<sup>108</sup> However, the Ninth Circuit disagreed with the City, and stated that baseball's antitrust exemption applied to "the entire 'business of providing public baseball games for profit between clubs of professional baseball players.'"<sup>109</sup> The Ninth Circuit reasoned that in passing the Curt Flood Act, Congress explicitly maintained baseball's antitrust exemption for matters concerning franchise relocation.<sup>110</sup>

While it ultimately ruled against the City, the Ninth Circuit clarified its holding by stating, "[n]or does [this ruling] mean that MLB or its franchises are immune from antitrust suit. There might be activities that MLB and its franchises engage in that are wholly collateral to the public display of baseball games, and for which antitrust liability may therefore attach."<sup>111</sup> However, the Ninth Circuit

103. *See id.* (detailing facts of case and what caused issues for city of San Jose).

104. *See id.* (stating how MLB constitution prevented Athletics from moving without MLB approval).

105. *See id.* at 688 (detailing how Athletics could have received approval for relocation).

106. *See id.* (discussing actions MLB took to examine Athletics' potential relocation).

107. *See id.* (stating city of San Jose felt MLB was purposely stalling Athletics' request to relocate).

108. *See id.* at 689 (explaining San Jose's argument antitrust laws should apply to MLB's actions in this case).

109. *Id.* at 690 (quoting *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953)) (examining the actions to which Supreme Court stated baseball's antitrust exemption applied).

110. *See id.* at 690–91 (explaining how Curt Flood Act factored into Ninth Circuit's ruling).

111. *Id.* at 690 (stating decision in *City of San Jose* did not broadly apply and there are still actions to which baseball's antitrust exemption does not apply).

continued by saying the geographic “designation of franchises” was not collateral but essential to baseball’s operations.<sup>112</sup> The Ninth Circuit reasoned that “interfering with [or changing] the franchise relocation rules . . . indisputably interferes with the public exhibition of professional baseball.”<sup>113</sup>

### III. LET ME ROOT, ROOT, ROOT FOR MY HOME TEAM: GARBER MAKES A CASE TO REMOVE THE ANTITRUST EXEMPTION

#### A. Garber, a Whole New Antitrust Ball Game

The decision in *City of San Jose* made it clear that the standard for examining where baseball’s antitrust exemption applies is whether the given action is essential to the “business of providing public baseball games for profit between clubs of professional baseball players.”<sup>114</sup> From this ruling, it appeared that only the actions listed in the Curt Flood Act were specifically exempt from antitrust laws, leaving all others actions open to examination.<sup>115</sup> One such action open to examination was the MLB’s control of broadcast rights and agreements.<sup>116</sup>

#### 1. *Broadcasting and Blackouts*

*Garber* dealt with the MLB’s broadcasting agreements, blackout restrictions, and antitrust exemption.<sup>117</sup> The MLB’s blackout restrictions exist because baseball’s antitrust exemption applies to broadcasting agreements.<sup>118</sup> The MLB created its blackout restrictions in the 1960s, well before the days of cable.<sup>119</sup> In the 1960s, the MLB created a map of “home territories” for teams in an effort

112. *Id.* (reiterating franchise relocation was an action to which baseball’s antitrust exemption applied).

113. *Id.*

114. *Id.* (quoting *Toolson*, 346 U.S. at 357) (taking from *City of San Jose*, generally, how to examine what actions to which MLB antitrust exemption applies).

115. *See id.* (examining how Curt Flood Act potentially applied to various actions of MLB).

116. *See id.*; *see also* 15 U.S.C.A. § 26b(b)(1)–96 (failing to explicitly state whether broadcasting rights and agreements are exempt or not exempt from antitrust laws). For further discussion of 15 U.S.C.A. § 26b, the Curt Flood Act, *see infra* notes 95–99 and accompanying text.

117. *See* Amended Complaint, *supra* note 12, at paras. 1–15 (detailing reasons plaintiff brought action against MLB and co-defendants in *Garber*).

118. *See* Thurm, *supra* note 29 (explaining how baseball’s antitrust exemption allows blackout restrictions to exist).

119. *See* Rood, *supra* note 30 (detailing origins of MLB’s blackout restrictions).

to help protect their local television affiliates.<sup>120</sup> These blackout restrictions originated from the MLB's practice of entering into agreements with local broadcasters and giving the broadcasters exclusive broadcast rights for a baseball club's "home territory."<sup>121</sup> In return, the MLB agrees not to stream the games of the team whose "home territory" it is on MLB.tv, or broadcast the game on MLB Extra Innings to any consumer within the "home territory."<sup>122</sup>

The MLB claimed that the blackout restrictions' purpose was to entice fans inside a team's "home territory" to go to that team's games.<sup>123</sup> However, this claim is weak because the blackout restrictions apply to both home and away games for teams.<sup>124</sup> The issue with the map that the MLB created is that some teams' "home territories" cover multiple states.<sup>125</sup> For example, both the Milwaukee Brewers' and St. Louis Cardinals' "home territories" extend well into parts of Iowa.<sup>126</sup> It is simply not feasible for a fan from Iowa to make the trip to every home game of either of the two teams.<sup>127</sup> As a result of these situations, there have been many complaints by fans who live in these overlapping territories, as it is almost impossible for them to watch their favorite teams even if they purchase MLB.tv or MLB Extra Innings.<sup>128</sup>

The MLB's response to these complaints has generally been that all games are available for viewing on MLB.tv ninety minutes after the end of the game; however, this does little to satisfy fans

120. See *id.* (discussing how and why MLB created blackout restrictions); see also Home Territory Map [hereinafter Map], GAWKER MEDIA, available at <https://i.kinja-img.com/gawker-media/image/upload/tln8fsucu09cxadn2053.png> [<https://perma.cc/9J36-UESY>] (providing "home territory" map MLB currently uses for blackout restrictions).

121. See Rood, *supra* note 30 (detailing how blackout restrictions operate).

122. See *id.* (describing further how MLB blackout restrictions operate).

123. See *id.* (explaining one of MLB's justifications for blackout restrictions).

124. See *id.* (stating how broadly blackout restrictions apply).

125. See Map, *supra* note 120 (showing how some teams' "home territories" overlap).

126. See *id.*; Rood, *supra* note 30 (giving example of how MLB's map of "home territories" is unrealistic for some fans); Erik Malinowski, *WTF MLB? Baseball Strikes Out with its Streaming Policies*, ROLLING STONE (Jun. 5, 2015), <http://www.rollingstone.com/sports/features/wtf-mlb-baseball-strikes-out-with-its-streaming-policies-20150605> [<https://perma.cc/8HJH-R3LS>] (detailing how Minnesota Twins fan located in Iowa cannot watch Twins online because MLB "home territories" overlap).

127. See Rood, *supra* note 30 (explaining further, how it is not feasible for some fans to go to games that are allegedly in their "home territories"); see also Map, *supra* note 120.

128. See Malinowski, *supra* note 126 (detailing how fans have grown frustrated with MLB's blackout restrictions).

who want to watch a live game.<sup>129</sup> Instead, what this response causes fans to seek out other, illegal, methods to watch games online.<sup>130</sup> However, using such methods carry with them an inherent risk.<sup>131</sup>

## 2. *The Basics of Garber*

*Garber* was a class action lawsuit brought against the MLB by two separate classes of plaintiffs: a television class and an Internet class.<sup>132</sup> The plaintiffs alleged multiple violations of the Sherman Antitrust Act on behalf of the MLB and its co-defendants.<sup>133</sup> The defendants also included the various broadcast partners of the MLB and every MLB baseball club.<sup>134</sup> The plaintiffs, including Fernanda Garber, were fans of different MLB teams and had grown frustrated with how the MLB constructed their broadcasting agreements.<sup>135</sup> The plaintiffs accused the MLB of using an “illegal cartel” to “eliminate competition in the distribution of games over the Internet and television.”<sup>136</sup> The plaintiffs claimed that they brought this lawsuit to both challenge the cartel and remedy any damage the MLB’s use of the cartel caused.<sup>137</sup> Namely, they sought a remedy for the “supra-competitive” prices they had to pay for sports and cable packages due to the anti-competitive agreements of the cartel.<sup>138</sup>

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129. See Rood, *supra* note 30 (discussing how MLB had responded to fans unhappy with blackout restrictions in their “home territory”).

130. See Malinowski, *supra* note 126 (detailing how one subscriber of MLB.tv got around blackout restrictions by using IP-masking client).

131. See Rood, *supra* note 30 (explaining possible penalty if MLB finds a fan using illegal methods to stream games through MLB.tv). If the MLB discovers a fan is using one of these methods, they will not only cancel their subscription but also charge them a one-hundred dollar (\$100.00) termination fee. See *id.*

132. See Amended Complaint, *supra* note 12, para. 42 (detailing parties bringing lawsuit and how they were bringing them).

133. See *id.* para. 45(a)–(k) (laying out allegations against MLB and co-defendants). For further discussion of the specific sections of the Sherman Antitrust Act the MLB allegedly violated, see *infra* note 151 and accompanying text.

134. See Amended Complaint, *supra* note 12, paras. 23–35 (detailing all parties plaintiffs were bringing allegations against). The defendants included the Office of the Commissioner of Baseball, every MLB club, MLB Advanced Media, Major League Baseball Enterprises, DirecTV, Root Sports, and Comcast. See *id.*

135. See *id.* paras. 16–22 (listing all plaintiffs and the damages they suffered). Other plaintiffs included Mark Lerner, Derek Rasmussen, Robert Silver, Garrett Traub, Vincent Birbiglia, and Peter Herman. See *id.*

136. *Id.* para. 2 (stating exactly what illegal actions plaintiffs believed MLB and co-defendants were carrying on).

137. See *id.* paras. 2, 14–15 (explaining what plaintiffs sought from bringing lawsuit against MLB and co-defendants).

138. See *id.* para. 11 (stating damages and inconveniences plaintiffs faced and suffered as result of alleged anti-competitive actions of MLB and its co-defendants).

According to the plaintiffs, the defendants created the cartel when they agreed “to divide the live-game video presentation market into exclusive territories, which were protected by anticompetitive blackouts.”<sup>139</sup> The plaintiffs claimed that these agreements were not essential to providing baseball contests and only served to reduce competition in the “live-game video presentation market.”<sup>140</sup> Therefore, the plaintiffs alleged that the MLB and its co-defendants were in violation of Sections 1 and 2 of the Sherman Antitrust Act.<sup>141</sup>

At the heart of these allegations was the MLB’s blackout policy.<sup>142</sup> The plaintiffs stated that, by creating these broadcasting agreements, the MLB and its co-defendants entered into a “conspiracy.”<sup>143</sup> This alleged conspiracy used the MLB’s blackout restrictions to stabilize the prices of pay television packages, MLB Extra Innings, and MLB.tv.<sup>144</sup> They alleged that by blacking out games everywhere but through the local broadcaster, fans who wanted to watch an in-market game were forced to buy a certain service or packages from the local broadcaster.<sup>145</sup> In turn, this arrangement allowed broadcasters to charge “supra-competitive prices” because they controlled the fans’ only way to watch games in certain areas.<sup>146</sup> These agreements also prevented local broadcasters from

139. *Id.* para. 2 (explaining exact actions MLB and its co-defendants took in furtherance of their alleged conspiracy).

140. *Id.* (detailing why plaintiffs believed broadcasting agreements and blackout restrictions of MLB were not exempt from antitrust laws).

141. *See id.* para. 45(a)–(k) (covering specific violations of Sherman Antitrust Act plaintiffs alleged MLB and co-defendants of). For further discussion of the specific sections of the Sherman Antitrust Act the MLB allegedly violated, see *infra* note 151 and accompanying text.

142. *See* Amended Complaint, *supra* note 12, para. 69 (stating blackout restrictions were tool MLB and its co-defendants used to enforce and create anti-competitive actions). Further, to justify bringing the action, the plaintiffs in *Garber* cited cases involving other sports leagues where plaintiffs brought similar actions, some in which the parties settled and others in which the courts ruled in favor of the plaintiffs. *See* Amended Complaint, *supra* note 12, paras. 3–8 (detailing precedent plaintiffs wanted to apply to *Garber*). However, in these cases the plaintiff was never the fan or consumer. *See id.* (examining, on a surface level, each of precedential cases). For further discussion of the MLB blackout restrictions, and how they work, see *supra* notes 118–128 and accompanying text.

143. *See* Amended Complaint, *supra* note 12, paras. 69, 71.

144. *See id.* paras. 70–72 (explaining extent of alleged conspiracy between MLB and its co-defendants).

145. *See id.* paras. 74–97 (detailing how MLB and its co-defendants forced plaintiffs, consumers, and fans into buying certain packages).

146. *See id.* paras. 11, 74–80 (describing how MLB and local broadcasters worked together to force plaintiffs, consumers, and fans to pay supra-competitive prices).

broadcasting any out-of-market games.<sup>147</sup> Therefore, any consumer who wanted to watch out of market games that were not broadcast on national television had to purchase an expensive MLB Extra Innings package or purchase MLB.tv's "out of market" package.<sup>148</sup> In some cases the broadcasting agreements left plaintiffs and class members with no way to watch games, either through local broadcasters or through streaming options.<sup>149</sup>

As a result of these alleged violations, the plaintiffs sought very specific relief.<sup>150</sup> First, they sought penalization of MLB and its co-defendants as provided for by Sections 1 and 2 of the Sherman Antitrust Act.<sup>151</sup> Second, they asked the court to order the MLB to pay three times the amount in damages sustained by the plaintiffs and all members of the class, combined with the cost of filing the complaint and attorney's fees.<sup>152</sup> Finally, the plaintiffs requested that the court enjoin the MLB and its co-defendants from violating anti-trust law any further than they already have with their actions.<sup>153</sup>

In May 2015, the presiding judge, U.S. District Judge Shira Scheindlin, certified the class action lawsuit and also ruled that the plaintiffs could only seek injunctive relief in the case.<sup>154</sup> This meant the plaintiffs could only get relief in the form of the MLB

147. *See id.* (detailing what local broadcasters got out of signing deals with MLB).

148. *See id.* paras. 81–97 (explaining how agreements forced plaintiffs and class to purchase expensive "out-of-market" packages). Out-of-market packages are "a bundle of all out-of-market games, from every team." Goldman, *supra* note 16.

149. *See* Amended Complaint, *supra* note 12, para. 88 (providing example of how some plaintiffs and members of class were blocked from watching some games online). The example given by the plaintiffs was that of a Mets fan in New York. *See id.* paras. 10–11, 88. The hypothetical fan had no access to any Mets streams over the Internet, despite the fact that the MLB streamed Mets games over the Internet elsewhere on a regular basis. *See id.* This same hypothetical fan could not watch games with an MLB Extra Innings package, and therefore would be forced by the MLB and its co-defendants to subscribe to a local television provider in order to watch Mets games. *See id.*

150. *See id.* paras. A–G (detailing specific relief sought on behalf of plaintiffs and class).

151. *See id.* paras. A–C (explaining first form of relief plaintiffs sought for themselves and class).

152. *See id.* para. D (stating second form of relief plaintiffs sought for themselves and class).

153. *See id.* para. F (stating fourth and final form of relief plaintiffs sought for themselves and class).

154. *See* Nathaniel Grow, *The Impending Battle over the Future of Televised Baseball*, FANGRAPHS (Jan. 11, 2016), <http://www.fangraphs.com/blogs/the-impending-battle-over-the-future-of-televised-baseball/> [<https://perma.cc/3SG8-JKJQ>] (detailing steps taken in pretrial phase by judge). These steps included ruling out all forms of relief aside from injunctive relief. *See id.*

and its co-defendants changing their broadcast policies and not in the form of monetary damages.<sup>155</sup>

### 3. *Settlement in the Bottom of the Ninth*

There was a lot riding on the outcome of *Garber*.<sup>156</sup> Baseball's antitrust exemption was at risk of further chipping away, and the MLB and its co-defendants were at risk of receiving a binding court order.<sup>157</sup> *Garber* remained on deck in the pretrial phase for just over two years, the media excitedly following its progress as both sides prepared for trial.<sup>158</sup> Then, right before the trial began, the MLB settled with the plaintiffs.<sup>159</sup>

## B. Broadcasting Agreements and Antitrust Laws

*Garber* almost went to trial.<sup>160</sup> The MLB defended itself fully up until one week before the trial was to begin.<sup>161</sup> It was clear from the start that the MLB would be fighting an uphill battle.<sup>162</sup> Ulti-

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155. See *id.* (explaining what only having injunctive relief available meant to both plaintiffs and MLB and its co-defendants).

156. See Ryne Horde & Eric Lindros, *Garber v. Office of the Commissioner of Baseball: Why We Should Care*, THE GOOD PHIGHT (Jan. 14, 2016, 2:26 PM), <http://www.thegoodphight.com/2016/1/14/10769818/garber-v-office-of-the-commissioner-of-baseball-why-we-should-care> [<https://perma.cc/VR57-L3YY>] (detailing some of the potential outcomes of *Garber*).

157. See Grow, *supra* note 154 (reiterating forms of relief judge had ruled out well before *Garber* was ever to go trial).

158. See *Major League Baseball Settles Lawsuit over Television Blackouts*, SPORTS ILLUSTRATED (Jan. 19, 2016), <http://www.si.com/mlb/2016/01/19/garber-case-settlement-tv-packages> [<https://perma.cc/5HU9-SJDB>] (explaining how plaintiffs first filed suit in *Garber* in 2012).

159. See Neumeister, *supra* note 10 (stating MLB and its co-defendants settled *Garber* case right before it was about to go to trial).

160. See *id.* (stating MLB defended its regional television contracts in pretrial phase).

161. See *infra* notes 166–213 and accompanying text (discussing how *Garber* could have turned out for MLB if it had gone to trial).

162. See Jeff John Roberts, *Baseball Fans Will Get Cheaper Prices in MLB Settlement, 'Blackouts' Remain*, FORTUNE (Jan. 19, 2016, 2:25 PM), <http://fortune.com/2016/01/19/mlb-blackout-settlement/> [<https://perma.cc/Z7ZM-RM6U>] (noting how Judge Scheindlin sided with fans in a similar class action complaint concerning National Hockey League). See generally *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 480–92 (S.D.N.Y. 2012) (holding National Hockey League's blackout arrangement did appear to be violation of antitrust laws). In *Laumann*, plaintiffs brought as class action lawsuit similar to the lawsuit in *Garber*. See *id.* at 471. In fact, *Laumann* and *Garber* had some of the same plaintiffs, including Fernanda Garber herself. See *id.* at 472 nn.7–8. The plaintiffs in *Laumann* brought allegations of Section 1 and 2 violations under the Sherman Antitrust Act against the National Hockey League (the "NHL"), the MLB, and their regional sports networks partners, including Comcast and Fox Sports, with whom the NHL and MLB had broadcasting agreements. See *id.* at 476. Similar to the plaintiffs in *Garber*, the plaintiffs in *Laumann* alleged that how the MLB and NHL, among others, di-

mately, the MLB took the safe route and, in doing so, protected its antitrust exemption.<sup>163</sup> The settlement in *Garber* ultimately opened up a variety of new streaming options for baseball fans.<sup>164</sup> If *Garber* went to trial, the court would have likely held that baseball's antitrust exemption did not apply to broadcasting agreements, forcing the MLB to reconfigure their broadcast agreements and possibly end its use of blackout restrictions.<sup>165</sup>

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vided up markets and distributed out-of-market games which “adversely affected and substantially lessened competition in the relevant markets.” *Id.* at 475. The plaintiffs further alleged that the MLB and NHL’s practice of blacking out games in order to protect these market divisions contributed to their anticompetitive actions. *See id.* at 471. Ultimately, the court held that the claims of Section 1 violations could proceed against all the defendants in the case; however, the claims of Section 2 violations could only proceed against the NHL and MLB. *See id.* at 480–92.

The outcome of *Laumann* would allow class action suits against the MLB to go forward. *See* Bob Van Voris, *MLB, NHL Fans Win Approval to Try and Change Way Games Aired*, BLOOMBERG (last updated May 14, 2015, 5:12 PM), <http://www.bloomberg.com/news/articles/2015-05-14/mlb-nhl-must-face-class-antitrust-claims-u-s-judge-rules> [<https://perma.cc/6SPE-G8P2>] (discussing outcome of *Laumann*). However, before the case could go any further, the NHL and the plaintiffs came to an agreement. *See* Van Voris & Smith, *supra* note 38. According to this agreement, the NHL provided fans with single-team packages priced at least twenty percent below the NHL’s current out-of-market packages. *See id.* The MLB announced it would be offering a similar package because of this agreement as well, prior to the settlement of *Garber*. *See id.*

163. *See infra* notes 205–231 and accompanying text (detailing what would have happened if *Garber* went to trial and how MLB prevented erosion of antitrust exemption by settling).

164. *See generally* Class Action Settlement Agreement, *Garber v. Office of the Comm’r of Baseball*, 120 F. Supp. 3d 334 (S.D.N.Y. 2014) (No. 12-3704 (SAS)) (laying out settlement reached in *Garber*, including various forms of relief). The plaintiffs in *Garber*, and all MLB fans as an extension, received relief in four major ways. The first was single-club programming for both television and Internet, allowing fans to buy a cheaper package that only allows them to watch one team. *See id.* para. 55. Secondly, defendants must set cheaper prices for both MLB.tv packages and MLB Extra Innings Packages. *See id.* paras. 56–57. The third was what the MLB called a “Follow-Your-Team” package, which would allow fans to watch the out-of-market stream of one specific team. *See id.* para. 58. For example, if a fan followed the Phillies and lived within the Phillies’ home territory, the fan could watch the Mets stream of a Phillies vs. Mets game. Finally, the MLB would provide streams of in-market games to fans who could not view the games in any fashion. *See id.* para. 60.

165. *See* Nathaniel Grow, *End the Blackouts*, THE HARDBALL TIMES (Jan. 14, 2015), <http://www.hardballtimes.com/end-the-blackouts/> [<https://perma.cc/9NEN-6SZW>] (stating if *Garber* went to trial outcome could be devastating for MLB). Grow states, “[w]hile the suit’s odds of success are uncertain, MLB would be wise to fix its blackout restrictions now, on its own terms, rather than risk having a judge or jury impose even more radical changes in the future.” *Id.*

1. *The MLB was Already Down in the Court*

The case got off to an unfavorable start for the MLB with Judge Scheindlin's ruling that she would not let the MLB defend itself by clinging to baseball's antitrust exemption.<sup>166</sup> In 2014, when the MLB tried to get the case dismissed on antitrust exemption grounds, she ruled that baseball's antitrust exemption did not apply to *Garber* and allowed the lawsuit to proceed.<sup>167</sup> In addition, Judge Scheindlin was not "afraid to break new ground" in the law, as many expected her to do in *Garber* if it went to trial.<sup>168</sup> Judge Scheindlin had already ruled, in a similar case, that actions such as the MLB's broadcast agreements did violate the Sherman Antitrust Act.<sup>169</sup>

The last time the issue of baseball's antitrust exemption came before the Supreme Court, it survived only on *stare decisis*.<sup>170</sup> Since then, the MLB has continued to operate in anti-competitive ways that would otherwise violate the Sherman Antitrust Act.<sup>171</sup> Courts noted this, but they failed to act.<sup>172</sup> However, with anything not explicitly exempt in the Curt Flood Act now at question, it is only a matter of time before Congress or the Supreme Court further chips away at baseball's antitrust exemption.<sup>173</sup>

166. See Emert, *supra* note 1; see also Grow, *supra* note 154 (detailing how in 2014 U.S. District Judge Scheindlin ruled an antitrust exemption would not be accepted defense against antitrust claims).

167. See Grow, *supra* note 154 (explaining further Judge Scheindlin's statements and ruling).

168. Horde & Lindros, *supra* note 156 (quoting Dan McLaughlin (@baseballcrank), TWITTER (Jan. 11, 2016, 12:58 PM), [https://twitter.com/baseballcrank/status/686608236162646016?ref\\_src=twsrc%5Etfw](https://twitter.com/baseballcrank/status/686608236162646016?ref_src=twsrc%5Etfw)) (examining decisions Judge Scheindlin made in past cases).

169. *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 492 (S.D.N.Y. 2012) (stating MLB's agreements did violate antitrust laws). For further discussion of *Laumann*, see *supra* note 162 and accompanying text.

170. For a discussion on the Supreme Court's holding and reasoning in *Flood*, see *supra* notes 86–94 and accompanying text.

171. For a discussion of the anticompetitive actions the plaintiffs accused the MLB of in *City of San Jose*, see *supra* notes 102–113 and accompanying text. For an explanation of the anticompetitive actions of which plaintiffs accused the MLB in *Garber*, see *supra* notes 132–155 and accompanying text.

172. For a discussion of the anticompetitive actions the plaintiffs accused the MLB of in *City of San Jose*, see *supra* notes 102–113 and accompanying text. For an explanation of the anticompetitive actions of which plaintiffs accused the MLB in *Garber*, see *supra* notes 132–155 and accompanying text.

173. See *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (explaining some actions antitrust exemption may not apply to and which Curt Flood Act does not list). For further discussion of *City of San Jose*, see *supra* notes 100–113 and accompanying text. For further discussion of how the ruling in *City of San Jose* left the antitrust exemption exposed, see *infra* notes 198–204 and accompanying text.

## 2. *Evaluation Under the Sherman Antitrust Act*

By settling *Garber*, the MLB protected itself.<sup>174</sup> As Judge Scheindlin ruled that the MLB would not be able to use baseball's antitrust exemption to defend itself, she next would examine if the MLB and its co-defendants' actions violated the Sherman Antitrust Act.<sup>175</sup> The plaintiffs accused the MLB and its co-defendants of violating Section 1 of the Sherman Antitrust Act.<sup>176</sup> Technically, baseball is not exclusively exempt from the Sherman Antitrust Act itself, but from the wider field of antitrust law.<sup>177</sup> Nonetheless, baseball is exempt from the Sherman Antitrust Act.<sup>178</sup>

Section 1 of The Sherman Antitrust Act makes “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce” illegal.<sup>179</sup> However, the Supreme Court clarified that Section 1 only makes illegal unreasonable restraints on trade.<sup>180</sup> To prove a violation of Section 1, a plaintiff “must show (1) that there was a contract, combination, or conspiracy[,] (2) that the agreement unreasonably restrained trade . . . and (3) that the restraint affected interstate commerce.”<sup>181</sup>

The MLB and its co-defendants clearly and publicly entered into contracts.<sup>182</sup> These contracts unreasonably restrained trade as

174. See Nathaniel Grow, *MLB Plays it Safe, Settles Television Lawsuit*, INSTAGRAPHS (Jan. 19, 2016), <http://www.fangraphs.com/blogs/instagraphs/mlb-plays-it-safe-settles-television-lawsuit/> [<https://perma.cc/DLQ4-Z99E>] (analyzing settlement in *Garber* case).

175. See Emert, *supra* note 1; see also Grow, *supra* note 154 (expanding upon Judge Scheindlin's 2014 ruling in *Garber*).

176. See Amended Complaint, *supra* note 12, para. 45(a)–(k) (covering specific sections of Sherman Antitrust Act plaintiffs accused MLB and co-defendants of violating). For further discussion of the specific sections of the Sherman Antitrust Act the MLB allegedly violated, see *supra* note 151 and accompanying text.

177. See Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 VILL. SPORTS & ENT. L.F. 213, 217 (1995) (stating ruling in *Federal Baseball* did not make baseball exempt from Sherman Antitrust Act specifically).

178. See *id.* (explaining baseball is still exempt Sherman Antitrust Act).

179. 15 U.S.C. § 1 (addressing first category of illegal activities under Sherman Antitrust Act and penalties). For further discussion of § 1 of the Sherman Antitrust Act, see *supra* note 52 and accompanying text.

180. See *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (stating Section 1 targets actions that “suppress” and “destroy” competition).

181. *Bahn v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) (describing three elements for violation of § 1 of Sherman Antitrust Act).

182. See Amended Complaint, *supra* note 12, at paras. 69–97 (describing broadcast agreements MLB and broadcast partners entered into, and harm they caused).

the contracts, and the blackout restrictions they operated around, made it impossible for some fans to watch their favorite teams in any way and made others pay for expensive content packages at supra-competitive prices.<sup>183</sup> This restraint affected interstate commerce as the blackout restrictions reached across states lines and forced fans to purchase content packages at supra-competitive prices.<sup>184</sup> Therefore, Judge Scheindlin would have found the MLB and its co-defendants to be in violation of Section 1 of the Sherman Antitrust Act.<sup>185</sup>

Section 2 of the Sherman Antitrust Act penalizes “[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.”<sup>186</sup> The plaintiffs in *Garber* argued that the defendants did this by forming a “cartel.”<sup>187</sup> To prove a violation of Section 2 of the Sherman Antitrust Act, a plaintiff must show (1) that the defendant possesses monopoly power in the relevant market and (2) that the defendant willfully acquired or maintained that power through exclusionary conduct toward the rest of the market.<sup>188</sup>

Monopoly power, or the ability “to control prices and exclude competition” in a given market, is present in the case of the MLB’s broadcast agreements as the MLB is able to control the prices of its online packages while its co-defendants were able to do the same with their television packages.<sup>189</sup> Further, by signing the broadcast agreements, the MLB and its co-defendants acted willingly in obtaining their monopoly power and acted in an exclusionary manner by picking and choosing which broadcasters to sign to these

183. *See id.* at 81–97 (detailing how broadcast agreements harmed fans, plaintiffs, and class).

184. *See id.* (describing further how broadcast agreements harmed fans, plaintiffs, and class).

185. *See id.* at 70–97 (discussing broadcast agreements MLB entered into and harm they caused); *Bahn*, 929 F.2d at 1410 (stating element plaintiff must prove to successfully bring violation of section 1 of Sherman Antitrust Act Claim). For further discussion of § 1 of the Sherman Antitrust Act, see *supra* note 52 and accompanying text.

186. 15 U.S.C. § 2 (laying out second category of illegal activities under Sherman Antitrust Act and penalties). For further discussion of § 2 of the Sherman Antitrust Act, see *supra* note 53 and accompanying text.

187. *See* Amended Complaint, *supra* note 12, at paras. 2–3 (seeking remedy for defendants’ illegal cartel).

188. *See* *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (describing elements for violation of section 2 of Sherman Antitrust Act).

189. *Id.* at 571 (defining “monopoly power”); *see* Amended Complaint, *supra* note 12, at paras. 81–97 (describing agreements MLB and broadcast partners entered into and blackout restrictions used to implement them).

deals.<sup>190</sup> Therefore, based on prior case law, Judge Scheindlin would have found the MLB and its co-defendants in violation of Section 2 of the Sherman Antitrust Act.<sup>191</sup>

### 3. *Evaluation as Part of “Business of Baseball”*

While it is clear that the MLB’s broadcasting agreements violate antitrust law, the real question involves determining whether antitrust law applies to baseball and the MLB.<sup>192</sup> There are those who believe that baseball’s antitrust exemption should not apply to broadcasting restrictions.<sup>193</sup> However, that could not be further from the truth.<sup>194</sup>

#### a. Finding the Gap

Since *Toolson*, the general rule seems to be that any action that is part of the “business of baseball” is exempt from antitrust laws.<sup>195</sup> Courts that have taken the majority approach seem to have taken a broad approach as to what constitutes the “business of baseball.”<sup>196</sup> However, after the ruling in *City of San Jose*, this approach seems to strike out.<sup>197</sup>

190. See Amended Complaint, *supra* note 12, at paras. 70–97 (explaining how broadcasting agreements operate).

191. See Amended Complaint, *supra* note 12, at paras. 70–97 (explaining how broadcasting agreements operate). See *Grinnell Corp.*, 384 U.S. at 570–71 (stating element plaintiff must prove to successfully bring violation of section 2 of Sherman Antitrust Act Claim). For further discussion of § 2 of the Sherman Antitrust Act, see *supra* note 53 and accompanying text. See also *Laumann v. Nat’l Hockey League*, 907 F. Supp. 2d 465, 480–92 (S.D.N.Y. 2012) (holding National Hockey League’s blackout arrangement did appear to be violation of antitrust laws).

192. See *supra* notes 174–191 (examining allegation made in *Garber* complaint under Sherman Antitrust Act).

193. See Jacob Ware, Note, *Intentional Pass: Analyzing Baseball’s Antitrust Exemption as Applied to Broadcasting Agreements in Laumann v. National Hockey League*, 49 GA. L. REV. 895, 918 (2015) (discussing why broadcasting agreements should be exemption from antitrust laws).

194. See *infra* notes 195–213 (detailing why antitrust laws should apply to MLB’s broadcasting agreements)

195. See *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1952) (stating what actions were exempt from antitrust law).

196. See Ware, *supra* note 193, at 923 (detailing majority of courts have “broadly interpret[ed]” “business of baseball” when analyzing what was covered by baseball’s antitrust exemption).

197. See *City of San Jose v. Office of the Comm’r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (explaining there are some actions within “business of baseball” that may not be exempt from antitrust laws). For a general discussion about *City of San Jose*, see *supra* notes 101–113 and accompanying text. For a discussion on how the ruling in *City of San Jose* left the antitrust exemption exposed, see *supra* notes 198–204 and accompanying text.

The passage of the Curt Flood Act and the decision in *City of San Jose* exposed baseball's antitrust exemption to attack.<sup>198</sup> The Curt Flood Act already removed labor disputes and the reserve clauses from what the exemption covered.<sup>199</sup> The Ninth Circuit adhered closely to the language of the Curt Flood Act in the *City of San Jose* ruling.<sup>200</sup> The court adhered so closely, in fact, that the Ninth Circuit pondered whether the exemption only applied to that which the Curt Flood Act itself covered.<sup>201</sup> The Ninth Circuit went on to state that there may be actions that are part of the business of baseball that are not exempt from antitrust laws.<sup>202</sup> In fact, the business of baseball is not as all-encompassing as it seems.<sup>203</sup> This potentially leaves actions not explicitly covered in the Curt Flood Act outside the scope of the exemption.<sup>204</sup>

#### b. The "Unique Characteristics and Needs" Standard

The interplay between the Curt Flood Act and the ruling in *City of San Jose* effectively created a grey area.<sup>205</sup> Courts have clarified this grey area by narrowing the scope of baseball's antitrust exemption to actions that are "integral to the sport and not related activities which merely enhance its commercial success."<sup>206</sup> The Su-

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198. See *id.* *City of San Jose*, 776 F.3d at 690 (stating some "business of baseball" actions may not be exempt from antitrust laws). The Ninth Circuit stated that any actions not specifically listed as being exempt from antitrust law may be at question. See *id.*

199. See 15 U.S.C.A. § 26b (removing labor issues from coverage of baseball's antitrust exemption). For further discussion of the Curt Flood Act, see *supra* notes 95–99 and accompanying text.

200. See *City of San Jose*, 776 F.3d at 690 (stating how Curt Flood Act factored into Ninth Circuit's ruling). For a general discussion about *City of San Jose*, see *supra* notes 101–113 and accompanying text.

201. See *City of San Jose*, 776 F.3d at 690 (explaining there are some actions antitrust exemption may not apply to and were not listed in Curt Flood Act).

202. See *id.*

203. See Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 620 (2010) (stating there are some parts of the "business of baseball" baseball's antitrust exemption does not cover).

204. See *City of San Jose*, 776 F.3d at 690 (explaining further how Curt Flood Act factored into Ninth Circuit's ruling).

205. For a discussion on the interplay between the Curt Flood Act and *City of San Jose*, see *supra* notes 195–204 and accompanying text.

206. *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263, 265 (S.D. Tex. 1982) (detailing how, when examining radio broadcast agreements, *Henderson* court took narrower approach to defining "business of baseball" to only essential elements of "business of baseball"). The court stated "broadcasting [in general] is not central enough to baseball to be encompassed in the baseball exemption." *Id.* See *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) (adopting limited view of baseball's antitrust exemption as applied to umpire employment), *rev'd on other grounds*, 998 F.2d 60 (2d

preme Court supported this concept in *Flood* when it stated that baseball's antitrust exemption had to take into account its "unique characteristics and needs."<sup>207</sup> This analysis regarding which parts of the "business of baseball" are exempt from antitrust law is often called the "Unique Characteristics and Needs" standard.<sup>208</sup>

Examining the allegations made in *Garber* under this lens, it becomes clear that the MLB's broadcasting agreements and blackout restrictions are not within the scope of the "business of baseball" activities that are exempt from antitrust law.<sup>209</sup> As they are currently set up, the agreements only serve to help the MLB and its broadcasting partners charge supra-competitive prices for their content packages.<sup>210</sup> As the agreements are made to "merely enhance [the] commercial success" of the MLB, they are outside the exemption.<sup>211</sup> Further, the broadcasting agreements are not unique to baseball because various other leagues also have broadcasting agreements.<sup>212</sup> Therefore, as more recent courts have leaned toward the "Unique Characteristics and Needs" standard, broadcasting agreements are outside the scope of baseball's antitrust exemption.<sup>213</sup>

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Cir. 1993). The holding in *Postema* stated "from antitrust challenges to its league structure and its reserve system . . . [not] anti-competitive behavior in every context in which it operates." *Id.* at 1488–89. *Henderson* was one of the many cases the plaintiffs in *Garber* relied on when making their argument. See Amended Complaint, *supra* note 12, at para. 8.

207. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (stating baseball's antitrust exemption should only apply to actions that are specific to baseball).

208. See *Grow*, *supra* note 203, at 589–90 (explaining "Unique Characteristics and Needs" standard used to determine what "business of baseball" actions are exempt from antitrust laws).

209. See Amended Complaint, *supra* note 12, at para. 45(a)–(k) (covering specific provisions of Sherman Antitrust Act plaintiffs alleged MLB and co-defendants violated). For further discussion of the specific sections of the Sherman Antitrust Act the MLB allegedly violated, see *supra* note 151 and accompanying text. See *Henderson*, 541 F. Supp. at 265 (stating, explicitly broadcasting is not within scope of antitrust exemption).

210. See Amended Complaint, *supra* note 12, at paras. 74–80 (describing how MLB and local broadcasters worked together to force plaintiffs, consumers, and fans to pay supra-competitive prices). For a discussion on how these actions violate antitrust laws, see *supra* notes 182–185 and accompanying text.

211. See Amended Complaint, *supra* note 12, at paras. 74–80 (detailing alleged violations of antitrust laws); see also *Henderson*, 541 F. Supp. at 265 (discussing how *Henderson* court narrowed scope of exemption to actions which are "integral to the sport and not related activities which merely enhance its commercial success").

212. See, e.g., *Laumann*, 907 F. Supp. 2d at 492 (explaining how MLB and NHL have similar broadcasting agreements). For further discussion of *Laumann*, see *supra* note 162 and accompanying text.

213. See *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) (adopting limited view of baseball's antitrust exemption),

## C. A Sign of What is on Deck

As baseball's antitrust exemption is under attack, *Garber* marks its third challenge in the past five years.<sup>214</sup> Recently blackout restrictions and broadcasting agreements have taken the brunt of the scrutiny.<sup>215</sup> Baseball's exemption has been chipped away at over the years, and by settling *Garber* the MLB avoided having its broadcasting agreements removed from the exemption's scope.<sup>216</sup> It is clear that had *Garber* gone to trial, the MLB would have lost the case, and the court would have held that broadcasting agreements were not within the scope of the "business of baseball" actions that are exempt from antitrust law.<sup>217</sup> However, the game is far from over.<sup>218</sup> Although Judge Scheindlin finalized the settlement, there are plaintiffs who remain unhappy with the final terms.<sup>219</sup> In total, thirteen class members objected to the settlement, leaving the door open for further future lawsuits.<sup>220</sup>

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*rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993). See also *Henderson*, 541 F. Supp. at 265 (narrowing scope of "businesses of baseball" to unique elements); *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (explaining there are some actions within "business of baseball" that may not be exempt from antitrust laws).

214. For a discussion on the challenge to the baseball antitrust exemption in *City of San Jose*, see *supra* notes 101–113 and accompanying text. For a discussion on the challenge to the baseball antitrust exemption in *Garber*, see *supra* notes 132–155 and accompanying text. For a discussion on the challenge to the baseball antitrust exemption in *Laumann*, see *supra* note 162 and accompanying text.

215. For a discussion on the challenge to the baseball antitrust exemption in *Garber*, see *supra* notes 132–155 and accompanying text. For a discussion on the challenge to the baseball antitrust exemption and discussion of the NHL's blackout restrictions in *Laumann*, see *supra* note 162 and accompanying text. For further discussion on the MLB's broadcasting agreements and blackout restrictions, see *supra* notes 117–131 and accompanying text. For a discussion on how the MLB's broadcasting agreements and blackout restrictions violate antitrust laws, see *supra* notes 174–185 and 205–213 and accompanying text.

216. For a discussion on how Congress addressed the antitrust exemption, see *supra* notes 95–99 and accompanying text. For an explanation of *Garber*, see *supra* notes 162–165 and accompanying text.

217. For a discussion on the ramifications if *Garber* had gone to trial, see *supra* notes 174–185 and 205–213 and accompanying text.

218. See *Grow*, *supra* note 174 (stating both Judge Scheindlin and all members of class must approve settlement to finalize it).

219. See Pete Brush, *\$200M MLB Antitrust Deal Cutting Cost of Web Streams OK'd*, LAW360 (Apr. 25, 2016, 10:02 PM), <http://www.law360.com/articles/788712/200m-mlb-antitrust-deal-cutting-cost-of-web-streams-ok-d> [https://perma.cc/L2NQ-RGZA] (detailing circumstances around finalized settlement). The settlement received final approval on April 25, 2016; however, not all members of the class approved. See *id.* Concerning the class members who objected to the settlement, Judge Scheindlin stated, "[f]ans would certainly have preferred more changes but that's not the way settlement works." *Id.*

220. See Zachary Zagger, *MLB Fans Push for Antitrust Deal OK Despite Protests*, LAW360 (Apr. 20, 2016, 10:59 PM), <http://www.law360.com/articles/786845/mlb->

Recent developments have led to greater support for legislation such as the Furthering Access and Networks for Sports Act (the “FANS Act”).<sup>221</sup> The FANS Act aims to eliminate all blackout restrictions across sports, and to potentially wipe out baseball’s anti-trust exemption altogether.<sup>222</sup> The FANS Act, on its face, states its purpose is “[t]o decrease the frequency of sports blackouts, [and] to require the application of the antitrust laws to Major League Baseball.”<sup>223</sup> The FANS Act aims to do this by amending the Curt Flood Act.<sup>224</sup> This would be very similar to the approach the Ninth Circuit took in *City of San Jose*.<sup>225</sup> In fact, Senators John McCain and Richard Blumenthal reintroduced the FANS Act in 2015.<sup>226</sup> By

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fans-push-for-antitrust-deal-ok-despite-protests [https://perma.cc/5FTB-AX9W] (stating thirteen class members objected to settlement terms). The majority of the objectors believed that the settlement did not “do more to stop in-market blackouts or overturn the regional market system entirely.” *Id.*

221. See S. 1721, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/1721/text> [https://perma.cc/6DEW-2K7L] (explaining FANS Act).

222. See *id.* (stating purpose of FANS Act).

223. *Id.*

224. See *id.* §§ 4–5 (explaining how Curt Flood Act would be amended). The FANS Act would remove the language “any conduct, acts, practices or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level, including but not limited to.” *Id.* § 4(2)(A). By doing this, the FANS Act would greatly expand what “business of baseball” actions are subject to antitrust laws by limiting what actions are exempt from antitrust law to those explicitly stated in the Curt Flood Act. See generally *id.*

In explaining the reasoning behind the FANS Act, Senator Richard Blumenthal stated:

Special breaks should be stopped for professional sports leagues that impose anti-consumer blackout policies leaving their fans in the dark. . . . Leagues that enjoy antitrust exemptions and billions of dollars in subsidies and other benefits should give their fans fair access to their favorite teams on TV. This legislation would protect fans who now get the short end of the stick from leagues that treat the public with contempt while continuing to enjoy public benefits. Fans deserve to be put first—or at least treated fairly.

Shayna Goldman, *NHL Reaches Landmark In-Market Streaming Deal with Fox Sports*, SPORTS ILLUSTRATED (Jul. 14, 2016), <http://www.si.com/tech-media/2016/07/14/nhl-fox-sports-streaming-market> [https://perma.cc/9ASX-MWHY] (internal quotation marks omitted) (quoting Richard Blumenthal) (supporting goals of FANS Act). The FANS Act would also “remove the language from the [Sports Broadcasting Act of 1961] that grants the leagues the ability to force local broadcasters to blackout home games when that team fails to sell most of their tickets.” Goldman, *supra* note 16.

225. See *City of San Jose*, 776 F.3d at 690 (stating how Curt Flood Act factored into Ninth Circuit’s ruling and how Ninth Circuit looked at what Curt Flood Act explicitly exempt from antitrust laws). For further discussion of *City of San Jose*, see *supra* notes 101–113 and accompanying text.

226. See John Eggerton, *FANS Act Reintroduced*, MULTICHANNEL NEWS (Dec. 17, 2015, 3:45 PM), <http://www.multichannel.com/news/congress/fans-act-reintro>

settling *Garber*, it appears that the MLB has only delayed the inevitable.<sup>227</sup>

As various courts have pointed out over the years, baseball's antitrust exemption is an anomaly.<sup>228</sup> In fact, the exemption no longer covers the very issue that first granted baseball its antitrust exemption.<sup>229</sup> Baseball is currently the only professional sport with an antitrust exemption.<sup>230</sup> Congress continually diminishes this exemption, which baseball should not, and will not, have much longer.<sup>231</sup>

#### IV. FOR IT'S ONE, TWO, THREE STRIKES THE MLB'S OUT: AN END TO THE EXEMPTION AND BLACKOUTS

In the end, the MLB decided to give the plaintiffs in *Garber* an intentional walk, instead of facing off against them at the plate. As the lawyers for the MLB stated after the settlement of *Garber*,

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duced/396082 [https://perma.cc/GZ7L-M8JR] (detailing how two senators reintroduced FANS Act and were praised for doing so).

227. For an explanation of the broadcasting agreement with regard to baseball's antitrust exemption, see *supra* notes 214–226 and *infra* notes 227–231 and accompanying text. *But see* Ryan Fagan, *Despicable 'Save America's Pastime Act' Aims to Screw Minor Leaguers*, SPORTINGNEWS (Jun. 29, 2016), <http://www.sportingnews.com/mlb/news/minor-league-save-americas-pastime-act-salaries-antitrust-exemption-broshuis-congress/1jfn290g1ubcd18af2tjyb1u7l> [https://perma.cc/Z7S5-HPXH] (detailing how unfair minor league salaries draw more attention to baseball's antitrust exemption). Baseball's antitrust exemption keeps minor leaguer players exempt from minimum wage standards. *See id.* This allows the MLB to pay minor leaguers arbitrary salaries that often fall below what minimum wage would deem acceptable. *See id.* Two members of Congress introduced the Save America's Pastime Act, which would uphold the minimum wage law exemption to minor league teams. *See id.* The proposed Act received a strong negative response because the Act would put a cap on minor league salaries rather than raising them to an acceptable level as compared to the large salaries of MLB players. *See id.*

228. For a discussion on how previous cases have addressed baseball's antitrust exemption, see *supra* notes 75–94 and accompanying text.

229. *See supra* notes 95–99 and accompanying text (detailing Curt Flood Act). The Curt Flood Act removed labor issue from the reach of baseball's antitrust exemption, effectively getting rid of the reserve clause in MLB contracts. *See supra* notes 95–99 and accompanying text. The reserve clause was the issue that baseball's antitrust exemption was born from in *Federal Baseball*. *See generally* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

230. *See* Kavitha A. Davidson, *Antitrust Exemption Holds Baseball Back a Century*, BLOOMBERGVIEW (Apr. 8, 2014, 10:41 AM), <https://www.bloomberg.com/view/articles/2014-04-08/antitrust-exemption-holds-baseball-back-a-century> [https://perma.cc/PQM5-NR6H] (stating MLB is only professional sport with antitrust exemption).

231. *See supra* notes 95–99 and accompanying text (detailing how Congress chipped away at baseball's antitrust exemption with Curt Flood Act). *See supra* notes 214–231 and accompanying text (discussing why baseball should lose its antitrust exemption, and how it may come about).

“[m]ake no mistake, this mission is not altruistic[.]”<sup>232</sup> While this may be true, the claim that their goal with the settlement was to help fend off “fierce competition” may not be the complete truth.<sup>233</sup> The MLB potentially faced a ruling that would hold that baseball’s antitrust exemption did not apply to broadcasting agreements.<sup>234</sup>

The Ninth Circuit’s ruling in *City of San Jose* left baseball’s antitrust exemption open to attack.<sup>235</sup> By declining to analyze baseball’s antitrust exemption beyond the reach of the Curt Flood Act, the Ninth Circuit left the door open for future courts to examine the exemption’s application to other topics, such as broadcasting rights.<sup>236</sup> This, combined with the fact that the MLB knew they would be fighting an uphill battle, made taking *Garber* to trial very risky for the MLB.<sup>237</sup>

If the MLB had taken the case all the way to trial, it was possible, and highly likely, that the court would rule in favor of the class. By settling *Garber*, the MLB changed their streaming and blackout policies on their own terms, instead of being forced to comply with a court order. However, the most important outcome from settling the case before trial was that baseball’s antitrust exemption remained untouched. It is clear that the MLB’s current broadcasting agreements violate antitrust law.<sup>238</sup> They are most likely not covered by baseball’s antitrust exemption, nor should they be; therefore, they should be subject to the scrutiny of the Sherman Antitrust Act.<sup>239</sup>

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232. Emert, *supra* note 1 (quoting MLB’s lawyers on the MLB motive behind settlement of *Garber*).

233. *See id.*; *see also supra* notes 160–231 and accompanying text (explaining what could have happened had *Garber* gone to trial).

234. *See* Emert, *supra* note 1 (detailing how Judge Scheindlin ruled in *Garber*). For further discussion of how Judge Scheindlin might have handled the case had it gone to trial, *see supra* notes 166–169 and accompanying text.

235. *See City of San Jose*, 776 F.3d at 690 (explaining there are some actions antitrust exemption may not apply to and the Curt Flood Act does not list). For further discussion of *City of San Jose*, *see supra* notes 101–113 and accompanying text. For further discussion of how the ruling in *City of San Jose* left the antitrust exemption exposed, *see supra* notes 198–204 and accompanying text.

236. *See City of San Jose*, 776 F.3d at 690 (refusing to examine scope of MLB’s antitrust exemption beyond Curt Flood Act).

237. *See supra* notes 166–173 and accompanying text (discussing challenges MLB faced if *Garber* went to trial).

238. *See supra* notes 174–191 and accompanying text (examining how MLB’s broadcast agreements violate antitrust laws).

239. *See supra* notes 192–213 and accompanying text (analyzing why broadcasting agreements should fall outside scope of baseball’s antitrust exemption).

A movement has been building in recent years to further strip away baseball's antitrust exemption, centered around the blackout restrictions the MLB currently has in place. This movement has led to the re-introduction of the FANS Act, which would not only end the blackout restrictions, but would almost entirely remove baseball's antitrust exemption.<sup>240</sup>

Baseball's antitrust exemption is nearly one hundred years old.<sup>241</sup> When the Supreme Court granted baseball its antitrust exemption, none of the sitting justices on the Supreme Court could have ever foreseen the great change that the Internet, or even television, would bring to baseball. The Supreme Court granted the exemption for baseball as it existed in 1922, not how it exists today.<sup>242</sup> For as advanced as the MLB has become with MLB.tv and its various cable packages, there are many who believe that baseball, and the MLB by extension, is a sport stuck in the past.<sup>243</sup> The MLB still focuses on fans going to the ballpark, despite offering a myriad of other ways of watching games. This may not be the case much longer, though, as the MLB may soon be facing a blackout of its own: a blackout from its antitrust exemption.

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240. See S. 1721, 113th Cong. (2013) (detailing FANS Act and what it aims to accomplish). For further discussion of the FANS Act, see *supra* notes 221–224 and accompanying text.

241. See Davidson, *supra* note 230.

242. See Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 200–09 (1922) (detailing holding in *Federal Baseball* and granting baseball its antitrust exemption).

243. See Carlos Correa, *Baseball Is Not Dying*, SOLE COLLECTOR (Apr. 4, 2016), <http://solecollector.com/news/2016/04/carlos-correa-baseball-is-not-dying> [<https://perma.cc/2EST-EPWV>] (stating Houston Astros shortstop Carlos Correa's opinion of how many aspects of baseball are "stuck in past"). Correa states, "[t]he game of baseball is beautiful, classic, traditional and . . . stuck in the past. We've romanticized the game's past so much that we've forgotten about its future." *Id.*

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