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Symposium Articles

MAJOR LEAGUE BASEBALL CONTRACTION AND ANTITRUST LAW

JOHN T. WOLOHAN*

I. INTRODUCTION

On November 6, 2001, two days after one of the most memorable World Series in recent baseball history, Bud Selig, the Commissioner of Major League Baseball ("MLB"), announced that two teams may be eliminated, or "contracted," from the league before the start of the 2002 season.1 This would be MLB's first contraction since the 1899 season when the National League cut the number of teams from twelve to eight by disbanding baseball franchises in Baltimore, Cleveland, Louisville, and Washington.2 Before Selig had the opportunity to name the two teams, however, baseball's plans to contract were diverted.3

Within days of Selig's announcement, two lawsuits were filed in Minnesota and Florida challenging the owners' rights to contract the two teams.4 In addition, the Major League Baseball Players As-

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1. See Jack Bell, Major League Soccer Eliminates Two Teams, N.Y. TIMES, Jan. 9, 2002, at D6 (explaining that Major League Soccer utilized contraction to solve economic problems). At the same time baseball announced its plans to contract two teams, Major League Soccer also announced plans to contract two teams from its league. See id. Soccer was able to contract two teams, Miami and Tampa Bay (two markets also under consideration by baseball). See id.


3. See Richard Sandomir, Selig Defends His Plan of Contraction to Congress, N.Y. TIMES, Dec. 7, 2001, at S3 (explaining that Major League Baseball Commissioner appeared before Congress to explain why contracting two professional baseball teams was necessary).

4. See Metro. Sports Facilities Comm'n v. Minn. Twins P'ship, 638 N.W.2d 214, 219 (Minn. Ct. App. 2002) (declaring that Minnesota Twins, one of teams sought to be eliminated by contraction, was under contract to play in public stadium during season, thus forcing team to play at stadium in accordance with agreement); see also Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316, 1319 (N.D. Fla. 2001) (ruling because baseball is exempt from antitrust laws, Florida's Attorney
The Major League Baseball Players Association filed a grievance with arbitrator Shyam Das claiming that the owners violated the collective bargaining agreement. One final consequence of Selig’s announcement was that Senator Paul Wellstone, a Minnesota Democrat, and Representative John Conyers of Michigan, the senior Democrat on the House Judiciary Committee, introduced bills in Congress designed to prevent baseball from retaining its exemption from antitrust laws. Unable to clear all the legal hurdles before the start of the 2002 season, Commissioner Selig announced that baseball was postponing the contraction until further notice.

Despite the postponement of baseball’s contraction plans, the application of federal and state antitrust laws to future contractions remains an issue. For example, although baseball traditionally has been exempt from antitrust laws due to the precedent set in three United States Supreme Court cases, there is some debate over the scope of the exemption. In the thirty years since the Supreme Court last considered the issue, the changing environment of baseball has clouded a once black and white issue. This is particularly true since Congress passed the Curt Flood Act in 1998 and introduced the Fairness in Antitrust in National Sports (FANS) Act of General could not prevent proposed contraction of baseball team with civil investigative demands). The Major League Baseball Players Association filed a grievance accusing the owners of unfair labor practices. See Hal Bodley, Union Files Grievance over MLB Contraction, USA TODAY, Nov. 9, 2001, at 1C. While no cities were named, most speculation centered on the Montreal Expos and the Minnesota Twins. See id.; see also Hal Bodley, Answers to Your Questions About Eliminating MLB Teams, USA TODAY, Nov. 6, 2001, at 4C. The Florida Marlins and the Tampa Bay Devil Rays were mentioned also as possible teams. See id. But see Metro. Sports Facilities Comm’n, 638 N.W.2d at 230 (awarding Twins exemption from contraction for one year due to contract with stadium).

While there was plenty of debate on how the arbitrator would have decided this grievance, no decision was reached. As part of the new collective bargaining agreement, both Major League Baseball and the players association agreed to drop the grievance.

When called to testify before the House Judiciary Committee on December 6, 2001, Commissioner Selig testified that Major League Baseball teams lost a total of $519 million in 2001. See id.

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both of which have the specific intent of limiting baseball's antitrust exemption.

This article examines whether circumstances surrounding professional sports have changed enough to allow the courts to apply antitrust laws to baseball. It begins with a brief overview of baseball's antitrust exemption. It then inspects the potential impact of the Curt Flood Act of 1998 and the Fairness in Antitrust in National Sports (FANS) Act of 2001 as relevant to contraction. Finally, the paper explores the present state of baseball's antitrust protection under the microscope of contraction.

II. THE HISTORY OF BASEBALL AND FEDERAL ANTITRUST LAW

Historically, the courts have held MLB exempt from antitrust laws. This section examines how courts traditionally have treated MLB under federal antitrust laws. The subsequent portion discusses baseball's "Supreme Court trilogy" and then examines some cases that followed.

A. Baseball's Supreme Court Antitrust Trilogy

The first case in baseball's Supreme Court antitrust trilogy was Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs. Under the leadership of James Gilmore, the Federal League in 1913 announced that it intended to establish itself as a third major league. Beginning in 1914, the Federal League, which was run like a syndicate, began to compete against both the American League and National League in the same cities. Indianapolis was replaced in 1915 by Newark.


15. See id. The league was run much like the Women's National Basketball League and Major League Soccer are today, with the players hired by the league and not the teams.

16. See id. The league started in 1914 with teams in Baltimore, Buffalo, Brooklyn, Chicago, St. Louis, Kansas City, Indianapolis, and Pittsburgh. Indianapolis was replaced in 1915 by Newark. See id.; see also LEE LOWENFISH, THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL'S LABOR WARS 90 (DaCapo Press, Inc. 1991) (1980).
two years of competition, however, the Federal League and MLB were ready to reach a settlement. In December 1915, the American, National, and Federal Leagues negotiated the “Peace Agreement,” which ultimately dissolved the Federal League.17

The Peace Agreement compensated the members of the Federal League in three ways. First, the Federal League received $600,000.18 Second, the Agreement permitted two of its owners to buy existing major league teams.19 Finally, dissolved teams were allowed to sell their players’ contracts to the highest bidding major league team.20

The agreement, however, contained no provisions for Baltimore’s dissolved Federal League team.21 Thus, with no league to play in after the Peace Agreement, the owners of the Baltimore team filed an antitrust suit against the remaining baseball leagues alleging that organized baseball had conspired to monopolize baseball and had committed violations of the Sherman Antitrust Act.22 Specifically, Baltimore argued that MLB “destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs . . . to leave their League . . . .”23 A federal district court ruled in the former Baltimore team’s favor


18. See LOWENFISH, supra note 16, at 91 (explaining conditions of 1916 Peace Agreement settlement, including $600,000 compensation for Federal League in exchange for dropping lawsuit seeking injunctive relief sought to prevent Federal League’s dissolution).

19. See id. Charles Weeghman and Phil Ball obtained ownership of the Major League Baseball teams in the Peace Agreement settlement. See id. Weeghman became the primary stockholder of the Chicago Cubs. See id. Phil Ball became the owner of the American League’s St. Louis baseball team. See id.

20. See id. Harry Sinclair was owner of the Federal League’s Kansas City team, which he relocated to Newark, New Jersey in 1915. See id. at 90. The Peace Agreement prevented Sinclair from becoming the owner of New York’s market team. See id. at 91. In return, Sinclair received $35,000 for trading Benny Kauff, the Federal League’s leading hitter. See id.

21. See id. (noting that Baltimore Federal League team received no benefits from 1916 settlement). Baltimore franchise owners Ned Hanlon and Harry Goldman began suit against the National and American Leagues, Weeghman, and Gilmore for antitrust violations. See id.

22. See id. (indicating professional baseball was subject to antitrust laws). Hanlon and Goldman claimed that actions to prevent their ownership of professional baseball, undertaken by National League, American League, Weeghman, and ball teams, were antitrust violations. See id.

and awarded it $240,000 in treble damages, costs, and attorney fees.\footnote{24}

On appeal, the district court's decision was overturned. The court of appeals, citing \textit{American League Baseball Club of Chicago v. Chase},\footnote{25} held that the game of baseball was not a trade or commerce.\footnote{26} It noted that baseball's exhibitions "[were] local in [their] beginning and in [their] end."\footnote{27} Accordingly, baseball did not constitute a localized entity under the Sherman Antitrust Act.\footnote{28}

The United States Supreme Court upheld the appellate court's decision, holding that the business of baseball was a state affair not involving interstate commerce within the meaning of the Sherman Antitrust Act.\footnote{29} Justice Holmes, in delivering the opinion of the Court, stated:

\begin{quote}
[Although] competitions must be arranged between clubs from different cities and States . . . the transport is a mere incident, not the essential thing . . . . [A baseball] exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words . . . [since] personal effort, not related to production, is not a subject of commerce.\footnote{30}
\end{quote}

Due to the nature of the enterprise, the Court exempted baseball from all antitrust laws.\footnote{31}

\footnote{24. \textit{See Nat'1 League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.}, 269 F. 681, 687-88 (D.C. Cir. 1920) (concluding MLB was engaged in interstate commerce and had attempted to monopolize and did monopolize part of that commerce).}

\footnote{25. 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914).}

\footnote{26. \textit{See Nat'1 League of Prof'l Baseball Clubs}, 269 F. at 686 (holding injunction prohibiting baseball player from playing for other baseball team constituted inequitable contractual practices, but did not violate antitrust laws).}

\footnote{27. \textit{Id.} at 685.}

\footnote{28. \textit{See id.}}

\footnote{29. \textit{See Fed. Baseball}, 259 U.S. at 208-09.}

The business is giving exhibitions of base ball [sic], which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.

\textit{Id.}

\footnote{30. \textit{Id.}}

\footnote{31. \textit{See id.} at 209 (holding exhibition baseball games for money did not interfere with interstate commerce).}
The next case in baseball’s Supreme Court trilogy was Toolson v. New York Yankees. Toolson, a minor league player in the Yankees farm system, failed to play for the Yankees Eastern League affiliate after the Yankees International League team demoted him. Toolson filed a lawsuit alleging antitrust violations and sought to free himself from the reserve clause of his baseball contract. He claimed that the clause in his contract, when accompanied by the rules of the Yankees farm system, deprived him of improved livelihood.

In a one-page decision, the Supreme Court upheld its prior decision in Federal Baseball. The Court determined that Congress did not intend to include MLB within the scope of federal antitrust laws. The Court noted that in the thirty years since MLB’s inception, Congress had adequate opportunity to bring the business of baseball within the reach of federal antitrust law. Thus, the business developed on the understanding that it was not subject to existing antitrust legislation. The Court ruled that it was the obligation of Congress to bring baseball within the scope of federal antitrust law.

The final case of the baseball trilogy was Flood v. Kuhn. In 1969, the St. Louis Cardinals traded all-star outfielder Curt Flood to the Philadelphia Phillies without obtaining Flood’s consent.

33. See Toolson v. N.Y. Yankees, 101 F. Supp. 93, 93 (S.D. Cal. 1951). Toolson was among baseball players who brought lawsuits against the owners of the New York and Cleveland professional baseball teams in order to regain his position on the Yankees International League team. See id.
34. See id. Toolson claimed that professional baseball clubs utilized players’ contracts in order to limit opportunities for professional baseball players to play with other baseball teams. See id.
35. See id. Toolson asserted that reserve clauses in baseball players’ contracts made professional baseball a monopoly subject to federal antitrust regulation under the Sherman Antitrust Act. See id.
36. See Toolson, 346 U.S. at 357.
37. See id.
38. See id.
39. See id. (reasserting professional baseball’s alleged exemption from antitrust regulations because Congress declined to include baseball in antitrust regulations).
40. See id. (noting Congress must alter federal antitrust regulations in order to apply antitrust regulations to baseball).
42. See Wolohan, supra note 11, at 358. Curt Flood never reported to Philadelphia in 1970. See Flood, 407 U.S. at 266. Instead, he sat out the year. See id. After the 1970 season, Flood’s rights were sold to the Washington Senators. See id. Flood agreed to play for Washington in 1971, but retired from baseball on April 27. See id.
Flood then requested that Commissioner Bowie Kuhn declare him a free agent. As a free agent, Flood would be permitted to negotiate with any major league team. After Kuhn denied his request, Flood filed a lawsuit claiming that baseball’s reserve clauses violated federal antitrust law.

In rejecting Flood’s claims, the district court and the Second Circuit determined that Federal Baseball and Toolson were controlling. The Supreme Court ruled that although baseball was a trade or commerce engaged in interstate commerce, it remained exempt from antitrust laws. The Court determined that the “longstanding exemption of professional baseball’s reserve system from federal antitrust laws... [wa]s an established aberration in which Congress has acquiesced,” and maintained that any inconsistency was for Congress to clarify. The Court reasoned that Congress’s silence on the issue showed Congress’s intent for MLB to escape the spread of federal antitrust laws.

43. See Flood, 407 U.S. at 265. One of Flood’s contentions was that he was not consulted about the trade beforehand. See id. It was only after the trade was finalized that he was informed of the deal by telephone. See id.

44. See Flood v. Kuhn, 316 F. Supp. 271, 272 (S.D.N.Y. 1970). For the first time, proponents and opponents of the baseball reserve system had to argue the merits of their cases, supported by adequate proof, in a court of law. See id. at 284.

45. See id. at 273 (stating baseball has been national pastime for over century and should remain structurally intact in order to continue); see also Flood v. Kuhn, 443 F.2d 264, 267-68 (2d Cir. 1971). The district court stated that although the Federal Baseball and Toolson decisions were “dubious,” the Supreme Court should retain the privilege of overruling its own decisions. See Kuhn, 316 F. Supp. at 278.

46. See Flood, 407 U.S. at 285 (indicating remedy was congressional action, not judicial activism).

47. Id. at 282-83. In support of its decision, the Court noted that “baseball[,] with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action.” Id. at 283. The Court also noted that baseball was the only professional sport to have such an exemption. See id.; see also Radovich v. NFL, 352 U.S. 445, 446 (1957) (ruling NFL was not exempt from antitrust laws); United States v. Int’l Boxing Club, 348 U.S. 236, 240 (1955) (reversing dismissal of antitrust action against individuals and corporations involved in promoting professional championship boxing); Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 467 (E.D. Pa. 1972) (issuing injunction preventing enforcement of reserve clause for professional hockey players); Wash. Prof’l Basketball Corp. v. NBA, 147 F. Supp. 154, 155 (S.D.N.Y. 1956) (holding professional basketball under National Basketball League to be interstate commerce subject to antitrust regulations under Sherman Antitrust Act).

48. See Flood, 407 U.S. at 285 (citing Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953)). The Court stated:

Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs... so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

Id. (citing Toolson, 346 U.S. at 357).
B. Post-Baseball Antitrust Trilogy Cases

It is apparent from baseball’s Supreme Court trilogy that baseball enjoys some form of exemption or immunity from antitrust laws. The residual question, therefore, is the scope of the exemption. For example, is the entire business of baseball exempt or is it simply the rules governing player controls? As the following cases demonstrate, the courts are divided on this question.

1. A Broad View of Baseball Antitrust Exemption

Charles O. Finley & Co. v. Kuhn was the first antitrust case to challenge the scope of baseball’s exemption after the Flood decision. Charles Finley, owner of the Oakland Athletics, sued the Commissioner of Baseball, Bowie Kuhn, over Kuhn’s decision to void the sale of three Oakland players.

In rejecting Finley’s antitrust argument, the district court held that “baseball . . . [was] not subject to the provisions of the Sherman Antitrust Act.” On appeal, Finley argued that any antitrust exemption professional baseball enjoyed did not apply to the entire business of baseball, but rather to the reserve system. Consequently, the Seventh Circuit also rejected the argument and held


50. 569 F.2d 527 (7th Cir. 1978).

51. See id. at 541-42 (appealing district court’s decision upholding Commissioner’s authority to disapprove of player assignments).

52. See id. at 531. Just before the trading deadline of June 15, 1976, Finley attempted to sell Joe Rudi and Rollie Fingers to the Boston Red Sox for $2 million and Vida Blue to the New York Yankees for $1.5 million. See id. Finley argued that he was going to lose Rudi and Fingers to free agency and that he could use the money to develop new talent. See id.

53. Id. at 540.

54. See id. Finley relied upon two quotations from Justice Blackmun’s opinion in Flood. See id. at 540 n.48. Primarily, he argued that “for the third time in 50 years the Court [wa]s asked specifically to rule that professional baseball’s reserve system [wa]s within the reach of the federal antitrust laws.” Id. at 540 (citing Flood v. Kuhn, 407 U.S. 258, 259 (1972)). Finley further argued that “[w]ith its reserve system enjoying exemption from the federal antitrust laws, baseball [wa]s, in a very distinct sense, an exception and an anomaly.” Id. (citing Flood, 407 U.S. at 282).
that despite any mention in the Flood case of the reserve system, the Supreme Court intended to exempt the whole business of baseball from the federal antitrust laws.\textsuperscript{55}

Baseball's antitrust immunity was reaffirmed in Professional Baseball Schools & Clubs v. Kuhn.\textsuperscript{56} The owner of a baseball franchise in the Carolina League filed a lawsuit challenging the monopolization of professional baseball by MLB.\textsuperscript{57} In dismissing the claims, the Eleventh Circuit, citing baseball's Supreme Court trilogy, found "the exclusion of the business of baseball from the antitrust laws . . . well established."\textsuperscript{58}

2. A Narrow View of Baseball Antitrust Exemption

Despite the abundance of decisions made at the Supreme Court level and other federal levels granting baseball a broad immunization from federal antitrust law, some courts rejected the broad interpretation of Flood as a blanket immunity from antitrust law for baseball and adopted a more narrow view. Specifically, the United States District Court for the Eastern District of Pennsylvania and the Florida Supreme Court gave Flood a more limited application.\textsuperscript{59}

In Piazza v. Major League Baseball,\textsuperscript{60} a Pennsylvania district court declined to interpret Flood as a broad exemption for baseball in every aspect of its business dealings.\textsuperscript{61} Vincent Piazza and Vincent Tirendi reached an agreement with Robert Lurie, the owner of the San Francisco Giants, to purchase the Giants and move the team to

\textsuperscript{55} See Finley, 569 F.2d at 541. The court cited Flood also for the proposition that "professional baseball is a business and it is engaged in interstate commerce . . . we adhere once again to Federal Baseball and Toolson and to their application to professional baseball." \textit{Id.} (citing Flood, 407 U.S. at 282, 284).

\textsuperscript{56} 693 F.2d 1085 (11th Cir. 1982).

\textsuperscript{57} See \textit{id.} at 1085. Specifically, the plaintiff challenged the player assignment system, franchise location system, the monopolization of the professional baseball business, and the Carolina League rule that required teams to play games only with other teams that belonged to the National Association. \textit{See id.}

\textsuperscript{58} \textit{Id.} at 1085-86.

\textsuperscript{59} See Piazza v. Major League Baseball, 831 F. Supp. 420, 437 (E.D. Pa. 1993) (ruling that baseball's exemption to federal antitrust laws did not extend beyond player reserve system); Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1025 (Fla. 1994) (interpreting Flood to exempt only baseball's reserve system from existing federal antitrust laws).

\textsuperscript{60} 831 F. Supp. 420 (E.D. Pa. 1993).

\textsuperscript{61} See \textit{id.} at 438 (rejecting argument that baseball was exempt from antitrust liability in present case).
Tampa Bay, Florida. The Ownership Committee of MLB, desiring to keep the franchise in San Francisco, rejected the deal. After a frantic search, Robert Lurie sold the Giants to the local group for $100 million, which was $15 million less than the Piazza and Tirendi partnership had offered.

In their lawsuit, Piazza and Tirendi claimed that baseball monopolized the MLB team market. They argued MLB "placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such teams."

Relying on its broad exemption to federal antitrust law, MLB moved to dismiss the case.

The district court denied the motion and refused to extend baseball's antitrust exemption to the entire "business of baseball." Rather, the court held Federal Baseball's exemption inapplicable and limited to baseball's reserve system. In support of its finding, the

62. See id. at 421. The agreement included a provision as to the exclusivity of the deal. See id. at 422. Lurie agreed to refrain from negotiating with others. See id.

63. See id. at 423. The Chairman of the Ownership Committee directed Lurie to consider other offers, which was in violation of Lurie's purchase agreement. See id.

On September 9, 1992, Bill White, President of the National League, invited George Shinn, a North Carolina resident, to make an alternative bid to purchase the Giants in order to keep the team in San Francisco. An alternative offer was ultimately made by other investors to keep the Giants in San Francisco.

64. See Peter Gammons, Magowan in San Francisco's Corner, BOSTON GLOBE, Nov. 1, 1992, at 66. The San Francisco group was headed by Peter Magowan, the chairman of the Safeway Corp. See id.

65. See Piazza, 831 F. Supp. at 424. The plaintiffs asserted that "Major League Baseball [wa]s an unreasonable and unlawful monopoly created, intended and maintained by defendants for the purpose of permitting defendant team owners, an intentionally select and limited group, to reap" enormous profits. Id. at 429 n.13.

66. Id. at 424.

67. See id. at 429. The court determined that "[b]aseball's motion to dismiss focus[ed] solely upon ... whether plaintiffs adequately plead[ed] that Baseball acted under color of state law by conspiring with the City of San Francisco." Id. at 428-29 n.11.

68. See id. at 436 (citing Radovich v. NFL, 352 U.S. 445, 450-53 (1957) (holding case law, which exempted baseball from antitrust law, was not applicable to other businesses like NFL)).

69. See id. at 421. The court distinguished the nature of the anticompetitive activity at issue in Piazza from that of Federal Baseball and resolved that in Piazza, the anti-competitive activity was in the market for the "sale of ownership interests in baseball teams . . . ." See id. at 440. The court reasoned that this activity was inapposite with that of Federal Baseball, where the anticompetitive activity was in the market for the exhibition of baseball games. See id. The court found the anti-competitive market in Piazza to be a "market seemingly as distinguishable from the game exhibition market as the player transportation market." Id.
court cited the Supreme Court’s decision in *Flood* for removing “from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, i.e., the reserve clause.” The *Flood* decision removed any doubt that baseball’s exemption from the federal antitrust laws, created by *Federal Baseball*, was limited to the reserve clause only. The court concluded that because the case did not involve the reserve system, baseball’s conduct was subject to federal antitrust laws.

While MLB settled with Piazza prior to the court’s final decision, the legal challenges to the sale of the San Francisco Giants did not end. In *Butterworth v. National League of Professional Baseball Clubs*, the Florida Supreme Court was asked to decide whether MLB’s antitrust immunity exempted all decisions involving the sale and location of baseball franchises from federal and Florida antitrust law. The specific focus of the civil investigative demand (“CID”) was “[a] combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants baseball franchise.”

Faced with the Attorney General’s CID, baseball petitioned the Florida courts to have it set aside. The Florida Supreme Court was asked to determine the parameters of baseball’s antitrust exemption. In particular, the court addressed whether baseball’s antitrust exemption covered decisions involving the sale and loca-

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71. *See id.* (ruling that baseball was engaged in interstate commerce).
72. *See id.* (emphasizing decisions in *Flood* and *Toolson* that exemption lay solely in reserve system). “Baseball developed . . . with the understanding that its reserve system, not the game generally, was exempt from the antitrust laws.” *Id.*
73. 644 So. 2d 1021 (Fla. 1994).
74. *See id.* at 1021. The court stated:
Section 542.28(1), Florida Statutes (Supp. 1992), authorize[d] the Attorney General to issue a civil investigative demand (CID) to any person that the Attorney General ha[d] reason to believe may be in possession, custody, or control of documentary material or information relevant to a civil antitrust investigation. The CIDs may require that person to produce documents for inspection, to answer written interrogatories, or to give sworn testimony.
75. *Id.* at 1022 n.2.
76. *Id.* at 1022.
77. *See id.* (certifying question to Florida Supreme Court). The circuit court, with the district court of appeal affirming, stated, “decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball’s antitrust exemption.” *Id.*
tion of baseball franchises from federal and Florida antitrust law.\textsuperscript{78} The Attorney General set forth the argument that the exemption only applied to the reserve clause system.\textsuperscript{79} In opposition, the National League argued that baseball's antitrust exemption should be applied broadly to "the business of baseball."\textsuperscript{80}

The Florida Supreme Court held that although Piazza seemed to contradict federal case law regarding the extent of the exemption, "none of the other cases ha[d] engaged in such a comprehensive analysis of Flood and its implications."\textsuperscript{81} Furthermore, the court ruled that even though the Piazza court was the only federal court to have interpreted baseball's antitrust exemption so narrowly, the United States Supreme Court's language in Flood supported such an understanding.\textsuperscript{82}

Another case rejecting baseball's claim of blanket antitrust immunity is Postema v. National League of Professional Baseball Clubs.\textsuperscript{83} The plaintiff, a female umpire, alleged that MLB had engaged in employment discrimination.\textsuperscript{84} In one of her claims, Postema al-

\textsuperscript{78} See Butterworth, 644 So. 2d at 1021. The court of appeals certified to the state supreme court the following question "to be one of great public importance: does the antitrust exemption for baseball recognized by the United States Supreme Court in Federal Baseball . . . and its progeny exempt all decisions involving the sale and location of baseball franchises from federal and Florida antitrust law?" Id. at 1021-22.

\textsuperscript{79} See id. The court answered the certified question as to whether baseball's antitrust exemption exempted all decisions concerning sales of baseball franchises from federal and Florida antitrust law in the negative. See id.

\textsuperscript{80} See id. at 1023. The National League asserted that the sale and location of the franchises are in the business of baseball. See id.

\textsuperscript{81} Id. at 1025.

\textsuperscript{82} See id. (noting that in Flood, Supreme Court reasoned that professional baseball was engaged in interstate commerce, directly contradicting reasoning in Federal Baseball, which held that baseball exhibitions were "purely state affairs"). It "defied legal logic and common sense" that baseball would have such a broad judicially created antitrust exemption, while all other professional sports did not. See id. at 1026 (Overton, J., concurring). For examples of antitrust exemption petitions in other sports, see Radovich v. NFL, 352 U.S. 445, 446 (1957) (holding antitrust laws apply to business of professional football); United States v. Int'l Boxing Club, 348 U.S. 236, 240 (1955) (holding presentation of live exhibitions actionable as violations of antitrust law); Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 467 (E.D. Pa. 1972) (finding NHL could not assert exemption from antitrust laws as affirmative defense); Wash. Prof'l Basketball Corp. v. NBA, 147 F. Supp. 154, 155 (S.D.N.Y. 1956) (reserving right to decide question of federal antitrust statute concerning alleged interference with right to engage in professional basketball business).

\textsuperscript{83} 799 F. Supp. 1475 (S.D.N.Y. 1992), rev'd on other grounds, 998 F.2d 60, 62 (2d Cir. 1993).

\textsuperscript{84} See id. at 1477 (stating plaintiff's claim was common law restraint of trade).
leged that baseball's conduct violated antitrust laws. The district court rejected baseball's claim of blanket antitrust immunity on grounds other than antitrust exemptions. The court found that while "the baseball exemption immunize[d] baseball from antitrust challenges to its league structure and its reserve system, the exemption d[id] not provide baseball with blanket immunity . . . in every context in which it operates." It reached this decision after holding that the Supreme Court decision in Flood was an "endorsement of a limited view of the exemption."

3. Reaffirming a Broad View of Baseball's Antitrust Exemption

The willingness of the courts to limit baseball's antitrust exemption in Piazza, Butterworth, and Postema has not become the rule. A federal district court, interpreting the Supreme Court trilogy, extended the antitrust exemption to the entire business of baseball in McCoy v. Major League Baseball. In McCoy, a group of fans and business owners brought an antitrust action against MLB, stemming from the owners' alleged unfair labor practice throughout the 1994 strike.

85. See id. at 1489 (finding baseball enjoys immunity from antitrust challenges to its league structure and its reserve system).

86. See id. The court determined that the "baseball exemption d[id] not encompass umpire employment relations." Id. Therefore, the claims by Postema were not preempted. See id. The court noted that the antitrust exemption did not provide baseball with blanket immunity for anti-competitive behavior in every context in which baseball operates. See id.

87. Id.

88. See Postema, 799 F. Supp. at 1489.

89. 911 F. Supp. 454 (W.D. Wash. 1995). The federal district court found that "[i]n spite of repeated invitations by the high court to invalidate the rule, Congress has chosen not to repeal the judicially created antitrust exemption." Id. at 458. Accordingly, the court applied the antitrust exemption established by Federal Baseball, Toolson, and Flood. See id.

90. See id. The court summarized the facts of McCoy, stating:

On December 31, 1993, the collective bargaining agreement between the twenty-eight Major League Clubs (the "Owners") and the Major League Baseball Players Association (the "Players Association") expired. When the Owners and the Players Association were unable to agree on a new contract, the players went on strike, resulting in the cancellation of the remainder of the 1994 major league baseball season, the 1994 World Series, and a portion of the 1995 season.

The Owners and the Players Association each filed unfair labor practice charges with the National Labor Relations Board (the "NLRB"). The NLRB filed a complaint against the Owners alleging an unfair labor practice and seeking a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j). Finding reasonable cause for the NLRB to conclude that the Owners had engaged in an unfair labor practice, a district court granted a temporary injunction to preserve the status quo . . . . The injunction reinstated the terms of the
The district court granted MLB’s motion for dismissal and rejected the Piazza court’s interpretation that baseball’s antitrust exemption only applied to baseball’s reserve system. Following an examination of baseball’s Supreme Court trilogy, the McCoy court found that the antitrust exemption encompassed the entire business of baseball. The court noted that the “great weight of authority” recognized that the antitrust exemption covers the entire business, and that until Congress or the Supreme Court sees fit to alter the rule, the exemption covers the industry of baseball.

III. RECENT LEGISLATIVE ACTION ON BASEBALL

Although there is a split in the judiciary as to the scope of baseball’s antitrust exemption, the courts all agree that Congress should pass legislation addressing the issue. Nonetheless, while Congress has conducted numerous hearings on the issue, it has done little to provide the courts with much guidance.

A. The Curt Flood Act of 1998

As part of the 1997 Collective Bargaining Agreement (“Basic Agreement”) between MLB and MLBPA, both sides agreed that they would jointly request and lobby for legislation to clarify expired collective bargaining agreement until (1) a new agreement is reached, (2) the NLRB renders a final disposition of the related administrative matter currently pending, or (3) the district court finds that the parties are at an impasse.

Id. at 455.

91. See id. at 457 (stating antitrust exemption goes beyond reserve system). Piazza relied on Flood in reaching its decision that the exemption solely applies to the reserve system, yet forwent mentioning “Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” Flood v. Kuhn, 407 U.S. 258, 285 (1972) (citing Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953)).

92. See McCoy, 911 F. Supp. at 458 (applying antitrust exemption established by Federal Baseball, Toolson, and Flood).

93. See id. Furthermore, the court rejected the plaintiffs’ standing to bring an action. See id. Antitrust standing was given to “any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . .” Id. (quoting 15 U.S.C.A. § 15 (West Supp. 1995)).
whether professional baseball players were covered under antitrust law.\textsuperscript{94} The result of this joint effort was the Curt Flood Act.\textsuperscript{95}

A crucial aspect of the Curt Flood Act, which amended the Clayton Act,\textsuperscript{96} is that only Major League Baseball players have standing to sue.\textsuperscript{97} The Act covers antitrust issues involving major league players, but specifically excludes Minor League Baseball, the amateur draft, the relationship between the major leagues and the

\textsuperscript{94} Article XXVIII of the 1997 Basic Agreement between Major League Baseball and the Major League Baseball Players Association – Antitrust states:

The Clubs and the Association will jointly request and cooperate in lobbying the Congress to pass a law that will clarify that Major League Baseball Players are covered under the antitrust laws (i.e., that Major League Players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of that bill does not change the application of the antitrust laws in any other context or with respect to any other person or entity.


\textsuperscript{97} See Curt Flood Act § 3. The stated purpose of the Act is to grant Major League Baseball players the same coverage under the antitrust laws as other professional athletes, such as football and basketball players. See id. 15 U.S.C. § 27a, the codified version, states that:

Only a major league baseball player has standing to sue under this section. For the purposes of this section, a major league baseball player is—

(1) a person who is a party to a major league player's contract, or is playing baseball at the major league level; or

(2) a person who was a party to a major league player's contract or playing baseball at the major league level at the time of the injury that is the subject of the complaint; or

(3) a person who has been a party to a major league player's contract or who has played baseball at the major league level, and who claims he has been injured in his efforts to secure a subsequent major league player's contract by an alleged violation of the antitrust laws: \textit{Provided however}, That for the purposes of this paragraph, the alleged antitrust violation shall not include any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players; or

(4) a person who was a party to a major league player's contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.

minors, franchise relocation, intellectual property, the Sports Broadcasting Act, and umpires from coverage.\footnote{98} 

For the purposes of contraction, the key sections and provisions of the Curt Flood Act can be found in section 3 and its subsections. Section 3, entitled “Application of the Antitrust Laws to Professional Major League Baseball,” provides:

\[T\]he conduct, acts, practices, or agreements of persons\footnote{99} in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.\footnote{100} 

Although it intended to provide MLB players with the antitrust protections that their colleagues enjoy in other professional sports, the Act may cover contraction.\footnote{101} As stated before, “the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws.”\footnote{102} By eliminating two teams, the Commissioner, a person in the business of or-

\footnote{98} See Curt Flood Act § 3 (excluding certain groups and persons from standing to sue).

\footnote{99} The Act defines “person” as: “[A]ny entity, including an individual, partnership, corporation, trust, or unincorporated association or any combination or association thereof. As used in this section, the National Association of Professional Baseball Leagues, its member leagues and the clubs of those leagues, are not ‘in the business of organized professional major league baseball.’”\footnote{101} Id.

\footnote{100} Id. § 2.

\footnote{101} See id. Due to the United States Supreme Court’s decision in \textit{Brown v. Pro Football Inc.}, the impact the Curt Flood Act will have on labor relations between MLB and the MLBPA is probably going to be very little. See \textit{Brown}, 518 U.S. 231, 250 (1996). In \textit{Brown}, a group of professional football players challenged the right of the NFL to fix unilaterally the salary of all players assigned to a team’s developmental squad once an impasse was reached in the collective bargaining process. See id. In upholding the NFL’s right to impose unilaterally conditions on its employees, the Supreme Court ruled that the league’s conduct in fixing the salary for developmental squad players fell within the scope of non-statutory labor exemption from antitrust liability. See id. The labor exemption allows parties involved in the collective bargaining to engage in conduct that is authorized by labor laws without fear of being sued under antitrust law by the other party for their conduct. See id. Therefore, due to the existence of a union, the non-statutory labor exemption bars the players from filing any antitrust claims. See id.

\footnote{102} 15 U.S.C. § 27a(a) (2000); Curt Flood Act § 3.
organized professional Major League Baseball, clearly affects the employment of at least fifty Major League Baseball players. Therefore, it appears that any player affected by contraction would be covered under this section of the Curt Flood Act.

Another section of the Act providing text relevant to the issue of contraction can be found in section 27a(b)(3) of the Clayton Act. The section exempts from coverage under the Curt Flood Act: "any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including owner-ship transfers, the relationship between the Office of the Commissioner and franchise owners ...".

In light of the Piazza and Butterworth litigations, there are two ways the courts can interpret section 27a(b)(3). The primary approach is that Congress inserted this clause for the specific purpose of challenging the decisions in Piazza and Butterworth. By specifically excluding franchise and ownership issues, Congress intended to protect MLB from future antitrust lawsuits "affecting franchise expansion, location or relocation, [and] franchise ownership issues."

The second interpretation is that Congress wanted to include franchise and ownership issues under federal antitrust law because it failed to overturn Piazza explicitly. This argument is supported by the language at the beginning of section 27a(b), which mandates "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth . . . ." The legislative history of the Curt Flood Act makes it clear that the Act "is absolutely neutral with respect to the state of the antitrust laws between all entities and in all circumstances other than in the area of employment as between major league owners and players."

104. Id.; see also Curt Flood Act § 3(b)(3).
105. For a discussion of the facts of Piazza and the impact of the holding, see supra notes 60-72 and accompanying text. For a discussion of Butterworth and the impact of that case, see supra notes 73-82 and accompanying text.
107. 15 U.S.C. § 27a(b)(3); Curt Flood Act § 3(b)(3).
not attempt to overrule current case law, except to the extent that courts exempted baseball from antitrust regulations when dealing with MLB players.110

B. Fairness in Antitrust in National Sports (FANS) Act of 2001

Frustrated by baseball’s plans of contraction, Congress introduced another piece of legislation in November 2001 entitled the “Fairness in Antitrust in National Sports (FANS) Act of 2001” (“FANS”).111 Introduced by Senator Paul Wellstone, a Minnesota Democrat, and Representative John Conyers of Michigan, FANS attempted to amend the Clayton Act to make the antitrust laws applicable to the elimination or relocation of Major League Baseball franchises.112

110. See id. ("Whatever the law was the day before this bill passes in those other areas it will continue to be after the bill passes."). The Judiciary Committee also noted "both the parties[, major league baseball and the MLBPA,] and the Committee agree that Congress is taking no position on the current state of the law one way or the other." Id.

111. H.R. 3288, 107th Cong. (2001). The Act was introduced on November 14, 2001. See id. One bill, S 1704 IS, was introduced in the Senate while another, HR 3288 IH, was introduced in the House of Representatives. See S. 1704, 107th Cong. (2001); H.R. 3288, 107th Cong. (2001).


(1) by redesignating section 27, as added by the Curt Flood Act of 1998 (Public Law 105-297), as section 28, and

(2) by adding at the end the following:

Section 29.

(a) Subject to subsections (b) through (d), the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting the elimination or relocation of a major league baseball franchise are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.

(b) No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a). This section does not create, permit, or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect the elimination or relocation of a major league baseball franchise, including but not limited to—

(1) the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the 'Professional Baseball Agreement,' the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to organized professional baseball's minor leagues;
Designed after the Curt Flood Act, the intent of FANS is to make:

[T]he conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting the elimination or relocation of a major league baseball franchise... subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.\textsuperscript{113}

Like the Curt Flood Act, courts are prohibited from relying on FANS to "create, permit, or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect the elimination or relocation of a major league baseball franchise."\textsuperscript{114} Also similar to the Curt Flood Act, FANS specifically excludes from coverage any antitrust issues involving Minor League Baseball, intellectual property, the Sports Broadcasting Act, and any person not in the business of organized professional Major League Baseball.\textsuperscript{115}

IV. APPLYING ANTITRUST LAW TO BASEBALL’S CONTRACTION

Shortly after baseball announced its plan to contract two teams before the start of the 2002 season, Attorney General of Florida Robert Butterworth issued CIDs to MLB, its Commissioner, and the

\begin{itemize}
\item[(2)] any conduct, act, practice, or agreement of a person engaging in, conducting, or participating in the business of organized professional baseball relating to or affecting the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball, and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively;
\item[(3)] any conduct, act, practice, or agreement protected by Public Law 87-331 (15 U.S.C. Sec. 1291 et seq.) (commonly known as the 'Sports Broadcasting Act of 1961'); and
\item[(4)] any conduct, act, practice, or agreement of a person not in the business of organized professional major league baseball.
\end{itemize}

S. 1704 § 3; H.R. 3288 § 3.

113. S. 1704 § 3; H.R. 3288 § 3.

114. S. 1704 § 3; H.R. 3288 § 3.

115. See S. 1704 § 3(b)(1)-(4); H.R. 3288 at § 3(b)(1)-(4). Section 3(b)(1) excludes the minor leagues from antitrust coverage. See S. 1704 § 3(b)(1). Section 3(b)(2) excludes intellectual property, section 3(b)(3) covers actions under the Sports Broadcasting Act, and section 3(b)(4) deals with persons not in the business of baseball. See id. § 3(b)(2)-(4).
two Florida Major League Baseball clubs.\textsuperscript{116} The purpose of the CIDs was to investigate possible violations of the federal and state antitrust laws.\textsuperscript{117} In an attempt to stop the examination, MLB sought a court order seeking "declaratory and injunctive relief against the Attorney General on the grounds that the 'business of baseball,' including the decision whether to contract, is exempt from the federal and state antitrust laws."\textsuperscript{118}

The district court in \textit{Major League Baseball v. Butterworth} reviewed the Supreme Court's decisions regarding baseball's antitrust exemption to reaffirm that only Congress could terminate baseball's exemption.\textsuperscript{119} Therefore, with respect to the issue of whether contraction was part of the "business of baseball," the court held that "[i]t [was] difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete."\textsuperscript{120} The court ruled that the basic league structure, including the number of teams, remained an essential feature of the business of baseball and thereby exempted it from the antitrust laws.\textsuperscript{121}

\textsuperscript{116} See Murray Chass, \textit{Legislators Are Seeking to Limit Antitrust Exemption for Majors}, N.Y. \textit{Times}, Nov. 14, 2001, S3. The Attorney General argued that even if the Florida Marlins and the Tampa Bay Devil Rays were not subject to contraction, the State of Florida still had an economic interest because the Expos and the Twins both have spring training camps in Florida. \textit{See id.}

\textsuperscript{117} See 15 U.S.C. § 57b-1(c)(1) (2000) (stating CIDs may be issued if Commission has reason to believe information may be available "relevant to unfair or deceptive acts or practices in or affecting commerce").


\textsuperscript{119} \textit{See id.} at 1330. The court upheld the precedent set in \textit{Federal Baseball} and \textit{Toolson} and reiterated the principle that only Congress had the power to terminate baseball's antitrust exemption. \textit{See id.}

\textsuperscript{120} \textit{Id.} at 1332.

\textsuperscript{121} \textit{Id.} The court stated:

The Attorney General assert[ed] that the contraction decision may have been motivated by economic (and indeed anti-competitive) concerns rather than concern for the nature and quality of the game. For two reasons, this d[id] not help the Attorney General. First, the applicability of the antitrust exemption d[id] not turn on whether any antitrust claim would otherwise be well founded; the whole point is that the antitrust laws do not apply, thus exempting even anti-competitive conduct from liability. Second, the Attorney General's apparent assertion that economics, on the one hand, and the nature and quality of the game, on the other, are wholly separate concerns [wa]s obviously incorrect; at least dating to the sale of Babe Ruth by the Red Sox, the interplay between economics and the nature and quality of the game has been obvious. It would be irrational for club owners to ignore economics, which in the long run (and probably the short) necessarily will impact the nature and quality of the game; and it would be irrational to ignore the nature and quality of the game, which in the long run (and probably the short) will impact economics. Any assertion that club owners should, could or ever
As for the application of the Florida Antitrust Act, the court ruled that the Florida Antitrust Act explicitly exempted any subject matter that is exempt under federal law. Additionally, the court noted that "any effort to apply the Florida Antitrust Act to the business of baseball would remain invalid even if the Act by its terms did not incorporate the federal exemption" because of the Supreme Court decision in *Flood v. Kuhn*. The *Flood* Court held that "state antitrust laws could not be applied to the business of baseball because state antitrust regulation would conflict with federal policy, would prevent needed national uniformity in the regulation of baseball, and thus would run afoul of the Commerce Clause." The court concluded that the business of baseball, including the right to contract, escaped the range of federal and state antitrust regulations.

The Florida Attorney General's basic argument centered on the premise that regardless of the merits, MLB is bound by the Florida Supreme Court's 1994 decision in *Butterworth v. National League of Professional Baseball Clubs*. Once again, in that case, the court held that the long recognized exemption of the business of baseball applied only to the reserve clause, not the entire business of baseball. In comparing the two cases, the district court ruled that because the parties (the National League and its President versus Major League Baseball and its Commissioner) and the issues (applicability of the antitrust laws to the 1994 proposed sale and transfer of the Giants to Florida versus the applicability of the antitrust laws to the 2002 proposed contraction of the major leagues) were different, the parties did make a decision on the number of clubs in the league without considering economics and other factors affecting the nature and quality of the game would be wholly fanciful.

Id. n.18.

122. See *Major League Baseball*, 181 F. Supp. 2d at 1333 (citing Fla. Stat. Ann. § 542.20 (West 2001)). The Florida Antitrust Act provides that "[a]ny activity of conduct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter." *Id.*

123. *Id.; see also* *Flood v. Kuhn*, 407 U.S. 258, 273 (1972) (citing prior case law to establish lack of congressional intent to encompass baseball in federal antitrust laws).


125. See *id.* at 1334 (quoting *Flood* Court's summation of state's application of federal and state antitrust laws).

126. 644 So. 2d. 1021 (Fla. 1994).

127. See *id.* at 1025 (holding that baseball's antitrust exemption only applied to reserve system).
ent, the doctrine of collateral estoppel did not bar the action.\(^\text{128}\) The court noted that the:

[I]rony in the Attorney General's assertion now that *Butterworth* - a decision in which the Florida Supreme Court accepted the Attorney General's assertion that the antitrust exemption must be evaluated issue by issue - forecloses consideration of whether the antitrust exemption applies to yet another issue, the proposed contraction from thirty clubs to twenty-eight.\(^\text{129}\)

\section*{V. CONCLUSION}

What is the status of baseball's antitrust exemption? How do the Curt Flood Act and the FANS Act affect contraction? The short answer to these questions is that baseball's antitrust exemption is stronger than ever. In the words of the court in *Major League Baseball v. Butterworth*,\(^\text{130}\) "the business of baseball is exempt; the exemption was well established long prior to adoption of the Curt Flood Act and certainly was not repealed by that Act."\(^\text{131}\)

In the past four years, Congress has had two opportunities to repeal baseball's antitrust immunity or to clarify the judicial debate over the extent of the exemption.\(^\text{132}\) Though it failed to take advantage of either opportunity, Congress's silence has sent a strong message. In the absence of contrary legislation, the Curt Flood Act continues to stand for the proposition that the entire business of baseball, except for "the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players" is exempt from antitrust law.\(^\text{133}\)

\(^{128}\) See *Major League Baseball*, 181 F. Supp. 2d at 1337 (noting that collateral estoppel did not prohibit particular action).

\(^{129}\) Id.

\(^{130}\) 181 F. Supp. 2d 1316, 1318 (N.D. Fla. 2001).

\(^{131}\) Id. at 1331 n.16 (discussing how adoption of Curt Flood Act represents endorsement of baseball's antitrust exemption).


\(^{133}\) Curt Flood Act § 3; see also *Major League Baseball*, 181 F. Supp. 2d at 1334. In fact, this was one of the arguments used in *Major League Baseball* when baseball asserted "that the Curt Flood Act, 15 U.S.C. § 27a, adopted in 1998, constitutes an endorsement by Congress of the exemption of the business of baseball." Id. at 1331 n.16. Although the court rejected this argument and found no such intent

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The assertion that contraction affects the employment of Major League Baseball players, thereby triggering coverage under the Curt Flood Act, should be rejected.\textsuperscript{134} As the court in \textit{Major League Baseball} held, "properly construed, th[e] \textsuperscript{[Curt Flood Act]} does not affect the issues in . . . [contraction] one way or the other, because Congress explicitly indicated its intention not to affect issues other than direct employment matters."\textsuperscript{135} In addition, Congress's introduction of FANS legislation makes it impossible to argue that Congress intended to include contraction and other franchise issues under the federal antitrust law.\textsuperscript{136} FANS makes it clear that Congress does not believe contraction is covered by the Curt Flood Act or is subject to federal antitrust law.\textsuperscript{137}

FANS attempted to make "agreements . . . directly relating to or affecting the elimination or relocation of a major league baseball franchise . . . subject to the antitrust laws."\textsuperscript{138} With contraction postponed, talks in Congress have stalled and passage now seems likely only if the owners actually do contract two teams.\textsuperscript{139} Unfortunately, in the following years, it will probably be too late to save the two franchises. In conclusion, without the passage of FANS, anyone wishing to prevent contraction will have to look beyond the federal antitrust laws for direction.

\begin{footnotes}
\item[134] See Patrick Reusse, \textit{Soccer Is Contraction's Ugly Remnant}, \textit{STAR TRIB.}, Dec. 9, 2001, at 2C. It should be noted that contraction affects the front-office staff, stadium vendors, concessionaires, minor league players, and all other ancillary people and businesses that depend on the franchise for a living.
\item[135] \textit{Major League Baseball}, 181 F. Supp. 2d at 1331 n.6.
\item[136] See S. 1704 § 3; H.R. 3288 § 3 (exhibiting no legislative intent to include contraction or franchise issues under federal antitrust law).
\item[137] See S. 1704 § 3; H.R. 3288 § 3 (excluding contraction from antitrust exemption).
\item[138] S. 1704 § 3(a); H.R. 3288 § 3(a).
\item[139] It does not help that the former owner of the Texas Rangers, George W. Bush, now sits in the White House. See Mark Asher, \textit{Legislation to Challenge Antitrust Exemption}, \textit{WASH. POST}, Nov. 14, 2001, at D02 (stating Senator Leahy reached out to Bush for support on bill).
\end{footnotes}