Docket No. 15-16938

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

SERGIO MIRANDA, et. al.,

Appellants,

vs.

OFFICE OF THE COMMISSIONER OF BASEBALL, et. al.

Appellees.

Appeal from the United States District Court Northern District of California
The Honorable Haywood S. Gilliam, Jr. Presiding
Case No. 3:14-cv-05349-HSG

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION..1

ISSUES PRESENTED...1

STATEMENT OF THE CASE...2

SUMMARY OF ARGUMENT 14

ARGUMENT 15

I. THERE IS NO "EXEMPTION" FROM THE ANTITRUST LAWS THAT ALLOWS APPELLEES TO CONSPIRE TO FIX THE SALARIES PAID TO MINOR LEAGUE PLAYERS 15

A. No Exemption From Antitrust Laws For Horizontal Price Fixing of Minor League Baseball Players' Salaries..16

B. Stare Decisis Does Not Apply To This Case...23

C. Circumstances Have Changed Dramatically Since *Federal Baseball* Was Decided...28

1. Baseball is Big Business..29

2. Messersmith/McNally Arbitration 32

3. Collusion: Appellees Have Been Previously Found To Have Violated Antitrust Laws 33

4. Other Considerations...35

5. Minor League Baseball Players Are The Only Professional Athletes That Have No Protection From Antitrust Laws, And As A Result, Are Subjected To Non-Negotiable, Uniform Contracts That Provide Depressed Salaries And No Benefits. 37

6. Thanks To The NFL Collective Bargaining Agreement, NFL Practice Squad Players Have Favorable Working Conditions As They Pursue Their Goal To Make An Active NFL Roster. 38

7. The NBA Created Its Developmental League To Help Train Young Basketball players To Eventually Make The Jump To The NBA. 40

8. The NHL Minor League System Is Extremely Similar To That Of MLB, And Yet Its Members Are Treated Fairly. 41

D. Even If *Federal Baseball* Decided The Minor League Issue, This Court Could Still Not Apply It 43

E. Justice 46

F. The Curt Flood Act Does Not Apply To This Case 46

CONCLUSION 48

CERTIFICATE OF COMPLIANCE 49

STATEMENT OF RELATED CASES 50

CERTIFICATE OF SERVICE 51

TABLE OF AUTHORITIES

Cases

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240-242 26

Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954) 46

Brown v. Mesirow Stein Real Estate, Inc., 7 F. Supp. 2d 1004, 1006 (N.D. Ill. 1998) 19, 22, 43, 44

City of San Jose v. Office of the Com'r of Baseball, 776 F.3d 686 (2015) 22

Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D.Cal.1971) 17

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) 23, 24

Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs, 259 U.S. 200 (1922) .... passim

Flood v. Kuhn, 407 U.S. 258 (1972) .... passim

Gately v. Com. of Mass., 2 F.3d 1221, 1226 (1st Cir. 1993) 22, 43

Kansas City Royals v. MLBPA, 532 F.2d 615 (8th Cir. 1976) 33

Kapp v. National Football League, 390 F.Supp. 73 (N.D.Cal.1974) 17

Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001) 6

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899-907 (2007) .... passim

Mackey v. National Football League, 543 F.2d 606, 617 (8th Cir. 1976)4, 16, 25, 28

Natrona Services, Inc. v. Continental Oil Co., 598 F.2d 1294, 1297-1298 (9th Cir. 1979) 3

Obergefell v. Hodges, (2015) 135 S. Ct. 2584 46

Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42 (1930) 4

Paramount Pictures, Inc. v. United Motion Picture Theater Owners, et al, 98 F.2d 714, 719 (3rd Cir. 1937) 3

Plessy v. Ferguson, 163 U.S. 537 (1896) 46

Radovich v. National Football League, 352 U.S. 445 (1957) 4, 17, 20, 37

Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (S.D.N.Y.1975) 17

State Oil Co. v. Khan, 522 U.S. 3, 19 (1997) 25

Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)............................ passim

United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972) 45

Statutes

15 U.S.C. § 1 16

15 U.S.C. § 15 .... 15, 16

15 U.S.C. § 27 .... 46, 47

15 U.S.C. §§ 1 and 2 .... 2, 5, 20, 47

15 U.S.C. §§ 1, 2, and 15 8

15 U.S.C. §§ 15 and 26 .... 20, 47

Other Authorities

"The Curt Flood Act of 1998: A Hollow Gesture After All These Years?", 9 Marquette Sports Law Journal 314, 342 27

50 Yale L. Rev. 1448 43

56 Harv. L. Rev. 652, 653 43

The Baseball Trust by Stuart Banner, Oxford University Press 2013........ 33, 35, 36

STATEMENT OF JURISDICTION

This is an appeal from the September 14, 2015 decision and judgment of the United States District Court, dismissing Plaintiffs' class action antitrust complaint (A474-479).

ISSUES PRESENTED

1. WHETHER THE APPELLEE COMMISSIONER OF BASEBALL AND THE MAJOR LEAGUE BASEBALL CLUBS' CONSPIRACY TO FIX, AT UNIFORM, BELOW MARKET LEVELS, THE SALARIES THEY PAY MINOR LEAGUE BASEBALL PLAYERS, VIOLATES FEDERAL ANTITRUST LAWS?

2. WHETHER THERE IS A SO CALLED EXEMPTION FROM THE ANTITRUST LAWS FOR THE COMPENSATION PAID BY MAJOR LEAGUE BASEBALL CLUBS TO MINOR LEAGUE BASEBALL PLAYERS, I.E., WHETHER THE SO CALLED "RESERVE CLAUSE" VIOLATES FEDERAL ANTITRUST LAWS?

STATEMENT OF THE CASE

This is a class action brought by professional minor league baseball players against the Commissioner of Baseball and the constituent Major League Baseball Clubs for conspiring to uniformly fix, at below market levels, the salaries they pay to Minor League Baseball players in violation of Sections 1 and 2 of the Sherman Act.

Appellees' conspiracy is a clear violation of the antitrust laws which is designed to, and actually did, eliminate competition as to the amount of compensation Minor League Baseball players receive. As a result of Appellees' antitrust violations Minor League Baseball players receive salaries at levels far below what they would receive in a competitive market.

The Appellees, while conceding their anti-competitive conduct, claim they are exempt from the reach of the federal antitrust laws as a result of the non-statutory, judicially created, so called "business of baseball exemption." Respectfully, there is no statutory business of baseball exemption and there should not be any judicially created business of baseball exemption. It is certainly not one of the statutorily enacted exemptions from the application of the federal antitrust laws. The judicially created exemption no longer has, if ever it had, any basis in reality and should be eliminated.

The doctrine of *stare decisis* should not be applied and does not apply where, as here, the circumstances that may have once applied to the prior decision no longer apply and/or are no longer reasonable, particularly in the ever evolving field of antitrust jurisprudence. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899-907 (2007).

INTRODUCTION AND STATEMENT OF FACTS

> "Throughout history it has been the inaction of those who could have acted; the indifference of those who should have known better, the silence of the voice of justice when it mattered most that has made it possible for evil to triumph."
> Haile Selassie

In enacting the federal antitrust laws Congress intended to free interstate commerce from the evils produced by combinations and conspiracies composed of employers of all kinds. Paramount Pictures, Inc. v. United Motion Picture Theater Owners, et al, 98 F.2d 714, 719 (3rd Cir. 1937).

The purpose of the antitrust laws, is to "protect competition not competitors." Natrona Services, Inc. v. Continental Oil Co., 598 F.2d 1294, 1297-1298 (9th Cir. 1979). The antitrust laws were never intended to protect billionaire baseball owners from competing for the services of baseball players. To the contrary, the "fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to the

destruction of competition through monopolies and combinations n restraint of trade." Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42 (1930).

The antitrust laws were enacted for precisely the present type of situation to promote competition including for the services of athletes so that the athletes receive a fair competitive wage for their services. Mackey v. National Football League, 543 F.2d 606, 617 (8th Cir. 1976), Radovich v. National Football League, 352 U.S. 445 (1957).

It is just plain wrong and antithetical to the very purpose of the antitrust laws to allow thirty billionaire baseball owners to conspire to fix, at anti-competitively low values, the salaries they pay their thousands of minor league players.

This Court should not sit in silence and let the evil of price fixing and monopoly triumph while thousands of minor league baseball players are forced to work for essentially slave wages instead of the competitive wages to which they are entitled, simply because 93 years ago in drastically different times under drastically different economic conditions, the Supreme Court mistakenly carved out of whole cloth an artificial exemption for baseball that did not then and should not now exist.

It is undisputed that the defendant baseball teams and the commissioner conspired to fix and keep Minor League baseball players' salaries artificially low in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and

2. Indeed, Appellees force all Minor League players to sign a uniform standardized contract, which sets a non-negotiable, below market salary for Minor Leaguers. The Minor Leaguer either signs it or he cannot pursue his profession as a professional baseball player. He has no bargaining power, no union, no collective bargaining agreement, no arbitration agreement, no strike capability, no free agency, and according to the Appellee baseball clubs, no legal basis to sue the baseball clubs for redress for their admitted conspiracy to fix, at below market levels, the salaries minor league baseball players can receive.

No other industry, including all other professional sports industries, is allowed to per se violate the antitrust laws by freely allowing competitors to conspire to fix, at non-competitive levels, the compensation paid to employees.

The defendants claim the so-called, non statutory, judicially created "business of baseball exemption" allows them to brazenly violate the antitrust laws by colluding to fix the below market compensation they pay Minor League players. Defendants are wrong. There is no statutory exemption in the antitrust laws that allows Appellees to conspire to fix the compensation they pay Minor League players. Toolson v. New York Yankees, Inc., 346 U.S. 356, 364 (1953) (Justice Burton dissent).

Nor has any court, let alone the United States Supreme Court, held that Major League teams can conspire to fix, at artificially low salaries, the

compensation paid to *minor league* baseball players. None of the so-called baseball trilogy of cases decided that issue.

This is a case of first impression regarding Appellees antitrust violations with respect to *minor league* baseball players' salary. There is no stare decisis bar to a finder of fact in this case finding that Appellees have violated federal antitrust laws.

On a Rule 12(b)(6) motion to dismiss, the facts alleged in the Complaint must be taken true. Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001). Therefore, the Appellees[1] are either members of or govern the cartel known as Major League Baseball ("MLB"). In order to monopolize minor leaguers, restrain and depress minor league players' salaries, the MLB cartel inserted a provision (known as the reserve clause) into all minor league players' contracts that allows the Appellee team to retain for seven (7) years the contractual rights to players and restrict their ability to negotiate with other teams for their baseball services. The reserve clause preserves MLB's minor league system of artificially low salaries and nonexistent contractual mobility. (A005, ¶ 81-95; A233, ¶ VII).[2]

Unlike major leaguers, minor leaguers have no union or collective bargaining agreement, even though they comprise the overwhelming majority of

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[1] The term "Appellees" applies to all Defendants named in the Complaint.

[2] References to "A___" are to the page numbers of the appendix filed herewith.

baseball players employed by the Appellees. The Major League Baseball Players' Association ("MLBPA") does not represent the interests of minor leaguers.

Minor leaguers are powerless to combat the collusive power of the MLB cartel. Major leaguers' salaries have increased by more than 2,000 percent since 1976 while minor leaguers' salaries have, on average, increased only 75 percent since that time. Inflation has risen by more than 400 percent over that same time period. (A005, ¶ 6).

Most minor leaguers earn between $3,000 and $7,500 for the entire year, despite routinely working between 50 and 70 hours per week during the roughly five-month championship season. They receive no overtime pay, and instead, routinely receive less than minimum wage during the championship season. (A005, ¶ 8).

The Appellees have conspired to pay no wages at all for significant periods of minor leaguers' work. The Appellees do not pay minor leaguers their salaries during spring training, even though the Appellees require minor leaguers to often work over fifty hours per week during spring training. Similarly, the Appellees do not pay salaries during other training periods such as instructional leagues and winter training.[3] (A005, ¶ 9).

[3] *See* Exhibit A attached to the Complaint, Major League Rules ("MLR") Attachment 3, UPC ¶ VII, B (A234); ¶ VI, B (A232).

This suit seeks to recoup the damages sustained by minor leaguers as a result of MLB's violations of the antitrust laws, 15 U.S.C. §§ 1, 2, and 15, and to enjoin Appellees from continuing their antitrust violations. (A005, ¶ 10).

The Baseball Industry

MLB is big business. Its games are broadcast throughout the United States. During the 2013 season, over 74 million fans paid to attend MLB games. (A015, ¶ 64).

In 2012, revenue for MLB and its thirty teams surpassed $7.5 billion. Annual revenue was expected to reach $9 billion dollars in 2014.[4] (A015, ¶ 65).

Franchise values for the thirty MLB teams have grown as well. The average value of the thirty Franchises is estimated at $744 million each.[5] (A016, ¶ 66).

Without a union to counteract MLB's power, MLB and its teams have exploited minor leaguers by, among other things, continuing to promulgate and impose oppressive rules on minor leaguers' entry into the industry, restriction of movement to other teams, and on contracts, salaries, and compensation. (A016, ¶

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[4] *See* Maury Brown, *MLB Revenues $7.5B for 2012, Could Approach $9B by 2014*, Biz of Baseball (Dec. 10, 2012), http://www.bizofbaseball.com/?catid=30:mlb-news&id=5769:mlb-revenues-75b-for-2012-could-approach-9b-by-2014&Itemid=42&option=com_content&view=article.

[5] Mike Ozanian, *Baseball Team Valuations 2013: Yankees on Top at $2.3 Billion*, Forbes (Mar. 27, 2013), http://www.forbes.com/sites/mikeozanian/2013/03/27/baseball-team-valuations-2013-yankees-ontop-at-2-3-billion/.

67).

The MLB's rules require all minor league contracts to be filed with and approved by the Commissioner.[6]

Appellees require all teams to use the same uniform player contract ("UPC") when signing amateur players. MLR 3(b)(2) states:

> To preserve morale among Minor League players and to produce the similarity of conditions necessary for keen competition, all contracts…shall be in the form of the Minor League Uniform Player Contract that is appended to these Rules as Attachment 3. All Minor League Uniform Player Contracts between either a Major or a Minor League Club and a player who has not previously signed a contract with a Major or Minor League Club shall be for a term of seven Minor League playing seasons….The minimum salary in each season covered by a Minor League Uniform Player Contract shall be the minimum amount established from time to time by the Major League Clubs…
>
> (A018-A019, ¶81; A077)

Moreover, "[a]ll contracts shall be in duplicate," and "[a]ll…must be filed with the Commissioner…for approval."[7] (A077). No contract can vary any term without the approval of the Commissioner.[8] A minor leaguer cannot work for an

[6] *See* MLR 3(e) (requiring all contracts to be approved by the Commissioner)(A086); MLR Attachment 3, UPC ¶ XXVI (requiring approval by the Commissioner for the contract to have effect).(A245)

[7] MLR 3(b)(3) (A077); *see also* MLR 3(b)(4) (saying that a player cannot play until the UPC is signed). (A077).

[8] MLR 3(b)(3). (A077)

MLB team without signing the UPC because a "player's refusal to sign a formal contract shall disqualify the player from playing with the contracting Club or entering the service of any Major or Minor League Club."[9] (A019, ¶82; A085-86).

Thus, the UPC grants the MLB team the exclusive rights to the minor leaguer for seven championship seasons (about seven years).[10]

But the minor leaguer cannot leave voluntarily to play for another baseball team—even outside of MLB, and even outside of the United States.[11] A player doing so "shall be subject to the discipline of the Commissioner."[12] Retirement from baseball during the seven-year term requires the Commissioner's approval.[13] (A019, ¶ 84).

MLB rules make clear that MLB and its Franchises remain the employers of minor leaguers at all times. MLR 56(g) states:

> The players so provided shall be under contract exclusively to the Major League Club and reserved only to the Major League Club. The Minor League Club shall respect, be bound by, abide by and not interfere with all contracts between the Major League Club and the players that it has provided to the Minor League Club.

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[9] MLR 3(d).(A085-A086)

[10] MLR 3(b)(2) (A077); MLR Attachment 3, UPC ¶ VI.A. (A077; A231-232)

[11] MLR 18; MLR Attachment 3, UPC ¶ XVI. (A239)

[12] MLR 18. (A141)

[13] MLR 14. (A135-136)

(A020, ¶ 88; A215).

Since minor leaguers do not belong to a union, nothing has prevented the Appellees from artificially and illegally depressing minor league wages. Because of Appellees' monopoly over the entryway into the highest levels of baseball, and given the young minor leaguer's strong desire to enter the industry, Appellees have exploited minor leaguers by paying them depressed compensation, below what they would receive in a competitive market. (A020, ¶ 90).

Appellees, through the Commissioner, issue minor league salary "guidelines" for players signed to an initial UPC, and teams deviate very little from these guidelines. MLR 3(c) requires that all first-year minor leaguers earn "the amount established by" MLB.[14] (A078). It is currently believed that all first-year minor leaguers employed by the Appellees must earn $1,100 per month. (A020-A021, ¶ 91).

While salary guidelines are not publicly available, the Appellants are informed and believe, based on the salaries paid by the Appellees across the minor leagues, that MLB currently imposes the following salaries, paid only during the championship season: $1,100 per month for Rookie and Short-Season A; $1,250 per month for Class-A; $1,500 per month for Class-AA; and $2,150 for Class-

[14] As the 2013 Miami Marlins Minor League Player Guide states, "all first-year players receive $1,100 per month regardless of playing level per the terms of the [UPC]."

AAA. (A021, ¶ 93).

Beyond the first year, the UPC required by MLB, and enforced by the Commissioner, purports to allow salary negotiation by the minor leaguer, as the UPC states that salaries will be set out in an addendum to the UPC and subject to negotiation.[15] But the same UPC provision states that if the Franchise and minor leaguer do not agree on salary terms, the Franchise may unilaterally set the salary and the minor leaguer must agree to it.[16] As the 2013 Miami Marlins Minor League Player Guide states, "This salary structure will be strictly adhered to; therefore, once a salary figure has been established and sent to you, there will be NO negotiations." (A021, ¶ 95).

The UPC required by MLB, and enforced by the Commissioner, further states that salaries are only to be paid during the championship season, which lasts about five months out of the year. [17] Appellants believe that most minor leaguers earn less than $7,500 per calendar year. Some earn $3,000 or less. Despite only being compensated during the approximately five-month championship season. (A021-A022, ¶ 97).

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[15] MLR Attachment 3, UPC ¶ VII.A. (A233)

[16] MLR Attachment 3, UPC ¶ VII.A. (A233)

[17] MLR Attachment 3, UPC ¶ VII.B. ("The obligation to make such payments to Player shall start with the beginning of Club's championship playing season…[and] end with the termination of Club's championship playing season….").(A234)

MLB is made up of competitive member teams and has market power in the provision of minor league professional baseball games in North America and Latin America. Use by Appellees of the reserve clause, the UPC, and draft, which grants each Club absolute veto power and control over their minor league players' ability to negotiate and contract for higher compensation with other teams, are unreasonable, unlawful, and anticompetitive restraints under Section 1 of the Sherman Act. (A025, ¶ 107).

Through MLB and the exclusionary and anticompetitive provisions in the MLB Constitution, Appellees have conspired to violate the antitrust laws, and have willfully acquired and maintained monopoly power in violation of Section 2 of the Sherman Act within the market for minor league professional baseball players by preventing such minor league players from freely negotiating with other teams for their services and the compensation they should receive. (A025, ¶ 108).

This action challenges — and seeks to remedy — Appellees' violation of the federal antitrust laws and the use of the illegal cartel to institute and maintain the reserve clause and UPC as a means to stifle competition and suppress the compensation that minor leaguers receive, which would be significantly higher absent Appellees antitrust violations, which eliminate competition in the payment of minor leaguers. Not only are such agreements not necessary to producing

baseball contests, they are directed at reducing the compensation paid to minor leaguers by eliminating competition for their services. (A025, ¶ 109).

Appellees moved, pursuant to Fed. R. Civ. P. Rule 12(b)(6), to dismiss the entire complaint for failure to state a cause of action, arguing that Appellees were exempt from the antitrust laws as a result of the so called business of baseball exemption. (A381-A410).

Appellants opposed the motion on the grounds that Appellees *did* violate the antitrust laws; there was no statutory antitrust exemption; there should not be any judicially created baseball exemption, and if there is it should not be followed due to changed circumstances. (A411-A439).

The District Court reluctantly granted Appellees' motion despite believing there are 'strong public policy reasons that Appellees should not be afforded carte blanche to restrict the pay and mobility of minor league players without answering to the federal antitrust laws.' (A476-A477).

On September 24, 2015 judgment was entered. (A478-A479).

On September 28, 2015 Appellants filed this appeal. (A480-A481).

SUMMARY OF ARGUMENT

The Appellees' conspiracy to fix, at non-competitive, below market levels, the compensation they pay Minor League Baseball players violates Sections 1 and

2 of the Sherman Act, and Section 4 of the Clayton Act. There is no statutory exemption from the antitrust laws for the business of baseball. There is no longer (if there ever was) any valid basis for any judicially created exemption for the business of baseball, especially in the area of antitrust jurisprudence. Since circumstances have dramatically changed, there is no stare decisis bar to applying the antitrust laws to baseball. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899-907 (2007).

ARGUMENT

I. THERE IS NO "EXEMPTION" FROM THE ANTITRUST LAWS THAT ALLOWS APPELLEES TO CONSPIRE TO FIX THE SALARIES PAID TO MINOR LEAGUE PLAYERS

It is undisputed that the Appellees, and all of them, have conspired and continue to conspire to fix the salaries they pay their Minor League players. Appellants have alleged that Appellees conspire to fix (at artificially low levels) the amount of compensation they pay their players. This is done in several ways. Every Minor League player must sign a standardized contract that fixes the amount he is paid ($1,100/month for first year players, $1,250/month for second year players).

The players cannot negotiate with the team that drafted him or with other teams for a higher salary. Unlike Major League players, there is no free agency so

the player either accepts the fixed compensation or he cannot work as a minor league player.

Because Appellees have created a monopoly for the playing of minor league baseball games, Appellants and the class of minor league baseball players have no alternatives to seek employment for their professional services, thereby further stifling competition and damaging Appellants and the class of minor league baseball players they represent by being forced to work for below market compensation.

A. No Exemption From Antitrust Laws For Horizontal Price Fixing of Minor League Baseball Players' Salaries

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination … or conspiracy, in restraint of trade or commerce … is declared to be illegal.

The courts, including the United States Supreme Court, have repeatedly held that it is a violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 4 of the Clayton Act, 15 U.S.C. § 15, for competitors to conspire to fix the compensation paid to employees in a sports or entertainment industry. Mackey v. National Football League, 543 F.2d 606, 617 (8th Cir. 1976). The court in Mackey, 543 F.2d at 617 stated:

> In other cases concerning professional sports, courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players'

> services. See Kapp v. National Football League, 390 F.Supp. 73 (N.D.Cal.1974); Robertson v. National Basketball Ass'n, 389 F.Supp. 867 (S.D.N.Y.1975). See also Radovich v. National Football League, supra; Smith v. Pro-Football, supra; Boston Professional Hockey Ass'n, Inc. v. Cheevers, supra; Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D.Cal.1971), stay vacated, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971) (Justice Douglas, Opinion in Chambers).

In the present case, the Uniform Player Contract, which all minor league players must sign, sets the salary they will receive, does not allow for negotiations, and if the minor leaguer does not agree, he cannot play professional baseball:

> A. … Club will pay Player at the monthly rate set out in Addendum C-1 … The Player and Club shall attempt annually to negotiate an applicable monthly salary rate … If the Player and Club do not reach agreement, then the Player's monthly salary rate for the next championship playing season shall be set by the Club … (Emphasis added).

(A233-A234, Attachment 3, § VII).

Indeed, Appellees do not dispute that they have conspired to fix (depress) minor league baseball players' compensation. Rather, they argue that their conspiracy to fix minor league baseball players' compensation is exempt from the Sherman Act's restrictions on restraint of trade, based on the so-called judicially created "business of baseball exemption." There is no statutory exemption in the Sherman Act exempting "business of baseball" (or minor league baseball) from the

antitrust laws. Rather, the so-called "business of baseball" exemption supposedly was created by the Supreme Court in three cases: Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs, 259 U.S. 200 (1922), Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), and Flood v. Kuhn, 407 U.S. 258 (1972). Those decisions have been severely criticized by the Supreme Court itself. None of those three cases ruled on or decided the issue in this case of whether major league baseball and its constituent clubs could conspire to fix the salaries paid to *minor league* players.

In Federal Baseball, the owner of a professional baseball team of a defunct baseball league brought an antitrust suit claiming the National and American Leagues and others conspired to monopolize baseball by destroying the competing league. The issue was whether the business of giving exhibitions of baseball constituted interstate commerce. The Supreme Court held that it was not interstate commerce and therefore not subject to the Sherman Act. Federal Baseball Club of Baltimore, 259 U.S. at 209.

That decision has been soundly criticized. In fact, the sole underpinning for that decision—that the business of giving exhibitions of baseball is not interstate commerce—has since been rejected by the Supreme Court in Flood v. Kuhn, 407 U.S. 258 (1972) ["Professional baseball is a business and it is engaged in interstate commerce." (Emphasis added).]. Thus, Federal Baseball has no precedential value

and certainly did not decide the issue in this case of whether Appellees' admitted conspiracy to fix minor leaguers' salaries is a restraint of trade in violation of section 1 of the Sherman Act. Brown v. Mesirow Stein Real Estate, Inc., 7 F. Supp. 2d 1004, 1006 (N.D. Ill. 1998).

In Toolson, supra, the Supreme Court, in a one paragaph per curiam decision, held "[w]ithout reexamination of the underlying issues" of the underlying cases on review, that based on the authority of Federal Baseball, "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." Toolson, 346 U.S. at 357. There was no analysis, and respectfully, no basis for that holding. As made clear by Justice Burton's dissent in Toolson, there was no statutory exemption for baseball in the Sherman Act whereas there were express exemptions from federal antitrust laws created by Congress for other industries such as labor organizations, farm cooperatives, and insurance. ["Congress, however, has enacted no express exemption from that [Sherman] Act of any sport…."], Toolson, 346 U.S. at 364 and n.11.

The majority in Toolson simply stated that because Federal Baseball supposedly held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws and Congress had allowed the baseball business to develop

based on the Federal Baseball decision,[18] that the business of baseball was exempt from the federal antitrust laws. Of course, as Justice Burton correctly pointed out in his dissent, Toolson, 346 U.S. at 364, Congress had already enacted legislation—the Sherman Act—that brought the "business of baseball" within the ambit of federal antitrust laws, i.e., Congress, by not expressly exempting baseball or the conspiracy to fix minor league baseball players' salaries from the antitrust laws, had subjected baseball and minor league baseball to the antitrust laws.

In Radovich v. National Football League, 352 U.S. 445 (1957), the Supreme Court refused to apply the so-called baseball antitrust exemption to the business of professional football,[19] holding that "we now specifically limit the rule there established [in Toolson and Federal Baseball] to the facts there involved, i.e., the business of organized professional baseball. … were we considering the question of baseball for the first time upon a clean slate we would have no doubts." *Id.* at 451 and 452.

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[18] As discussed *infra*, the so-called reliance theory for not overruling an incorrect case has much less force in antitrust cases which are meant to be adapted to changing economic realities. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899-907 (2007)..

[19] Mr. Radovich successfully sued the National Football League for antitrust violations for conspiring to blackball him from professional football in violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Clayton Act, 15 U.S.C. §§ 15 and 26.

In Flood v. Kuhn, 407 U.S. 258 (1972), the Supreme Court, in a four to three majority decision (in which Chief Justice Burger voted with the majority but agreed with the dissent), the court reluctantly upheld the reserve clause applicable to major league baseball players' contracts (the different reserve clause applicable to minor league players' contracts was also not an issue in that case) exempt from federal antitrust laws based on stare decisis—even though that judicially-created exemption was an "anomaly" and an "aberration"—because Congress had acquiesced in that judicially-created exemption. *Id.* at 282. Justice Douglas (who had voted with the majority in Toolson but who later stated he had "lived to regret it") stated in his dissent in Flood that upholding the exemption based on the Federal Baseball decision "is a derelict in the stream of the law that we, its creators, should remove." (Douglas dissent, Flood). Indeed, Federal Baseball had not even considered the reserve clause and was erroneously based solely on professional baseball not being interstate commerce. Flood relied on Federal Baseball even though the Flood court held, contrary to the Federal Baseball and Toolson decisions, that professional baseball is engaged in interstate commerce. Flood v. Kuhn, 407 U.S. 258 (1972) Thus, the Flood court based its decision to uphold a judicially-created exemption from the federal antitrust laws for baseball based on a stare decisis foundation that it held was unfounded. The Court felt it was for Congress to enact legislation to undo what it had created out of whole cloth

50 years earlier, because supposedly baseball had relied on the court's mistaken prior decisions and Congress had not seen fit to take any action to correct the Court's mistake.

In none of those three decisions did the Supreme Court decide the issue presented in this case of whether the Appellees' conspiracy to fix *minor league* baseball players' salaries was exempt from the federal antitrust laws. Thus, the doctrine of stare decisis does not apply.

The Appellees, here, argued that this Court's recent decision in City of San Jose v. Office of the Com'r of Baseball, 776 F.3d 686 (2015) is also a stare decisis bar which bound the District Court below to hold that the "business of baseball exemption" bars the minor leaguers' salary-fixing antitrust claims. Appellees are wrong. The City of San Jose was a franchise relocation case. That case had nothing to do with the "reserve clause", i.e., whether major league teams could conspire to fix the salaries that minor leaguers receive. Therefore, that case is not a stare decisis bar to the case before this Court. Gately v. Com. of Mass., 2 F.3d 1221, 1226 (1st Cir. 1993); Brown v. Mesirow Stein Real Estate, Inc., 7 F. Supp. 2d 1004, 1006 (N.D. Ill. 1998).

B. Stare Decisis Does Not Apply To This Case

Appellees, argued that under the doctrine of *stare decisis*, the so-called "business of baseball exemption" supposedly enunciated in Federal Baseball, Toolson, and Flood, bars Appellants' antitrust claims in this case. Appellees argue that stare decisis is applicable here and prevents this Court from allowing the case to be tried for the reasons set forth in Flood, i.e., that legislative changes to the antitrust laws should be left to Congress and that baseball has relied on those cases and inaction of Congress. Appellees are wrong. Respectfully, *stare decisis* does not apply because those cases did not decide the antitrust issues presented here. Morever, even if they had, this Court can decline to follow those cases.

In Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), the Supreme Court rejected the same arguments made below and refused to apply *stare decisis*. The Leegin Court overruled its earlier (96-year-old) antitrust decision in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (that vertical resale price maintenance is subject to a per se antitrust analysis) and held that such vertical resale price maintenance is instead subject to "rule of reason" antitrust analysis. In refusing to be bound by stare decisis and Congress's 97-year inaction, the Court in Leegin, 551 U.S. 877, 899-907 held:

> *Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman

Act. (Citation omitted). ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. (Citations omitted). ("In antitrust, the federal courts ... act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. …

…

... As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, … In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it.

Other considerations reinforce the conclusion that Dr. Miles should be overturned. Of most relevance, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." (Citation omitted). … We have distanced ourselves from the opinion's rationales. Khan, *supra,* at 21, 118 S.Ct. 275 (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); … (*Id.* at 900).

…

Respondent's arguments for reaffirming Dr. Miles on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. …

…

… We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with

> traditional § 1 principles, including the principle that our antitrust doctrines "evolv[e] with new circumstances and new wisdom." (Citation omitted). *Id.* at 905.
>
> …
>
> … The purpose of the antitrust laws, by contrast, is "the protection of *competition,* not *competitors*." (Citation omitted).

The same reasoning that the Leegin court applied in not blindly applying outmoded, erroneous reasoning to an antitrust case applies (with even more force) here. As in Leegin, the precedent was nearly 100 years old. The economic realities had changed greatly. There was no valid economic reason to adhere to the old wrong law. Subsequent decisions proved the earlier decision wrong.

Here, as in Leegin, the prior baseball trilogy of case(s) conflicted with subsequent Supreme Court precedent, i.e., antitrust laws have repeatedly been held to apply to invalidate horizontal conspiracies to restrain athletes' salaries, in football, hockey, basketball, etc. Mackey, supra, 543 F.2d at 617. Indeed, the Supreme Court justices themselves do not believe in the reasoning of those "aberrant" cases. There is no reason to apply them.

Accord, State Oil Co. v. Khan, 522 U.S. 3, 19 (1997):

> Respondents' reliance on Toolson v. New York Yankees, *Inc.*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953) *(per curiam),* and Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972), is similarly misplaced, because those decisions are clearly inapposite, having to do with the antitrust exemption for professional baseball, which

> this Court has described as "an aberration ... rest[ing] on a recognition and an acceptance of baseball's unique characteristics and needs," *id.,* at 282, 92 S.Ct., at 2112. In the context of this case, we infer little meaning from the fact that Congress has not reacted legislatively to Albrecht.
>
> …
>
> But "*[s]tare decisis* is not an inexorable command." *Ibid.* In the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." (Citation omitted). *Id.* at 20.

Accord, Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240-242:

> Nevertheless, as Mr. Justice Frankfurter wrote for the Court, '(S)tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.' (Citation omitted). It is precisely because Sinclair stands as a significant departure from our otherwise consistent emphasis … that we believe Sinclair should be reconsidered. Furthermore, in light of developments subsequent to Sinclair, … it has become clear that the Sinclair decision does not further but rather frustrates realization of an important goal of our national labor policy.

> Nor can we agree that conclusive weight should be accorded to the failure of Congress to respond to Sinclair on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that '(i)t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' (Citation omitted). Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of Sinclair, the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision. (Citation omitted).

Here too, Congress' failure to act is not a basis for applying admittedly wrong case law. There are any number of reasons why Congress has not enacted new legislation. Principle among them is that the antitrust laws have already been enacted and do apply. Moreover, congressional gridlock on an issue (baseball), which in the scheme of things is not a priority, is not a basis for applying the stare decisis doctrine.

Also, Appellees have not seriously relied on the so-called antitrust exemption. Since Flood, subsequent collective bargaining agreements, and free agency for major league ballplayers has rendered the so-called antitrust exemption for major leaguers virtually meaningless. ("The Curt Flood Act of 1998: A Hollow Gesture After All These Years?", 9 Marquette Sports Law Journal 314, 342).

Moreover, as Justice Thurgood Marshall noted in his dissent in *Flood*, the perceived adverse effects to baseball owners from an elimination of the "business

of baseball exemption" could be mitigated by eliminating the exemption prospectively. Flood, supra, 407 U.S. at 293.

The Court's more recent antitrust law subjecting sports leagues to the antitrust laws in order to protect players from the owners' restraints of trade[20] and the economic realities (and fears that chaos would ensue if the reserve clause was eliminated) have shown that the basis, if any, for the exemption and those fears are unfounded.

Baseball has flourished and free agency for major leaguers and collective bargaining for higher salaries for major leaguers has not harmed the business of baseball. Only the minor leaguers have been harmed by the "exemption!"

C. Circumstances Have Changed Dramatically Since *Federal Baseball* Was Decided

In 1946, broadcast revenues accounted for only about 3 percent of total revenues (U.S. Congress, House 1952 p. 1610). In 1990, it had increased to 50 percent. In actual dollar figures the amount of annual national broadcasting revenues was $1.2 million in 1950. In 1992, it was $365 million.

In 2014, major league baseball franchises earned $8 billion dollars in revenue. The Dodgers alone took in $120 million in local television money in 2014 as part of a $8.35 billion dollar deal with Time Warner Cable. During the last

[20] See Mackey, supra, 543 F.2d 606 at 617 and cases cited therein.

few years mega cable deals and new broadcasting contracts with ESPN, Fox, and TBS will pay a total of $12.4 billion over the next eight years.

In light of recent trends in revenues but with no collective bargaining and supposedly no antitrust rights for minor league players, it is time to take another look at the "baseball exemption" based on current economic factors particularly as they relate to professional minor league players who have been completely left out of the financial explosion.

The most common defense of the reserve clause during the first half of the 20th century was that it was necessary in order to prevent the richest clubs from signing all the best players. In the era before broadcast and licensing revenues became so significant, clubs in bigger cities had an advantage and it was argued that this would adversely affect competitive balance. The richest clubs would always win and that would destroy the league. History has shown that argument is not true.

1. Baseball is Big Business

Major League Baseball earned a record $9 billion revenue in 2014 and Commissioner Rob Manfred is aiming to increase annual revenue to more than $15 billion over the next several years (Sports Business Journal Jan.19-25, Eric Fisher). Research and reporting by Forbes magazine indicates that major league baseball is worth in excess of $36 billion (forbes.com 3/25/15 Mike Ozonian). The average

baseball franchise is worth $1.2 billion with 15 teams worth at least $1 billion. The New York Yankees ($3.2 billion) and the Los Angeles Dodgers ($2.4 billion) are worth the most but many of the teams with the higher franchise values are not located in the largest cities (e.g. St. Louis, Seattle, San Francisco). Revenues come from ticket sales, concessions, merchandising, product licensing, and especially from radio and television broadcasting. A single franchise, the Los Angeles Dodgers, signed an $8.35 billion dollar deal with Time Warner Cable. During the last few years mega cable deals and new broadcasting contracts with ESPN, Fox, and TBS will pay $12.4 billion over the next eight years (Forbes, supra).

Major league baseball players' salaries have accelerated due to free agency and salary arbitration rights gained through collective bargaining particularly since the Messersmith/McNally arbitration decision in 1975 and the collusion cases of the 1980s. The average major league player's salary now exceeds $4 million annually and the minimum salary (as negotiated through collective bargaining) exceeds $500,000. (usatoday.com 4/1/2015 Ted Berg points out that many minor leaguers will earn less ALL year than major leaguers get for *meal money*). More than 30 major league players make an annual salary in excess of $20 million and over 100 major league players will earn annual salaries in excess of $10 million. (usatoday.com/sports/mlb/salaries), BUT NOT MINOR LEAGUE PLAYERS, who

are paid a fixed statutory salary of $1,100/month for five months.

Minor league baseball ownership is also profitable. There are about 160 minor league teams with player development contracts with MLB and not one has to pay a single player, coach, manager, or trainer. Cities and counties are willing to finance minor league stadiums in order to stimulate the local economies. They accumulate revenue from ticket sales, parking, stadium sponsorships, stadium naming rights, merchandise, concessions (forbes.com 6/8/2012 Chris Smith). Over 40 million people attend minor league baseball games per year which is more than attend the NBA, the NHL, or the NFL. (Sports Business Journal August 4-10 Bruce Schoenfeld). Not only have minor league operators seen their profits rise, so too have the value of the franchises. Class A franchises sold for under $5000 in the late 1970s but now are valued in excess of $2 million. AA franchises which sold for under $100,000 in the 1980s sold for $4 million plus in the 1990s. The AA franchise in San Francisco recently sold for $32 million and the AAA Dayton Dragons for $40 million. (Sports Business Journal, Aug. 4-10 Bruce Schoenfeld; Indianapolis Business Journal, 8/16/2014 Anthony Schoettle). In July of 2013 Forbes magazine placed valuations of 10 minor league franchises at $29 million or greater. (Forbes, 7/17/2013 Kevin Reichard).

So things are quite good for major league teams, major league players, and minor league teams. But not so good for minor league players, who are compelled

to sign uniform, non-negotiable contracts for depressed salaries according to a scale, *well below the minimum wage*, and are subject to the exclusive control of the major league club for seven years. The thousands of professional baseball players working pursuant to a minor league contract each year receive no benefits, can be released unconditionally while receiving no severance pay. They have no union, no rights to free agency, arbitration or to have grievances heard by a neutral. All conditions for employment are unilaterally determined by the clubs and unlike the major league players who have as good a pension as any employee in the country, minor leaguers receive no pension when their playing days are over. It is typical for minor leaguers to share living quarters with four or five teammates.

2. Messersmith/McNally Arbitration

Seven players began the 1975 season playing under a renewed contract, i.e. one in which they did not sign or agree to but which were unilaterally renewed by the clubs according to their contracts. Two of the players, Andy Messersmith and Dave McNally, completed that season and then filed an arbitration grievance as provided in the Collective Bargaining Agreement challenging the reserve system. The issue in the case was whether the club's right to renewal was for a period of one year or whether it was intended to allow the club to renew the contract again and again in succeeding years. Arbitrator Peter Seitz ruled in favor of the players determining that it was decisive that the reserve clause did not explicitly state that

it would be perpetually renewing. Seitz, a respected veteran arbitrator who also served as permanent arbitrator for the NBA as well as director of industrial relations for the Defense Department and assistant director of the Federal Mediation and Conciliation Service, ruled that the players were free to bargain with other clubs as free agents. The owners fired Seitz and appealed his decision to the federal district court and then the federal court of appeals. Each court rejected the owners' appeals. (see Kansas City Royals v. MLBPA, 532 F.2d 615 (8th Cir. 1976) in which the Eighth Circuit Court of Appeals affirmed the judgment of the district court for the western district of Missouri directing the clubs to remove players Messersmith and McNally from the major league reserve list. The court indicated that the provision in the CBA prohibiting "concerted action" rendered ambiguous the provision relied on by the clubs stating that the CBA does not deal with the reserve system because the parties have differing views as to the legality and merits of the current system. (The Baseball Trust by Stuart Banner, Oxford University Press 2013, pp 224-235; also Notre Dame Law Journal article by Ed Edmonds, 2010, "At the Brink of Free Agency: Foundation for the Messersmith-McNally Decision").

3. Collusion: Appellees Have Been Previously Found To Have Violated Antitrust Laws

In three separate arbitration proceedings (Collusion I, II, and III) following

the 1985, 1986, and 1987 baseball seasons, the club owners were charged with acting in concert to boycott the signing of free agents and conspiracy to destroy free agency. After examining and hearing extensive evidence, arbitrator Thomas Roberts ruled in 1987 that the club owners were guilty of collusion. (Baseball and Billions by Andrew Zimbalist pp. 25-26, quoting from major league baseball arbitration panel on grievance 87-3 and 88-1). The case was brought pursuant to section XXE of the CBA which provides that, " Players shall not act in concert with other players and clubs shall not act in concert with other clubs." Arbitrator George Nicolau also found the owners guilty of conspiracy by creating a centralized "information bank illegally set up for the purpose of converting the free agent process into a secret buyers auction, to which the sellers of services (players) had not agreed and the existence of which they were not even aware …. it is evident that the clubs used the bank to track just how far they would have to go with particular players." (Baseball and Billions, Zimbalist p. 25, citing grievance 88-1 pp. 27, 9).

On December 21, 1990 a settlement for damages in the amount of $280 million was reached. And following the collusion cases a provision in the 1990 CBA was added calling for triple damages in future collusion cases. (Article XXE of the CBA). While major league salaries have seen a steady increase over the last 50 years, the greatest increases came right after the collusion cases (e.g. from 1990

to 1991 the average major league salary rose by 42.5 per cent from $597,537 to $851,492, Baseball and Billions, Zimbalist p. 76.) The Appellants should also be entitled to assert antitrust claims.

4. Other Considerations

The Curt Flood decision was reached in large part because the Court knew free agency was coming through collective bargaining. MLB attorneys argued in their brief that since the players had formed an effective labor union and were engaging in collective bargaining, federal labor law exempted the reserve clause from antitrust scrutiny because it was a mandatory subject of collective bargaining and because the union had agreed to that in the most recent contract. (The Baseball Trust, Stuart Banner p. 202, citing brief for MLB in Flood and article in Yale Law Journal 81, 1971 by Ralph Winter, Jr. "Antitrust Principles and Collective Bargaining by Athletes").

The most common defense of the reserve clause during the first half of the 20th century was that it was necessary in order to prevent the richest clubs from signing all the best players. That argument no longer has any merit. In the era before broadcast and licensing revenues became so significant clubs in bigger cities had an advantage and it was argued that this would adversely affect competitive balance. The richest clubs would always win and that would destroy the league. The president of the Cincinnati Reds, August Herman, testified in an

antitrust suit in 1910 that smaller cities would resent the annual loss of players to richer clubs in big cities and that the reserve clause was an essential means of preserving competitive balance (The Baseball Trust by Stuart Banner p. 9). But actually competitive balance has become noticeably more equal since the advent of free agency in major league baseball. In the first 15 seasons with free agency, twelve different teams won the World Series and 16 different teams made it to the World Series. Over the past seven postseasons just 25 out of 56 playoff teams repeated; over the past 15 post seasons only 61 out of 120 teams repeated. It is demonstrable that major league baseball has more competitive balance than any of the major sports. (e.g. see espn.com Jason Stark, “Free Agency Increased Competitive Balance”)

Minor league players have no legal or economic protection and do not share in this wealth. Players enter professional baseball through the annual June draft when they are selected by a club that thereafter has exclusive rights to sign that player. If the player does not sign he must stay out of baseball until the following June at which time another club may draft the exclusive right to sign him. Once signed that player is the property of that major league franchise for seven years. Currently the draft consists of 40 rounds plus compensatory picks which means that about 1200 players are drafted as potential minor leaguers each year. Approximately 1 in 19 professional players make it to the majors according to a

study by Peter Gammons cited in Baseball and Billions by Andrew Zimbalist, p. 245. Of those who play in one major league game, less than half are still in the major leagues after two years.

5. Minor League Baseball Players Are The Only Professional Athletes That Have No Protection From Antitrust Laws, And As A Result, Are Subjected To Non-Negotiable, Uniform Contracts That Provide Depressed Salaries And No Benefits.

Baseball is the only major American professional sport that the Courts have considered to be exempt from antitrust laws. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). Through the years, the courts have on numerous occasions ruled that the NFL, NBA and NHL do not have total antitrust immunity. Radovich v. National Football League, 352 U.S. 445 (1957). The corporate structures of these leagues, the product they put out for the public and the business models they follow all are essentially the same, and yet, Baseball is the only professional sport exempt from antitrust law.

One major effect of baseball's carte blanche exemption can be seen in the conditions under which minor league baseball players operate as they chase after their dreams of becoming Major League Baseball ("MLB") players. The conspiracy to restrict a minor league baseball players from maximizing their earning potential becomes even more apparent when their working conditions are

compared to minor league hockey, NBA Development League ("NBA D-League") and NFL practice squad players - developmental systems where young athletes train with the hope of playing their respective sports at the highest possible level.

Most minor leaguer baseball players earn between $3,000 and $7,500 for an entire year. They receive no overtime pay, and are not paid during spring training. The player cannot negotiate with the team that drafted him or with other teams for a higher salary, and they are under team control for seven years. Because Appellees have created a monopoly with the minor leagues being the only viable path to becoming a major league baseball player, they are powerless to combat the collusive power of the MLB cartel.

6. Thanks To The NFL Collective Bargaining Agreement, NFL Practice Squad Players Have Favorable Working Conditions As They Pursue Their Goal To Make An Active NFL Roster.

In stark contrast to the salary of a minor league baseball player, an NFL practice squad player earns a minimum of $6,600 *per week* for the 2015 season. This means that a player on the practice squad for the entire year will earn $105,600. This is a very substantial salary, especially when you consider that the minimum salary for an active roster NFL player is $420,000. That is not a sizable difference when compared to baseball, where most minor leaguers earn between $3,000 and $7,500, compared to the MLB minimum salary of $500,000.

There are also significant procedural safeguards in place for players on an NFL practice squad. For example, "(a)ny player on the practice squad shall be completely free to negotiate and sign a player contract with another club at any time during the league year." Baseball players do not have this same freedom – they are under team control for seven years and if they are assigned to the minor leagues, they do not have the right to try to negotiate with another franchise that might either put them on a MLB roster or at a higher level of minor league baseball. Also, "If a player is on the Practice Squad of one NFL club and signs a player contract with another club, the player shall receive at least 3 weeks' salary of his NFL player contract at the active roster minimum."

Another important distinction between football (where antitrust and collective bargaining protection exist) and baseball is that there are other venues for a football player to play professionally and still have the potential of eventually making the NFL. If a football player does not make an active NFL roster and he does not wish to sign to a practice squad, they can go play in the Canadian Football League ("CFL")m or Arena Football League ("AFL"). These are two very established professional leagues that pay competitive salaries and are filled with talent. Every year, former players from both leagues make NFL rosters. A baseball player does not have any such options, and is in fact prevented from playing in

another county or league and therefore, has no choice but to accept the terms of the uniform player contract.

7. The NBA Created Its Developmental League To Help Train Young Basketball players To Eventually Make The Jump To The NBA.

The NBA D-League is relatively new, but it is the official minor league of the NBA, with 19 NBA teams currently having a D-league affiliate. The current salary cap for a D-League team is approximately $170,000 and there are three different salary categories: a tier A salary is $25,000 per year, tier B salary is $19,000 per year, and tier C salary is $13,000 per year. Even the lowest salary designation for a D-League player is double what most minor league baseball players earn.

As in football, basketball players have measures of protection that baseball players do not. According to the NBA collective bargaining agreement, NBA teams can assign players in their first or second years to their D-league affiliate. However, a player that has played three or more years may only be assigned to the D-league with his consent and the consent of the NBA Players Association – a measure of control that is easily distinguished from that of a baseball player who can be assigned to the minor leagues for seven years before becoming a free agent.

Also, many college basketball players who do not immediately make the NBA, but want to continue to play professionally can play in any one of a number

of other leagues worldwide. Leagues in Spain, Italy, Greece, China, and many more offer competitive salaries and playing opportunities for young basketball players to work on their game and continue their pursuit of playing in the NBA. Again, there are no comparable options for baseball players.

8. The NHL Minor League System Is Extremely Similar To That Of MLB, And Yet Its Members Are Treated Fairly.

The most apt comparison might be hockey, whose minor league system is structured almost identically to baseball's. Much like in baseball, when an amateur hockey player is drafted, they agree to a contract with an NHL team and are then generally assigned to a minor league affiliate. Much like minor league baseball, there are multiple levels which all serve as a training ground for the parent club. The American Hockey League ("AHL") is the highest level, and each AHL team is affiliated with an NHL team. The other main league is the East Coast Hockey League ("ECHL"), in which most, but not all of the teams are affiliated with an NHL team.

While the structure of minor league baseball and hockey are very similar, the protections these athletes get are very different. Unlike baseball where the minor league players have almost no protection or bargaining authority, minor league hockey players have their own collective bargaining union – the Professional Hockey Players Association ("PHPA"). The PHPA is the certified, National Labor

Relations Board collective bargaining representative for all professional hockey players within the AHL and the ECHL.

Thanks to PHPA representation, minor league hockey players are dealt with fairly as they pursue their goal of becoming NHL players. The PHPA has negotiated a Collective Bargaining Agreement separately with the AHL and ECHL respectively. Among other rights, the PHPA bargained for health and welfare benefits, training camp allowances, travel and trade relocation expenses, daily per diem, housing allowances, playoff shares, licensing rights, revenue sharing, and Membership Assistance. The minimum salary for an AHL player is $42,375 per year, with the average annual salary being more than $90,000 per year. The ECHL minimum salary is $10,790 per year and, thanks to the PHPA, ECHL players also get a fully furnished apartment with all of their utilities paid.

While the NHL Players' Association has a strong relationship with the Professional Hockey Players' Association, working jointly to establish standards such as minimum salaries for two-way contracts (where a salary is dependent upon which league the athlete is assigned to play), the Major League Baseball Players' Association ("MLBPA") has shown little interest in assisting its minor league brethren. In fact, in the most recent negotiation between major-league players and team owners, the MLBPA even bargained away benefits for those who weren't members, including restrictions on signing bonuses for players taken in the

amateur draft.

http://www.providencejournal.com/article/20150221/NEWS/150229777

The lack of regard for minor league baseball players is especially disconcerting because approximately only 10% of minor league baseball players ever make it to the Major Leagues.

D. Even If *Federal Baseball* Decided The Minor League Issue, This Court Could Still Not Apply It

Moreover, even if, arguendo, the Supreme Court had ruled 45 years ago on the issue in this case, stare decisis would still not bar this Court from reconsidering the applicability of the federal antitrust laws to Appellants' claims in this case. Where, as here, it is almost certain that because of changed circumstances, the strong split among the justices regarding the issue, the different factual and economic circumstances relating to the issue now, the fact that the Supreme Court has tacitly and directly admitted its prior baseball cases were decided wrongly and were an "aberration," "a derelict in the stream of law," it is appropriate for a lower court to refrain from applying stare decisis. Brown, supra 7 F. Supp. 2d at 1006. See also 56 Harv. L. Rev. 652, 653; 50 Yale L. Rev. 1448; and cases cited therein.

Under such circumstances, a lower court can refuse to apply *stare decisis* or, because of different facts and issues, hold that it does not apply. Gately v. Com. of Mass., 2 F.3d 1221, 1226 (1st Cir. 1993) ["As stare decisis is concerned with rules

of law, however, a decision dependent upon its underlying facts is not necessarily controlling precedent as to the subsequent analysis of the same question on different facts and a different record."]. Accord, Brown v. Mesirow Stein Real Estate, Inc., 7 F. Supp. 2d 1004, 1006 (N.D. Ill. 1998) ["'[f]or stare decisis to be applied, an issue of law must have been heard and decided. If an issue is not argued, ... the decision does not constitute a precedent to be followed in subsequent cases in which the same issue arises.' … Furthermore, even assuming that stare decisis does apply, the court is not required to blindly follow [a prior case] in disregard of the more recent opinions … ('Ordinarily a lower court has no authority to reject a doctrine developed by a higher one.... If, however, events subsequent to the last decision by that court … make it almost certain that the higher court would repudiate the doctrine if given a chance to do so, the lower court is not required to adhere to the doctrine.')."].

Here, the issue of the *minor league* reserve clause and the Appellees' agreement to fix (set) all minor league players' salary at the same low amount and the effect on minor leaguers of those restraints of trade and monopoly practices, are different issues than decided in Flood, Toolson, and Federal Baseball, and the economic facts have greatly changed even from the time of the Flood decision.

The ones being harmed in this case are the minor league players. While their owners get richer and richer and everyone in baseball gets more money (even

major leaguers) as a result of the minor leaguers' efforts, the minor leaguers are forced to work for essentially slave wages with no opportunity to better their compensation. As Justice Thurgood Marshall stated in his dissent in Flood, supra, 407 U.S. at 289-292:

> To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system. …
>
> …
>
> 'Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.' United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

That labor law/antitrust relationship of protection for major leaguers, through collective bargaining, does not apply to minor leaguers. They have no union or collective bargaining that could obviate or lessen the need for antitrust protection, as it has for major leaguers.

E. Justice

Then, there is also the simple matter of justice. When a practice or law is not right, it is for the courts to correct it. The courts have been the bastion of last resort for the oppressed and discriminated against. Laws that treat unfavored persons differently have been corrected (sometimes after long periods) by the courts. Stare decisis has not been a barrier to correcting a law or precedent that has been applied incorrectly. Thus, in Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954), the Supreme Court erased the discriminatory concept of separate but equal enunciated nearly sixty years earlier in Plessy v. Ferguson, 163 U.S. 537 (1896).

And just a few months ago, in Obergefell v. Hodges, (2015) 135 S. Ct. 2584, it was the Court, not Congress, that finally gave gays equal marriage rights.

In this case, this Court can and should correct nearly a hundred years of deprivation and apply the existing antitrust laws as they are required to be applied to the victims—the minor leaguers.

F. The Curt Flood Act Does Not Apply To This Case

Appellees argued below that even if the trilogy of Supreme Court baseball cases does not bar this action, the Curt Flood Act, 15 U.S.C. § 27, does. Appellees are again wrong.

Contrary to Appellees' assertions, the Curt Flood Act does not make the other antitrust laws (Sherman Act and Clayton Act) inapplicable to minor league baseball players. It leaves those antitrust laws intact. The Curt Flood Act only makes that new provision, 15 U.S.C. § 27, inapplicable to minor leaguers. Congress chose to take no definitive stance on the issue of a baseball antitrust exemption for minor leaguers and left it to the courts to decide the question of whether the other existing federal antitrust laws (Sherman and Clayton Acts) apply to minor league players. Thus, the Curt Flood Act, 15 U.S.C. § 27(b), provides in pertinent part:

> (b) No court shall rely on the enactment of this section [§27] as a basis for changing the application of the antitrust laws … 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 employment of major league baseball players to play baseball at the major league level …
>
> …
>
> (c) Only a major league baseball player has standing to sue under this section. (Emphasis added).
>
> …

Thus, it is clear that the Curt Flood Act does not affect, restrict, limit, or eliminate any rights a minor league player has to pursue antitrust violations under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, or under section 4 of the

Clayton Act, 15 U.S.C. §§ 15, 26. The Curt Flood Act only restricts application of the Curt Flood Act to major league baseball players.

CONCLUSION

For the reasons set forth above, the District Court's Judgment dismissing Appellants' antitrust claims should be reversed.

Dated: January 6, 2016

/s/ Samuel Kornhauser

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, according to the word count provided by Microsoft Word 2013, the body of the foregoing brief contains 11,973 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). This brief is in 14-Point times New Roman Font, which is proportionally spaced. See Fed R. App. P. 32(a)(5),(6).

DATED: January 6, 2016 Respectfully submitted,

LAW OFFICES OF SAMUEL KORNHAUSER

By: /s/ Samuel Kornhauser
SAMUEL KORNHAUSER
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STATEMENT OF RELATED CASES

The undersigned, counsel of record for the Plaintiff-Appellant, certifies, pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, that to his knowledge there are no related cases.

DATED this 6th day of January, 2016.

By: /s/ Samuel Kornhauser
SAMUEL KORNHAUSER
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the forgoing **APPELLANT'S OPENING BRIEF** has been filed electronically with the Ninth Circuit Court of Appeals, this 6th day of January, 2016. Notice of this filing will be sent to all parties of record by operation of the Court's electronic filing system.

/s/ Samuel Rolnick
Samuel Rolnick