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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

For all the reasons set forth in Appellants' Opening Brief, the District Court's reluctant dismissal of Appellants' (collectively "Miranda") class action anti-trust complaint should be reversed.

The Major League Baseball clubs ("MLB") make basically the same arguments in their Answering Brief that they made below, which Miranda anticipated and fully addressed in their Opening Brief. MLB argues that the Supreme Court (not Congress) in a trilogy of cases has created an exemption from the antitrust laws for the "business of baseball," that the doctrine of *stare decisis* prevents this Court (or any other Court except the Supreme Court) from applying the Sherman Act to redress MLB's restraint of trade and monopolization violations against Minor League baseball players and that the Curt Flood Act also precludes Minor League baseball players from asserting any antitrust claims against MLB.

Each of MLB's arguments was argued and disputed at length in Appellants' Opening Brief and need not be repeated in detail here. Suffice it to say, that it is clearly known that the entire so-called "business of baseball" exemption has no statutory basis in the antitrust laws. There is nothing, not a single word in the Sherman Act or the Clayton Act that mentions, refers to, or implies any exemption from their application to the "business of baseball." It is built on a 94 year old "house of cards" foundation of a "soon-to-be-outmoded interpretation of the

Commerce Clause." City of San Jose v. Office of the Commissioner of Baseball, 776 F.3d 686, 688 (9th Cir. 2015). For 94 years, the courts have felt compelled to follow the limited and now acknowledged erroneous holding in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 208 (1922) that "the Sherman Act had no application to the 'business of baseball' because such 'exhibitions' are a purely state affair." San Jose, supra 776 F.3d at 688. The Federal Baseball holding, that the business of baseball is exempt from anti-trust laws including the Sherman Act was solely based on the erroneous legal interpretation that major league baseball games did not involve inter-state commerce and therefore, the Sherman Act did not apply to any aspect of the business of baseball.

Ninety-four years later, despite the universal acknowledgement that the "business of baseball" does involve inter-state commerce (and therefore, the sole rationale for the business of baseball anti-trust exemption no longer exists), the courts still believe they are compelled by the doctrine of *stare decisis* to apply an erroneous, entirely court created, non-existent anti-trust exemption for the business of baseball.

As set forth in detail at pages 16-45 of Miranda's Opening Brief, *stare decisis* does not require this Court or others to follow an erroneous, judicially created "anomaly" or "aberration," a "derelict in the stream of the law" which even

many of the Supreme Court Justices (Douglas, Marshall, Burton, Burger, Brennan) believe is erroneous and should be overturned. While great deference should be accorded to Supreme Court decisions, where the issue is different and has not been decided, or where the issue was decided but more recent decisions or review have reversed or questioned the legal underpinning of the that decision, then *stare decisis* does not apply and should not be applied, particularly in anti-trust cases where the law and the economic basis for it are constantly evolving. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899-907 (2007).

MLB argues that Appellants are asking this Court to commit "legal error." MLB has it backwards. Appellants are asking this Court not to commit legal error. Appellants are requesting that this Court not repeat the now erroneous holding that the Sherman act does not restrain a conspiracy among major league baseball teams and their owners to restrain trade in the business of baseball, particularly to the never decided issue of whether the Sherman Act prevents Major League Baseball owners and clubs from conspiring to fix and monopolize the compensation paid to Minor League baseball players. Again nothing in the Sherman Act creates an exemption for such price fixing actions by MLB. No case (other than the reluctant District Court decision in this case) has decided that issue, and therefore, this Court is not bound by any *stare decisis* precedent to so decide. 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.')."]. Accord, Gately v. Com. of Mass., 2 F.3d 1221, 1226 (1st Cir. 1993); 56 Harv. L. Rev. 652, 653; 50 Yale L. J. 1448.

Whether Circuit and District Courts are bound to follow Supreme Court decisions whose underpinnings have been discredited was discussed in 50 Yale L. J. 1448, 1450:

> Lower court judges should not be thought to exist in a judicial world apart from the mundane universe. …as members of a trade they have sufficient knowledge of their fellow workers to forecast their movements and to understand each judicial action. So equipped and so situated one might well question whether an inferior court fulfills the requirements of its function by mechanically following decisions known to be contrary to the philosophy of the bench, the needs of society, and the personal prejudices of a controlling majority of the Supreme Court.
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> . . .

> Thus, cases whose foundations have been seriously shaken, even though they remain technically "good law," should not command the respect of the lower courts.
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> . . .
>
> The attitude advocated can be simply stated : if the underlying reasons for a precedent are gone, if the precedent has been ignored and isolated in the dim past while competing philosophies have surged ahead, or if the precedent is adhered to only for face-saving purposes then a lower court should feel free to wield an axe;

Plaintiffs and some courts continue to nibble away at the supposed all encompassing business of baseball exemption, attempting to limit its scope if not outright reject it. Thus, in Laumann v. National Hockey League et. al., 56 F.Supp.3d 280, 295 (S.D.N.Y. 2014), the court held that despite the Federal Baseball trilogy, the MLB was not shielded from anti-trust liability by baseball's exemption from the Sherman Act (with respect to restraint of trade for television broadcasts because television broadcasts are interstate commerce, so Federal Baseball's blanket exemption from anti-trust laws based on baseball not being interstate commerce cannot apply).

If television broadcasts of MLB games are not part of the "business of baseball" (and therefore subject to anti-trust liability), then the compensation paid to Minor League baseball players should also be subject to anti-trust liability as "collateral to the public display of baseball games."

In any event, Appellants submit that it is not necessary to split legal hairs to try to distinguish Appellants' case from the Supreme Court's baseball trilogy. Federal Baseball was legally erroneous and so are the other baseball antitrust cases based on the non-existent business of baseball exemption. Congress never intended to exempt MLB when it passed the Sherman Act and it did not do so. The commentators, the courts, and even the Supreme Court Justices have acknowledged it is "bad law" and that it should not be followed. Justice Douglas initially voted to uphold the exemption but regretted doing so and subsequently voted against upholding it in Flood v. Kuhn, 407 U.S. 258, 286-287 (1972).

In fact, Appellants submit that this is a case that this Court surmised might exist when it stated in City of San Jose, supra 776 F.3d at 690:

> Nor does it mean the MLB or its franchises are immune from antitrust suit. There might be activities that MLB and its franchises engage in that are wholly collateral to the public display of baseball games, and for which antitrust liability may therefore attach.

I. SUPPOSED CONGRESSIONAL INACTION DOES NOT REQUIRE ADHERENCE TO ERRONEOUS LAW

As for Congressional inaction constituting "positive inaction… clearly evinc[ing] a desire not to disapprove [the baseball exemption] legislatively." (Flood at 283), Justice Douglas rejected that notion in his dissent in Flood, stating that the baseball exemption was "a derelict in the stream of the law that we, it's

creators should remove" and that the "unbroken silence of Congress should not prevent us from correcting our own mistakes." (Flood 407 U.S. at 287).

Likewise, more recently, in Leegin supra 551 U.S. at 899 the Supreme Court held that the general presumption that legislative change should be left to Congress has less force when dealing with anti-trust laws which Congress generally left to the courts to evolve.

II. THE CURT FLOOD ACT DOES NOT EXEMPT MLB FROM SHERMAN ACT VIOLATIONS AGAINST MINOR LEAGUE BASEBALL PLAYERS

As set forth in pages 46-48 of Appellants' Opening Brief, the Curt Flood Act does not make the Sherman Act inapplicable to Minor League baseball players. It leaves the antitrust laws intact, and nothing in the Sherman Act shields MLB owners from liability to Minor Leaguers for price fixing their compensation.

The passage of the Curt Flood Act was a rush to get something passed to avoid the threat of another strike. Legislative History of the Curt Flood Act of 1998, P. L. No. 105-297, 112 Stat. 2824. Contrary to MLB's implication, the Minor League players rights were not represented at the Congressional hearings. It was the Minor League owners, who were aligned with MLB owners that were supporting the passage of the Curt Flood Act, in an effort to protect their own financial interests, not those of the Minor Leaguers who had no representation. "Congress chose not to grant or deny any rights to minor league players because of

the urgency with which the Act needed to be passed… and thus it can be argued that Congress has not foreclosed the possibility of challenging the reserve clause as applied to minor leaguers…" Legislative History of the Curt Flood Act of 1998, P. L. No. 105-297, 112 Stat. 2824.

CONCLUSION

There is no statutory exemption in the Sherman Act for the business of baseball. The exemption is a figment of a 94 year old error. Judge Gilliam below knew there was no merit to the business of baseball anti-trust exemption but felt restrained to apply it because this Court and others have also felt restrained to continue it despite it being "bad law." There is no valid reason in policy or in justice to continue the error, simply so thirty billionaires can continue to reap billions of dollars more at the expense of Minor League baseball players, most of whom earn less than minimum wage. The District Court's decision should be reversed and Appellants should be allowed to proceed with the Sherman Act anti-trust claims.

Dated: April 15, 2016

RESPECTFULLY SUBMITTED

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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 2,412 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: April 15, 2016 Respectfully submitted,

LAW OFFICES OF SAMUEL KORNHAUSER

By: /s/ Samuel Kornhauser
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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 15th day of April, 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