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High time for high court to revisit antitrust exemption

In 1922, the U.S. Supreme Court, speaking through Justice Oliver Wendell Holmes, held inFederal Baseball that the exhibition of baseball games was not a business in interstate commerce within the meeting of the Sherman Antitrust Act. This opinion, delivered by a great jurist who suffered, like all baseball players, from what most have perceived to be a bad day, was nonetheless in tune with pre-New Deal interpretations of the commerce clause by the Supreme Court.

Soon, the Supreme Court's recognition that other sports - football, boxing, basketball, hockey - were businesses within interstate commerce subject to antitrust law coupled with the advent of radio and television - through which baseball made substantial sums by beaming its message across states lines - made the Federal Baseball holding "one of federal law's most enduring anomalies," as Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals wrote last month.

Twice in the 20th century the Supreme Court was confronted with an opportunity to reverse the 1922 ruling and twice it declined to do so because of the principle of stare decisis and congressional acquiescence in the holding, as well as the consequent reliance upon it by baseball. Thus, the 9th Circuit unanimously relied upon these precedents in ruling for organized baseball.

And so it is that the city of San Jose has thus far sought and failed to challenge Major League Baseball's refusal to allow the long-suffering Oakland Athletics to relocate from its East Bay declining-revenues-and-deteriorating stadium to the Silicon Valley riches contained in San Jose. As the Court of Appeals' opinion noted, "MLB has not rushed to grant this approval."

The 9th Circuit properly noted that Congress has continued to acquiesce in Federal Baseball. Indeed, there has been more than acquiescence - if anything, downright affirmance. This is attributable to another anomaly - the Curt Flood Act of 1998, which reversed the centerfielder's 1972 defeat at the hands of the high tribunal, where stare decisis dismissed his protest against a trade from the Saint Louis Cardinals to the Philadelphia Phillies.

The act reversed that decision - and in so doing, it not only made clear that the congressional reversal of the exemption granted by Federal Baseball was solely applicable to major league labor relations between clubs and players, but also that it had no relevance to other matters, such as disputes about relocations.

Congress, though reversing Flood's defeat, hardly gave his heirs a labor triumph inasmuch as the 1998 legislation placed the MLB and its union within the parameters of the Supreme Court's 1996 ruling, Brown v. Pro Football. There, the court held that relatively weak labor law trumps the more potent sanctions of antitrust law whenever a union was on the scene - as it is in baseball.

Thus, Kozinski, who did not cite some case authority which supported San Jose's claim and thus ran against the grain, was surely correct to conclude that the court'sFederal Baseball ruling

had not been disturbed by Congress. The only escape hatch has been suggested in dicta by the 7th Circuit in another Oakland case (again, not cited by Kozinski) - where A's president Charlie Finley's firesale of his leading stars to the Red Sox and Yankees was rescinded by the commissioner - that if "the rudiments of due process of law" were not followed or that the process was a "sham," judicial review might be warranted. The MLB's highhanded and arrogant treatment of San Jose - no one really knows whether any process has functioned and whether any committee has met to consider the impasse between the A's and the Giants over their respective territorial claims - might yet invite an reconsideration or limitation uponFederal Baseball.

Only the Supreme Court can change matters. But should it and will it?

Baseball, notwithstanding the Supreme Court's resounding reiteration of antitrust applicability to professional football just a couple of years ago, continues to maintain that it is different and unique and, in its view, worthy of the judge-made exemption. Once of baseball's major arguments is that professional baseball's vast minor league system and territorial enclaves carved out for each franchise would be injured through antitrust law, which would spell ruination for the minor league system upon which baseball relies to train its talent.

At least two points undercut this argument. The first is that other sports, particularly basketball and hockey, and even football, are developing their own farm clubs, albeit on a more modest scale. The second is the rise of independent leagues, which provide for competition to the minor league system, has hardly harmed organized baseball.

Federal Baseball should be reversed in 2015 - but it is unlikely that that will happen.

Though the Supreme Court might grant review, which it can do with four votes (Justice Sonia Sotomayor, the author of the 1995 district court baseball strike opinion, might possess the enthusiasm to do so), even that presents a long shot given so many cases clamor for the court's attention. No one, however, can predict a denial of review with overwhelming certainty.

What seems remote is that the court will reverse course, even if review is granted. This is because the business of this court is business. It has demonstrated this proposition on countless occasions with contorted analyses employed to defeat claims which challenge business.

Only within the past few years, the court has affirmed this trend in the of employment discrimination arena and has made angels stand on the heads of the pin to defeat plaintiffs' claims against companies. The same is true of its use of employer promulgated arbitration procedures that defeat the claims of individual employees. Trade unions, which suffered an enormous setback from the court in the union security agreement arena last June, try to avoid the high tribunal at all costs. The same ideological disposition is illustrated by what can only be characterized as a repeal of substantial portions of the Voting Rights Act of 1965.

Developments over the first part of the 21st century make it clear as ever thatFederal Baseball was wrongly decided. It is always possible for this recognition to dawn on the court. But baseball is a part of big business, and this court seems unlikely to interfere with its undeserved privilege.

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