a cause of action for private parties from a regulatory statute. However, *Santa Fe* may not end the litigation due to the interaction of state short-form merger statutes and federal securities law. In providing for prior notice at the majority's discretion, Delaware may have set the stage for another confrontation with federal securities law. However, unless and until Congress decides that short-form mergers constitute more than just internal corporate mismanagement, attempting to extend rule 10b-5 to proscribe such mergers where there is no finding of nondisclosure, would federalize a substantial portion of the law of corporations. If such federalization is to come about, it should be the result of express Congressional authorization, not the flexible growth of an implied cause of action.

Bruce Martin Mundorf

BASEBALL AND ANTITRUST: A HISTORICAL OVERVIEW

ANTITRUST POLICY

The Congressional purpose in enacting antitrust legislation[1] has been the promotion of the public welfare by fostering competitive freedom and economic opportunity in all areas of commercial activity. Thus, the dominant theme of these acts has been the suppression of coercive market forces which unduly restrict competition in the marketing of goods and services.

The foundation of antitrust legislation was laid in 1890 with the passage of the Sherman Antitrust Act.[2] However, a review of significant antitrust cases demonstrates that the Sherman Act has at times been applied with diligence and resolve, while on occasion its sweeping objectives have been relegated to obscurity under the banner of judicial discretion.[3] In practice,

1. 15 U.S.C. §§ 1-58 (1970).

2. 15 U.S.C. §§ 1-7 (1970).

3. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1957), where Justice Black articulated most distinctly the principal objectives and areas of application of the Sherman Act:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination . . . or conspiracy in restraint of trade or commerce among

judges have been careful to consider all circumstances and possible consequences before heeding the Act's unambiguous mandate.

The broad prohibitions of the statute have come to depend on a determination of "reasonableness," *i.e.*, "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[4] This "rule of reason," first read into the Sherman Act in *Standard Oil Company v. United States*,[5] ordinarily demands an ascertainment of the facts underlying a challenged business practice as a necessary concomitant to a finding of "unreasonableness."[6] Therefore, the primary role of the courts in determining the lawfulness of a restraint requires an examination of extenuating factors offered by a defendant in light of the amorphous standard of "reasonableness."

Another category of antitrust violations, *i.e.*, per se violations, consists of those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and, therefore, illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[7] Under the per se rule, particular arrangements and practices are deemed so contrary to the public welfare that their very existence is believed to subvert or weaken free competition in the course of trade. Practices deemed illegal in and of themselves include price fixing, division of markets, group boycotts, tying arrangements, and concerted refusals to deal.[8]

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the several states.' Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition.

4. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1917). The Court continued:

> To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

5. 221 U.S. 1, 62 (1911).

6. *See* United States v. Parker — Rust-Proof Co., 61 F. Supp. 805, 812 (D. Mich. 1945), where the court articulated this particular construction of the antitrust acts:

> Anti-Trust Laws were not enacted for the purpose of forcing every type of business enterprise into a common mold. Each case arising under these acts must be considered in light of the particular facts involved. Only such contracts and combinations are within the prohibition of the acts as would by reason of intent or inherent nature prejudice the public interest by unduly restricting . . . the course of interstate trade.

7. Northern Pac. Ry. v. United States, 356 U.S. at 4.

8. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940) (price fixing); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899) (division of the market); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (group boycott); Kloe's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), (group boycott); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (concerted refusal to deal); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements).

Flagrant inconsistencies characterize the application of the aforementioned rules in the area of professional team sports. The inventory of unsettled and controversial antitrust disputes which beset the field of professional sports enlarges with irritating persistence. The sports pages frequently attest to these legal disputes with the artful maneuvering of lawyers given wide coverage while athletic achievements are relegated to the back pages. In particular, the 1970's have been well supplied with encounters between the antitrust laws and the sports business.

Three primary areas of confrontation between professional sports and the antitrust laws have developed: (1) interteam competition for athletes, (2) the location of team franchises, and (3) the sale of broadcasting rights. This article will focus primarily on the array of team equalization rules[9] — an intricate set of self-regulatory procedures and practices, which restrict interteam competition for athletes. Recent developments in baseball will be emphasized through an analysis of court decisions which have abruptly lowered team owner's "batting average" in the antitrust and arbitration arena. Although the problem embraces the entire sports business, particular attention will be paid to baseball's putative antitrust exemption, which seriously undermines the policy considerations of antitrust legislation. An evaluation of the reasonableness of player control devices necessarily entails a survey of their history, purpose and effect. Many of the restrictive practices under consideration closely approximate the group boycotts, concerted refusals to deal and market divisions declared unlawful in other commercial contexts regardless of business justification. Yet it remains to be seen whether, in fact, these practices are not necessary to insure the future viability of the sports business.

THE DEBATE

As previously discussed, the policy consideration underlying antitrust legislation is that preservation of a competitive system will best promote the public welfare. However, sports leagues are essentially cartels holding a monopoly position in the marketing of professional sports exhibitions to vast metropolitan populations. Thus, the leagues constitute the only market wherein skilled athletes can sell their natural endowments. Until recently, free competition for baseball players' services was virtually precluded by an interlacing network of rules and procedures which ranged from player recruitment to retirement.[10]

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9. Team equalization rules are often referred to by adverse commentators as player control devices. This terminology will be used in this article. The most publicized and litigated control devices are the player reservation system, the option clause, the draft, agreements not to compete, the waiver rule and the "no sale" rule. These practices prevent the unrestrained proliferation of interteam competition for players. Extensive cooperation and strict adherence by team management has led to frequent challenges by players in recent years.

10. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 622 n.8 (8th Cir. 1976).

Professional sports entrepreneurs have ardently contended that some forms of player-control devices are necessary in order to guarantee balanced and sustained competition. It is argued that professional sports' continued existence would be threatened by inequality of competition, *i.e.,* teams unevenly matched in playing strength.[11] The extenuations offered in defense of player-control devices are rooted in the belief that the unique character of professional team sports precludes unrestrained competition. Free competition for player's services would inevitably lead to the demise of the financially weaker teams. An explicit statement of this generally held view was expounded in *United States v. National Football League.*[12]

> Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

The belief that the wealthier teams will corner all the talent is both powerful and plausible.[13] However, the uncertainty and apprehension generated thereby may be unfounded. Nevertheless, the soundness of the owners' reasoning is the focal point of the argument concerning the necessity and propriety of player-control devices. Whether these anticompetitive arrangements produce teams of equal playing strength and, therefore, justify the unique government policy toward professional sports compared

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11. *See* House Comm. on the Judiciary, Subcomm. on Study of Monopoly Power, Organized Baseball, H.R. REP. No. 2002, 82nd Cong., 2d Sess. 177 (1952) [hereinafter cited as H.R. REP. No. 2002], where the subcommittee stated:

> The subcommittee recognizes, however, that baseball is a unique industry. Of necessity, the several clubs in each league must act as partners as well as competitors. The history of baseball has demonstrated that cooperation in many of the details of the operation of the baseball business is essential to the maintenance of honest and vigorous competition on the playing field. For this reason organized baseball has adopted a system of rules and regulations that would be entirely inappropriate in an ordinary industry. *Id.* at 229.

12. 116 F. Supp. 319, 323 (E.D. Pa. 1953); *see also* American Football League v. National Football League, 205 F. Supp. 60, 75 (D. Md. 1962), *aff'd,* 323 F.2d 124 (4th Cir. 1963).

13. It is also feared that free agents, players who "play out" their options by performing for a full season without signing a new contract and thereby free themselves to sell their services in the open market (a new phenomenon in baseball), will wander from franchise to franchise. It is contended that this process will seriously undermine a fan's ability or willingness to identify with athletes. However, owners manage to sell or trade over a hundred players a year and entire teams have, in the past, moved from city to city. In such instances, owners have not displayed the same solicitude.

with other business enterprises, was the subject of comprehensive analysis by the Brookings Institute. The controversial findings were summarized as follows:

> None of the empirical or theoretical analyses in this book, even by authors who favor maintaining some form of reservation system, lends any support to the view that player reservation has a significant effect on the balance of competition. The theoretical conclusion is that the reserve clause could balance competition only if player trades and sales were prohibited — certainly an undesirable and unenforceable proposition. Empirical investigations find no discernible relation between the closeness of competition on the field and the degree of competition in the market for players. They also find no evidence that the prime motivation of the vast majority of owners is any consideration other than profits.[14]

Whether the conduct and structure of league operations are amenable to antitrust regulation is currently the subject of heated debate. The present judicial disposition toward professional sports indicates that free competition for players is a practice whose time has come. The effects of this recent trend have generated much litigation.

THE RESERVE SYSTEM

A common misconception concerning the player reservation system is the belief that it is embodied in a single contractual provision. The news media and sports commentators have propagated this myth by their frequent allusions to the "reserve clause" when in reality no single clause circumscribes the system under consideration. Rather, the player reservation system is a group of rules and regulations having the combined effect of binding a ballplayer to the club which first signs him by unilateral renewal of the original contract at its expiration. The effect is tantamount to forced renegotiation. A broad construction of the reserve system would embrace the following provisions: Uniform Players Contract — Paragraph 2, 5(a), 6(a-c), 7(b)(1-3), 7(e-c), 7(f)(1-5), 9(a), 10(a-b); Regulations 5 and 7; Major League Rules 3(a), 3(g), 4-A(a) and 9.[15] These provisions embody a reticulate set of

14. Noll, *Alternatives in Sports Policy*, GOVERNMENT AND THE SPORTS BUSINESS, 415 (Roger G. Noll ed. 1974).

15. However, for our purposes, the "core" of the system would encompass the following provisions:

1. Rule 3 of the Major League Rules which provides in part:

> '(a) UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the commissioner . . .
>
> . . . .
>
> '(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no

complex rules and regulations which effectively restrict the twenty-four Major League Clubs from competing *inter se* for playing talent. These anticompetitive practices center on the uniformity and assignability of players contracts and the annual and unilateral right to renew a contract. The result is exclusive control over a player by confining him to his respective team.

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negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.'

2. Rule 4-A of the Major League Rules provides in pertinent part:
'(a) FILING. On or before November 20 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding forty (40) active and eligible players, whom the club desires to reserve for the ensuing season; and also a list of all its players who have been promulgated as placed on the Military, Voluntarily Retired, Restricted, Disqualified, Suspended or Ineligible Lists; and players signed under Rule 4 who do not count in the club's under control limit. On or before November 30 the League President shall transmit all of said lists to the Secretary-Treasurer of the Executive Council, who shall thereupon promulgate same, and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released.'
3. Rule 9 of the Major League Rules provides in pertinent part:
'(a) NOTICE. A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.'
4. Rule 15 of the Major League Rules provides in pertinent part:
'(b) DISQUALIFIED LIST. A player who violates his contract or reservation may be reported to the Commissioner . . . for placement on the 'Disqualified List.' A player on the Disqualified List shall not be eligible to play with any Major League or National Association Club until reinstated.'
5. The Uniform Player's Contract (U.P.C.) provides in pertinent part:
'9(a) The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a member, and the Professional Baseball Rules, in effect at the date of this uniform Player's Contract, which are not inconsistent with the provisions of this contract or the provisions of any agreement between the Major League Clubs and the Major League Baseball Players Association . . .

. . . .

'10(a) On or before December 20 (or if a Sunday, then the next preceding business day) of the year next following last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address . . . If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major

Much of the success of the player reservation system can be attributed to the "tampering rule" (Rule 3-G) which eliminates interteam competition for players and purportedly maintains public confidence and trust in the integrity of the sport. As will be seen, this rule is ineffectual during periods of interleague competition for players. Exclusive control is also accomplished by the placing of a player on the "reserve list" (Rule 4-A(a)) which thereafter precludes a player from playing with or "negotiating with any other club until his contract has been assigned or he has been released." Control is also maintained and preserved by the renewal clause (U.P.C. 10(a)) which grants to the club the exclusive right or option to renegotiate or re-sign a player. The clause is self-perpetuating in that the club can renew all the "terms" of the original contract, including the renewal right. Therefore, at the expiration of the first renewal period the club could utilize the renewal option of the first renewal contract and thereby retain the player for one more period — and so on — ad infinitum. Should a player decline to renew his contract and be disinclined with the prospect of retirement, he is merely placed on the "reserve list." While under reserve status he is prohibited from playing or negotiating with another team, which is likewise precluded from initiating negotiations. These restraints on a player's bargaining power proportionately decrease the compensation he can demand.

The market structure of organized baseball greatly enhances the effectiveness of the aforementioned rules and regulations. The only source from which a baseball club can acquire players of proven major league ability are the rosters of twenty-three other clubs. Likewise, the only market for the sale or trade of athletes of proven capability are the remaining twenty-three major league clubs. Thus, the demand for, and the supply of, proven talent is generated in an exclusive market consisting of the clubs of the American and National Leagues.

HISTORICAL BACKGROUND OF THE RESERVE SYSTEM

Professional baseball's birth was marked by costly and reckless bidding for the services of talented players. This was but one manifestation of a prevailing lack of discipline and responsibility which beset league operations. A result was the acquisition of star players by the wealthier teams which were willing to pay unjustifiably high salaries. This destructive competition led to the collapse of the weaker teams, often in mid-season, and a great disparity in team playing strength among the survivors.[16]

League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year . . .

'10(b) The Club's right to renew this contract, as provided in the subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof.'

16. The manifestly high concentration of star players on the financially stronger clubs led to ridiculously incongruous final standings. In 1875, the Red Stockings, who

The need for regimentation prompted the formation of the National League of Professional Baseball Clubs in 1876. The eight constituent clubs, desirous of operational and financial stability, adopted a constitution which provided for interteam cooperation and the uniform regulation of league affairs. However, salary reductions were not forthcoming and financial instability continued to plague most clubs. Almost two-thirds of a team's operational expenses were earmarked for payroll obligations. Plainly, reckless bidding for talented players perpetuated the league's financial woes.

The concept of a player reservation system was seized upon as the means of dealing with an expensive player market. On September 30, 1879, the National League secretly adopted a reserve rule. The rule took the form of an agreement among team owners giving each the exclusive privilege to negotiate with five of their top players, thereby precluding interteam pirating of top players by financial enticement.[17] By alleviating competition for skilled players, the rule's initial effect was the reduction of players' salaries. Another desirable consequence was the equalization of competition on the playing field.

Prior to 1887, league employment contracts contained no provisions whereby a player directly agreed to his club's privilege of reservation. However, the contracts incorporated by reference such an agreement by a provision which bound a player to abide by the league constitution and national agreement. Thus, "the player thereby assented to become ineligible for engagement by any other club of the league during the season of his engagement by a particular club, or while the option of reengaging him for an ensuing year on the part of that club remained in force."[18] The players became dissatisfied with this particular arrangement, being "unwilling to consent to a form of contract by which they were to be subjected to conditions not mentioned in the contract itself."[19] The players and owners agreed upon the insertion of a clause in the uniform player's contract which directly bound the players to the option to reserve. In return, the owners agreed that only fourteen players could be reserved by a club and no reserved player would be subject to a salary reduction.[20] Upon the

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had cornered the talent market, won 71 games and lost 8 while the second place Philadelphia Athletics finished with a 53-20 record. The talent-stripped Brooklyn Atlantics won two games that year.

17. H.R. REP. No. 2002 *supra* note 11, at 111.

18. Metropolitan Exhibition Co. v. Ewing, 42 F. 198, 203 (C.C.S.D.N.Y. 1890).

19. *Id.* at 203.

20. Article 18 of the Uniform Players' Contract, adopted in 1879, contains the original "reserve clause" or right of reservation:

> Article 18. It is further understood and agreed that the party of the first part shall have the right to 'reserve' the said party of the second part for the season next ensuing the term mentioned in paragraph 2, herein provided, and that said right and privilege is hereby accorded to said party of the first part upon the following conditions, which are to be taken and construed as conditions precedent to the exercise of such extraordinary rights or privileges, *viz.*: (1) That the said party of the second part shall not be reserved at a salary less than that mentioned in the 20th paragraph herein, except by the consent of the party of the

dissolution of the National Brotherhood of Professional Baseball Players (the players' trade association) in 1890, the owners reneged on the aforementioned concessions.

The National Brotherhood of Professional Baseball Players, speaking through John Montgomery Ward, outlined several grievances and abuses generated by the reserve clause. Chief among them were the following disapprobations: (1) the reservation of players the club refused to sign to a contract; (2) the buying and selling of players which he termed "a clear perversion of the original intent of the rule"; (3) the transfer of players by sale or by trade without the players' consent; (4) the blacklisting of a reserved player "for the mere refusal to sign upon the terms offered by the club"; and (5) the practice of farming or "loaning" a player to another club, "much the same as a horse is put out to work for his feed."[21]

The Brotherhood's disillusionment with the reserve system led to the formation of the breakaway player's league in 1889. The upstart league commenced independent operations in 1889 and immediately engaged the services of the older league's most talented performers. The owners' attempts at inter-league enforcement of the reserve system led to a series of court decisions which emasculated the clause and the stability engendered thereby. The issues raised by these cases involved the proper construction of the reserve clause.[22]

One of the first cases to consider the validity of the clause was *Metropolitan Exhibition Company v. Ward.*[23] John M. Ward, a skilled player, signed with the New York Ball Club for the 1889 season. The club had the option to renew his contract for the next ensuing season, presumably upon the same terms and conditions. Ward negotiated a contract with another organization at the close of the 1889 season. Plaintiff organization, claiming the "reserve clause" prohibited the defendant from impairing the renewal right he expressly granted, and upon the force of *Lumley v. Wagner,* sought to enjoin the threatened breach of contract.

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second part; (2) That the said party of the second part, if he be reserved by the said party of the first part for the next ensuing season, shall not be one of more than 14 players then under contract, — that is, that the right of reservation shall be limited to that number of players, and no more.'

Id. at 200.

21. H.R. REP. No. 2002, *supra* note 11, at 32.

22. The "Players League War" thrust the validity of the reserve clause into court. At common law such contracts were rarely specifically enforceable, public policy being opposed to involuntary and acrimonious employment relationships. A narrow exception developed in cases involving express negative covenants, where, by reason of the unique and extraordinary character of the promised performance, an action at law would be wholly inadequate. (*See* Lumley v. Wagner, 1 De G. M. & G. 604, 42 Eng. Rep. 687 (1852).) Simply stated, could a player be compelled to respect his employment commitments through enforcement of the reserve clause and thereby prevent "league jumping." This generated a host of secondary issues: Was the reserve clause sufficiently definite, mutual and reasonable and was the promised performance unique?

23. 24 Abb. N. Cas. 393, 9 N.Y.S. 779 (Sup. Ct. 1890).

The court held the clause lacked mutuality and refused specific enforcement since the club could, upon 10 days' notice, determine and end all employment obligations while the defendant had bound himself in advance for at least one year.[24] The court also held the contract to be too indefinite:

> The failure in the existing contract to expressly provide the terms and conditions of the contract to be made for 1890, either renders the latter indefinite and uncertain, or we must infer that the same terms and conditions are to be incorporated in the one to be now enforced, which necessarily includes the reserve clause, for no good reason can be suggested, if all the others are to be included, why this should be omitted.[25]

It was the latter assumption, *i.e.,* the self-perpetuating nature of the reserve clause, which the court found repugnant. Because the reserve clause would necessarily be incorporated into every new contract if the club could annually and unilaterally renew the contract upon the same terms and conditions, this implied a succession of one-year extensions, ad infinitum. The entire playing life of an athlete would be subject to this exclusive and perpetual option to renew:

> In thus considering the obligations which, under the plaintiff's construction of the contract each has assumed, we have the spectacle presented of a contract which binds one party for a series of years and the other party for ten days, and of the party who is itself bound for ten days coming into a court of equity to enforce its claim against the party bound for years.[26]

In subsequent decisions the courts reiterated the position that where both sides were not equally obligated, the contract was unconscionable and, therefore, unenforceable in equity.[27] At times it is difficult to determine

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24. Clause 17 of Ward's contract read in part:

> 17. It is further understood and agreed that the party of the first part expressly reserves the right, at any time prior to the completion of the period when this contract, by its terms, is to end, by giving the party of the second part ten days' notice of its option and intention so to do, end and determine all its liabilities and obligations under this contract . . .

Id. at 399-400.

25. *Id.* at 414.

26. *Id.* at 415.

27. *See* Brooklyn Baseball Club v. McGuire, 116 F. 782 (C.C.E.D. Pa. 1902) (a contract in which the plaintiff has the option to terminate at any time on giving 10 day's notice will not be specifically enforced in equity); Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630 (1914) (a negative covenant in a baseball player's contract with a club, during the baseball season . . . cannot be specifically enforced by an injunction, where there is a want of mutuality of remedy because of a provision in the contract giving the Club the right to terminate the contract by giving the player 10 days notice); Philadelphia Ball Club, Ltd. v. Hallman, 8 Pa. Cir. Co. 57 (1890) (contract lacking in mutuality and unenforceable).

whether the courts were referring to mutuality of obligation or mutuality of remedy. Although the former predominated, it is fair to say both were considerations leading to the courts' determinations.

Lack of contractual definiteness was also a major consideration. Thus, in *Metropolitan Exhibition Company v. Ewing*,[28] the fatal flaw which rendered the "reserve clause" nugatory was its equivocal and undefined meaning. The court held the parties lacked a definite understanding since the salary terms for the following season were not immediately identifiable and, therefore, the contract could not be specifically enforced.[29]

The "reserve clause" was continually struck down. The courts indicated that the clause's unreasonableness was only surpassed by its unenforceability. However, if a collision course with the antitrust statutes seemed inevitable, the outcome of such an encounter was uncertain. Congressional authority to legislate within the realm of private contracts, which restrain interstate commerce, cannot be doubted. In so doing, the reaches of Congressional power are defined and limited by the Commerce Clause. Thus, in enacting the Sherman Act under the authority of the Commerce Clause, an inevitable jurisdictional prerequisite is that the subject of regulation affect interstate commerce. The Act has no greater dignity than the Clause. However, the exercise of Congressional power has not been consistent, due to varying judicial conceptions of interstate commerce. At the turn of the century the prevailing judicial conception of interstate commerce was restrictive and limited in scope.[30]

A seminal decision was rendered in *American League Baseball Club of Chicago v. Chase*,[31] the first case to address whether the reserve system was an unreasonable restraint of trade at common law. Chase, who played first base for the White Sox, breached his contract and signed with the Buffalo Federals of the upstart Federal League.[32] The White Sox succeeded in

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28. 42 F. 198 (C.C.S.D.N.Y. 1890).

29. The court's interpretation of the reserve clause deserves comment. Holding the privilege of reservation tantamount to an "agreement to agree" the court further stated:

> Consequently the right of reservation is nothing more or less than a prior and exclusive right, as against the other clubs, to enter into a contract securing the player's services for another season. Until the contract is made which fixes the compensation of the player and the other conditions of his service, there is no definite or complete obligation upon his part to engage with the club . . . In a legal sense, it is merely a contract to make a contract if the parties can agree.

Id. at 204.

30. Kidd v. Pearson, 128 U.S. 1 (1888) (manufacturing not within scope of Congressional power over commerce); United States v. E. C. Knight Co., 156 U.S. 1 (1895) (one of the first significant prosecutions under the Sherman Act where the Court held that monopolistic acquisitions of major competitors not within reach of commerce power because acts embraced only manufacturing).

31. 86 N.Y. Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914). *See also*, H.R. REP. No. 2002, *supra* note 11, at 54-55, 130.

32. Similar contract "jumping" throughout the leagues ushered in the era in baseball history known as the "Federal League War." In 1913, a group of moneyed sports entrepreneurs promoted and launched a third major league. The Federal

obtaining a temporary injunction, but the court granted Chase's motion to dissolve. At common law, any contract which unreasonably restrained trade conflicted with a strong public policy favoring free entry into, practice of, and exit from, any trade, business or profession. Thus, to justify a contractual provision which restrained a player from playing for another team, a club would have to demonstrate the manifest reasonableness of the provision in that it did not impose an undue burden or hardship on a player and was no broader than necessary to protect the clubs' interests. The court did not find sufficient grounds to justify the National Agreement and the rules and contracts subsidiary thereto.[33]

Although Chase won the legal battle, the players surely lost the antitrust war. Judge Bissell, in deliberating upon the antitrust aspects of baseball in connection with the Sherman Act, may have unwittingly insulated baseball from future antitrust scrutiny when he declared, "but I cannot agree to the proposition that the business of baseball for profit is interstate trade or commerce, and therefore, subject to the provisions of the Sherman Act."[34]

THE FEDERAL BASEBALL ERA

The dictum in *Chase* was seized upon as the basis for a landmark Supreme Court decision[35] which effectively insulated baseball, on jurisdictional grounds, from the reach of the Sherman Act. The Baltimore Federal League Club, claiming organized baseball had conspired to monopolize the business of baseball exhibitions, brought suit under the Sherman Act. In particular, plaintiff alleged the defendants dismantled the Federal League by purchasing some constituent clubs and by persuading the remaining teams to affiliate with the National League. Plaintiff organization was not asked to join. Mr. Justice Holmes, in speaking for a unanimous court,

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League sought admission into the "national agreement" but found the doors to be closed. Deterred but not crushed, the League indicated they would not respect the reserve clause, which they felt was unenforceable.

33. In American League Baseball Club of Chicago v. Chase, 86 Misc. at 461, 149 N.Y.S. at 17, the court evaluated the reserve system's legality as follows:

> The analysis of the National Agreement and the Rules of the Commission, controlling the services of these skilled laborers, and providing for their purchase, sale, exchange, draft, reduction, discharge, and blacklisting, would seem to establish a species of quasipeonage unlawfully controlling and interfering with the personal freedom of the men employed . . . 'Organized baseball' is now as complete a monopoly of the baseball business for profit as any monopoly can be made. It is in contravention of the common law, in that it invades the right to labor as a property right, in that it invades the right to contract as a property right, and in that it is a combination to restrain and control the exercise of a profession or calling.

34. The court further reasoned that, "Baseball is an amusement, a sport, a game that comes clearly within the civil and criminal law of the state, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce." 86 Misc. at 461, 149 N.Y.S. at 17.

35. Federal Baseball Club v. National League, 259 U.S. 200 (1922).

affirmed the lower court decision by holding professional baseball immune from federal antitrust laws.[36]

Justice Holmes relied on two propositions in reaching this conclusion. First, consistent with the then prevailing narrow definition of commerce, he determined that the business of giving baseball exhibitions was purely local in character. The business of baseball was "purely state affairs."[37] Justice Holmes would not abandon his position despite the interstate structure of the leagues, with clubs in every major city, and the mass movement of fans across state lines to and from ball parks. Even if baseball had economic and social ramifications which radiated beyond state boundaries, the resultant impact was merely an incidental consequence which bore little relevance to the essential consideration, *i.e.,* the exhibition itself. Second, a baseball exhibition, concededly a money-making proposition, fell short of the business activity which characterized the prevailing notion of "trade or commerce." Holmes believed that "personal effort" unrelated to the mechanisms of production was not comprehended by the noun "commerce." Thus, the immunity of baseball was firmly entrenched in Supreme Court precedent.

The next serious threat to baseball's monopsony in the players market occurred shortly after World War II, during an era known as the "Mexican League War." Don Jorge Pasquel, president of the Mexican League, sought to induce major-league players to repudiate their contracts and "jump" to the Mexican League, by offering generous incentives. A. B. "Happy" Chandler, then commissioner of the Major Leagues, instituted a five-year blacklisting policy which effectively boycotted any player from major-league competition who jumped his contract and reserve clause, in an attempt to check a mass departure of star players.[38] The Yankees obtained a temporary injunction which prohibited Pasquel from enticing Yankee players into Mexico. However, they were unsuccessful on a subsequent motion to strike Pasquel's affirmative defense that the "contracts under which plaintiff and other similar clubs engage their players, and the agreements and rules under which the various leagues making up 'organized baseball' conduct their games, are monopolistic, inequitable, unconscionable and against the public policy of the State of New York and the United States of America."[39] The case subsequently lost practical legal effect when Pasquel relented under high salary demands from athletes wary of the severe sanctions imposed by Chandler's ineligibility rules. Nevertheless, eighteen players managed to cross the border only to become disenchanted with Pasquel's circuit. The players' disinclination manifested itself in intermittent pleas for

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36. This was the last case concerning the status of professional team sports under the antitrust laws which was decided by a unanimous Supreme Court.

37. Federal Baseball Club v. National League, 259 U.S. at 208.

38. H.R. REP. NO. 2002, *supra* note 11, at 77.

39. American League Baseball Club of New York v. Pasquel, 188 Misc. 102, 103, 66 N.Y.S.2d 743, 744 (1946).

major-league reinstatement, but the commissioner was adamant and remained unresponsive.[40]

Daniel Gardella, in violation of the reserve clause, played in the Mexican circuit during the 1946 season and consequently was suspended by the commissioner for five years. Gardella brought suit alleging numerous violations of the antitrust laws including sections 1 and 3 of the Sherman Act and section 14 of the Clayton Act.[41] The district court was cognizant of a legal trend which expanded the concept of interstate commerce and which probably eliminated the jurisdictional restraints inherent in the *Federal Baseball* decision.[42] Speculating that the Supreme Court would not adhere to the decision in *Federal Baseball,* but constrained by *stare decisis,* the district court granted defendant's motion to dismiss. On appeal, Gardella found a surprisingly receptive and sympathetic audience in J. Learned Hand and J. Frank. In a two-to-one decision the case was reversed and remanded for trial with instructions to hear Gardella's allegations. J. Hand attributed significance to the technological innovations in communications which effectively transformed baseball into a nationwide media presentation. Accordingly, this broadcasting bonanza had an effect upon commerce, in economic and qualitative terms, which justified a reexamination of the rationale supporting *Federal Baseball.* He viewed the difference between the telegraph and the radio and television as a modification "so great as for practical purposes to make a difference in kind."[43] On the other hand, J. Frank considered *Federal Baseball* an "impotent zombi" in that the Supreme Court "has overruled the precedents upon which that decision was based" and concluded: "the concept of commerce has changed enough in the last two decades so that, if the case were before the Supreme Court *de novo,* it seems very likely that the Court would decide the other way."[44]

Despite Judge Frank's unconcealed optimism, the case was settled out of court before trial and Cardella, along with seventeen other Mexican ineligibles, was reinstated. What motivated the reconciliation between Chandler and the blacklisted players is open to debate. One can only speculate that the fear of Supreme Court review, with possible reconsideration of the *Federal Baseball* exemption, provided the impetus for Chandler's change of heart.

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40. H.R. REP. No. 2002, *supra* note 11, at 79.

41. Gardella v. Chandler, 79 F. Supp. 206 (S.D.N.Y. 1948), *rev'd,* 172 F.2d 402 (2d Cir. 1949).

42. *See, e.g.,* United States v. South Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (holding insurance industry to be engaged in interstate commerce and therefore subject to the provisions of the Sherman Act); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (this decision is noted for the abandonment of the limited and restrictive treatment of the meaning of commerce and trade by upholding the constitutionality of the National Labor Relations Act of 1935); Wickard v. Filburn, 317 U.S. 111 (1942) (holding Congressional power under the Commerce Clause extended to the regulation of the consumption of home grown wheat). The trend clearly was toward an expanding concept of commerce, subsuming what had been considered local economic affairs.

43. Gardella v. Chandler, 172 F.2d 402, 407 (2d Cir. 1949).

44. *Id.* at 409.

If these fears existed, they certainly proved chimerical when the Supreme Court reaffirmed *Federal Baseball* in *Toolson v. New York Yankees, Inc.*[45] The short opinion merely applies the doctrine of stare decisis without reconsidering the validity of the assumptions upon which the 1922 decision was based. *Toolson* rests on the proposition that Congress had no intention to bring baseball within the ambit of antitrust legislation. However, in contrast to *Federal Baseball,* a piecemeal translation of the language used in *Toolson* suggests that baseball's antitrust immunity was no longer derived from the jurisdictional limitations inherent in *Federal Baseball.* Rather, baseball's immunity appears to have evolved into a full-fledged exemption, independent of any vindicatory rationale. The Court merely supports its holding on baseball's putative and detrimental reliance on the earlier decision of 1922. There was no need to disturb a settled point of law if it would disturb a settled business practice. Thus, the unfettered growth of the sport, which J. Learned Hand believed forecasted its antitrust doom, was seized upon as the basis for reaffirming *Federal Baseball.* Although the court was guided by practical and prudential motives when it held that only Congress could avoid the inequities of a retroactive impact if the exemption was to be abandoned, one could argue that a conscientiously drawn opinion could have avoided such consequences. However, expediency prevailed and Congress has not yet accepted its invitation to take remedial action.[46]

The Court generated a certain amount of ambiguity when it sidestepped the issue of whether baseball's activities as of 1953 constituted a sufficient affect on interstate commerce to bring it within the reach of the Sherman Act. The ambiguity in *Toolson* can lead to two conclusions regarding baseball's interstate involvement during that period. If viewed merely as a reaffirmation of *Federal Baseball,* then the court tacitly held baseball not to be engaged in interstate commerce. Alternatively, if *Toolson*'s reaffirmation of baseball's immunity is based solely on the sport's three-decade reliance on *Federal Baseball,* then the commerce issue was irrelevant. This latter assumption appears to be the unarticulated premise of the Court. To have decided otherwise would have appeared ludicrous in light of the tremendous developments in broadcasting and the extensive cultivation of "farm systems,"[47] which had transformed baseball into a multi-million dollar enterprise and served to distinguish baseball during the interlude between *Federal Baseball* and *Toolson.*

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45. 346 U.S. 356 (1953).

46. *See* Post-Trial Memorandum of All Defendants Other Than Bowie Kuhn, Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970). Since its invitation to take remedial action in 1953, Congress has conducted five separate hearings in advance of the 92nd Congress. *See also,* Flood v. Kuhn, 407 U.S. at 281 n.17, where the Supreme Court lists the plethora of ineffectual bills introduced in Congress since the *Toolson* case which concerned antitrust and baseball.

47. When baseball clubs in leagues of lower classification are owned or controlled by a baseball club of higher classification, usually a major league club, they comprise a farm system or chain. They are used to develop or season young talent. *See* H.R. REP. No. 2002, *supra* note 11, at 177.

Further clarification of the *Toolson* rationale came in *Radovich v. National Football League,*[48] which held the business of football within the purview of the Sherman Act. In limiting the applicability of the antitrust immunity created by *Federal Baseball* and *Toolson* to the sport of professional baseball, the Court was compelled to explain why stare decisis did not require similar treatment with respect to football. In a rare gesture evincing a candid recognition of fallibility, they noted that the present distinction between football and baseball was "unrealistic," "inconsistent," and "illogical," and that they would have no doubts "were we considering the question of baseball for the first time upon a clean slate."[49] Continued Congressional inaction dictated that the exception (or exemption) be maintained but not expanded.[50]

In an antitrust suit brought by former American League umpires who were allegedly discharged because of their endeavor to organize for collective bargaining purposes, Judge Friendly freely acknowledged "that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days" and that the "rationale of *Toolson* is extremely dubious."[51] Deferring to the Supreme Court the "exclusive privilege" of overruling its controversial decision in *Federal Baseball,* the Judge nevertheless revealed his sentiments when he stated, "While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy dispatch."[52]

When the Supreme Court once again rebuffed an attempt to bring baseball under antitrust scrutiny, Judge Friendly's guarded optimism proved too favorable a construction of future developments in baseball. In 1969 the St. Louis Cardinals "traded" Curt Flood to the Philadelphia Phillies without obtaining his prior consent, nor did they inform him of the

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48. 352 U.S. 445 (1957), *reh. denied,* 353 U.S. 931 (1957).

49. *Id.* at 452.

50. The Court clarified *Toolson* when it quoted from United States v. Shubert, 348 U.S. 222, 230 (1955), where it said, "In short, *Toolson* was a narrow application of the rule of stare decisis." Later the Court quoted from United States v. International Boxing Club, 348 U.S. 236, 242-43 (1955), where it said, "Toolson neither overruled Federal Baseball nor necessarily reaffirmed all that was said in Federal Baseball," and that *Federal Baseball* "could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise." The *Radovich* Court then defended its own holding by stating:

> It seems that this language quoted would have made it clear that the Court intended to isolate these cases by limiting them to baseball, but since Toolson and Federal Baseball are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i.e.,* the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to — but not extend — the interpretation of the Act made in those cases.

Radovich v. National Football League, 352 U.S. 451 (1957).

51. Salerno v. American League of Professional Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied, sub nom.,* Salerno v. Kuhn, 400 U.S. 1001 (1971).

52. *Id.* at 1005.

development until after the fact.[53] Flood's complaint contained four causes of action.[54] He alleged that the reserve system and its boycott sanction violated the Sherman Act, various state antitrust laws and the Canadian antitrust laws, the common law sanction against unreasonable restraint of trade, and the thirteenth amendment's prohibition against involuntary servitude. The district court rendered judgment in favor of Kuhn[55] and was subsequently affirmed by the court of appeals.[56] The Supreme Court adamantly refused to reverse, holding professional baseball's immunity from antitrust laws a time-honored and established aberration entitled to the benefit of stare decisis[57] and once again deferred to Congress the opportunity to take remedial action.[58] As to petitioner's state antitrust claim, federal preemption under the commerce clause was held to preclude state regulation, which was deemed to impose an undue burden on interstate commerce because of possible extraterritorial effects and the lack of a strong state interest in regulating baseball.[59]

Thus, the Court's settled aversion to the sudden and unexpected imposition of the antitrust statutes to an enterprise adapted to a state of

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53. Flood, 31, a sensitive black athlete who is a skilled portrait painter, expressed no objection to playing for the Philadelphia Club; he simply said he could not accept being treated as 'property.' In a letter to baseball commissioner, Bowie Kuhn, Flood said that 'I believe I have the right to consider offers from other clubs before I make a decision.'

NEWSWEEK, January 12, 1970, at 36.

54. Flood v. Kuhn, 312 F. Supp. 404 (S.D.N.Y. 1970).

55. Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970).

56. Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971).

57. Mr. Justice Holmes, who delivered the opinion of the Court in *Federal Baseball,* revealed his sentiments toward stare decisis in a much-quoted passage from a law review article he authored some 24 years earlier:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).

58. "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court." Flood v. Kuhn, 407 U.S. 258, 284 (1972). *But see, id.* at 287 n.3 (Douglas, J., dissenting), quoting Helvering v. Hallock, 309 U.S. 106, 119–21 (1940):

> Nor does want of specific Congressional repudiation . . . serve as an implied instruction by Congress to us not to reconsider, in the light of new experience . . . those decisions. . . . It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines.

59. A paradox of sorts is presented in the manner in which Flood was precluded from asserting a state antitrust claim. Baseball's judicially created exemption was based on the proposition that the sport was not sufficiently entrenched in interstate commerce to justify federal regulation. The doctrine of stare decisis has propagated this notion and had bound Flood to the holding in *Federal Baseball.* Conversely, modern decisions have recognized the economic growth of the sport since 1922 and have consequently denied local regulation of an essentially interstate business because of the need for uniformity of regulation.

immunity served to justify baseball's continued preferred status. The majority (5-3) opinion, delivered by J. Blackmun, sidestepped the merits of Flood's claim and instead tossed the ball to Congress. Noting professional baseball "is a business engaged in *interstate commerce*" whose antitrust exemption is therefore an "exception and an anomaly" in that "other professional sports operating interstate — football, boxing, basketball, and presumably hockey and golf — are not so exempt," the Court emphasized that it

> continued to be loath, 50 years after *Federal Baseball* and almost 2 decades after *Toolson* to overturn those cases judicially when Congress, by its *positive inaction* has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively. [Emphasis supplied.][60]

It is useful to note at this juncture that the respondents had argued that the reserve system, as part of a collective bargaining agreement, was the subject of mandatory bargaining; therefore, the federal labor statutes preempted federal antitrust laws and, consequently, exempted the reserve system from antitrust scrutiny. In the instant case the Court felt it superfluous to rule on the argument. As will be demonstrated, this juncture represents the pinnacle of the club owner's position vis-a-vis player relations and control devices.

MESSERSMITH'S ATTACK

Judge Cooper, who presided over the district court in the *Flood* case, was convinced that if baseball's age-old serfdom was overdue for major modifications, "negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned" and that "the reserve clause can be fashioned so as to find acceptance by players and club."[61] Ballplayers, disillusioned with Supreme Court adamance and Congressional indifference, decided a work stoppage might enforce compliance with their demands for collective bargaining. Consequently, by striking before the start of the 1973 regular season, the players were able to obtain this valuable concession. Shortly thereafter, the National Baseball League and the Major League Baseball Players'

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60. Flood v. Kuhn, 407 U.S. 258, 283-84 (1972). Justice Marshall's dissenting opinion challenged the continued reliance on Congressional inaction as a basis for justifying denial of relief. Marshall considered Congressional inaction as tacit approval of prior judicial action which brought other sports within the purview of antitrust legislation. Thus, he asked rhetorically:

> Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. . . . But the Court may have read too much into the legislative inaction.

Id. at 292.

61. 316 F. Supp. at 282, 284.

Association (formed in 1966) hammered out a collective bargaining agreement to take effect in 1973. It provides that any "grievance" which concerns the interpretation of, or compliance with, the provisions of the collective bargaining agreement or any agreement between a player and a club should be directed to a three-step grievance procedure.[62] A dispute not satisfactorily resolved at the lower level can be appealed to an arbitration panel by either the player or owner. The panel is composed of three arbitrators: a chairman and impartial arbitrator who is selected by the mutual agreement of the parties, a Club Owner's arbitrator, and a Players' Association arbitrator.[63] Any subject of dispute within the definition of "grievance" circumscribes both the jurisdiction of the panel and the remedies of the parties.[64]

The acid test of the efficacy of the grievance procedure and for that matter, the continued validity of the reserve system, was administered by pitcher Andy Messersmith. Messersmith's historic "freedom fight" was a legal "bombshell" which has seriously disrupted baseball's status quo. The Messersmith decision thrust baseball into a metamorphic era in which the distinguishing characteristic will be pronounced changes in player-owner relations in the area of player employment mobility.

Andy Messersmith's confrontation with the reserve system began in the spring of 1975. He had signed with the Los Angeles Dodgers in 1974 for a purported salary of $90,000. By virtue of his emergence as a premier pitcher after compiling an imposing won-lost record (20-6), he demanded $150,000 for the 1975 season. The Dodgers' response was either take $90,000 or be traded. As contract negotiations progressed, the Dodgers became more accommodating toward the salary demands but remained uncompromising toward Messersmith's demand for a "no-trade" or "trade on approval" clause in his contract.[65] The parties were unable to agree, and Messersmith performed during the 1975 season without signing a new contract.

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62. BASIC AGREEMENT BETWEEN AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, Article X, Jan. 1, 1973 [hereinafter referred to as BASIC AGREEMENT]. *See also,* Halverson, *Arbitration and Antitrust Remedies,* 30 ARB. J. 25, 26 (1975), where the author discussed recent efforts to develop antitrust remedies which utilize arbitration procedures as an expeditious and equitable mode of relief:

> Because the central issues in antitrust law have traditionally concerned whether various activities are illegal, relatively less attention has been given, in the past, to developing the most effective remedy for each particular situation which would restore competition and protect economic freedom. . . . Antitrust law is on the threshold of a period of extensive innovation which will see the development of [arbitrational] remedies which are more effective in preserving competition.

63. *Id.* at article X, A 1(c)(10) and B.

64. *Id.* at article X.

65. Purportedly, the league had instructed the Dodgers to refuse Messersmith's demand for a no-trade clause because it would set a bad precedent. TIME, April 26, 1976, at 74.

Nevertheless, he did play under contract that season by virtue of the "renewal right" contained in his 1974 contract.[66]

The Players' Association instituted grievance procedures under the Basic Agreement on October 7, 1975, by filing a grievance on Messersmith's behalf. The Players' Association alleged that Messersmith completed the "renewal year" of his 1975 renewed contract on September 29, 1975, and from that date "there was no longer any relation" between Messersmith and Los Angeles and that he "became free to negotiate with any of the twenty-four clubs with respect to his services for 1976"; and that this right was frustrated in that the clubs "have conspired to deny Mr. Messersmith that right and have maintained the position that the Los Angeles Club is still exclusively entitled to his services."[67]

The response to both grievances came on October 24, 1975, where the Player Relations Committee of the Major Leagues of Professional Baseball Clubs contended that "the claims made by the Association are not within the scope of the grievance procedure and the claims are not subject to the jurisdiction or authority of the Arbitration Panel." The answer further stated: "It is our position that the substance of these claims is totally without merit and that both players remain properly reserved by their respective clubs."[68]

The grievances were to be heard on November 21 and November 24, 1975. However, during the interlude, the Kansas City Royals instituted an action praying for a declaratory judgment which would rule the two grievances non-arbitrable because the panel lacked jurisdiction. The Club also wished to enjoin the Players' Association from arbitrating the grievances. Within a short time the remaining Major League Clubs became plaintiff-intervenors. At the first pretrial conference the parties entered into a written stipulation of record wherein they agreed to proceed to arbitration; and, if the jurisdictional dispute was not satisfactorily resolved by the panel, it could be resubmitted to the court for redetermination on the basis of the arbitration record.[69] The parties then proceeded to arbitration.

The clubs and the league took the position that the panel need not concern itself with the merits of the two grievances inasmuch as the grievances were not properly before the panel due to deficient subject matter

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66. *See* UPC section 10(a), *supra* note 15.

67. *In re* Messersmith, Grievance No. 75-27, Dec. No. 29, at 2 (1975). The Players Association also filed a companion grievance on behalf of Dave McNally of the Montreal Expos (Grievance No. 75-28). The grievance contained allegations which approximate those contained in the Messersmith grievance (Section 10(a) of the UPC). However, McNally had retired in mid-season rather than play out his renewal year. Therefore, McNally was placed on the disqualified list whereas Messersmith was placed on the reserve list. Thus, with the exception just noted, both grievances are based on similar facts, and accordingly, the decision is directed primarily to Messersmith.

68. *In re* Messersmith, Grievance No. 75-27, Dec. No. 29, at 3 (1975).

69. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 236 (W.D. Mo. 1976).

jurisdiction. To substantiate their contention of a jurisdictional defect, they relied primarily on article XV of the Basic Agreement.[70] Simply stated, the league's position centered on the putative incompatibility between the exclusionary language contained in article XV and the grievants' claim, which the league considered in derogation of subject matter held exempt from the grievance procedure. The owners contended that the requested relief would impair the "core" of the reserve system; that Major League Rules 4-A (reserve list) and 3(g) (tampering) are part of the "core"; and that the panel's jurisdictional grant is entirely contained within the Basic Agreement. Therefore, since an arbitrable grievance must be founded on an "agreement" between the Players' Association and the clubs, and since article XV expressly declares that the Basic Agreement's grievance procedures "do not deal with the reserve system," the present grievances were wholly dehors the Basic Agreement's scope.[71] The League concluded that the article should be honored as an exclusionary clause.

On the other hand, the Players' Association contended that the panel was competent to hear the particular grievance inasmuch as a "grievance" is defined as a dispute which "involves the interpretation of, or compliance with, the provisions of any agreement . . . between a Player and a Club,"[72] and the reserve system's "core" elements are patently the subject of such an "agreement." Hence, since both grievances address themselves to the probable meaning, purpose and enforceability of mutually agreed upon contractual provisions of the Uniform Players Contract, the panel had jurisdiction to hear the complaints.[73]

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70. Article XV of the BASIC AGREEMENT provides:

Except as adjusted or modified hereby, this Agreement does not deal with the reserve system. The Parties have differing views as to the legality and as to the merits of such system as presently constituted. This Agreement shall in no way prejudice the position or legal rights of the Parties or of any Player regarding the reserve system.

During the term of this Agreement neither of the Parties will resort to any form of concerted action with respect to the issue of the reserve system, and there shall be no obligation to negotiate with respect to the reserve system. (Emphasis supplied.)

71. *In re* Messersmith, Grievance No. 75-27, Dec. No. 29, at 9 (1975). That article XV removed the "core" of the reserve system from the scope of article X was buttressed by the league's contention that the Players Association had never agreed to the reserve system (a position inconsistent with the league's stance in *Flood*). The league contended that the reserve system was a managerial prerogative. Since the parties were never in accord as to the reserve system, that in itself removed it from the purview of article X, which only concerns "the interpretation of, or compliance with, the provisions of any agreement between the Association and the Clubs." The Players Association's position is also inconsistent with their stance in *Flood*, where they firmly held that the reserve system was perpetual. Chairman Seitz disregarded the aforementioned contradictions. He recognized that parties in court actions often make allegations which are incompatible and contrary to what they would maintain in other "fora and circumstances." *Id.* at 22.

72. Flood v. Kuhn, 316 F. Supp., at 282, 284.

73. All of the "core" elements of the reserve system are the subject of agreement between the parties inasmuch as section 9(a) of the Uniform Players Contract expressly provides that the players agree to "accept and abide by" the Major League

Chairman Seitz squarely faced the dilemma when he asked: "What does it mean when the Basic Agreement professes not to deal with the reserve system if the Players Contract incorporated into and made a part of that Basic Agreement actually contains provisions which are components of that system?"[74] What perplexed Seitz was the seeming paradox contained in his rhetorical question. On the other hand, the Basic Agreement does not "deal" with the reserve system, while conversely, its own provision (article III) absorbs and incorporates the "core" elements of the reserve system.

Seitz, sustaining the panel's jurisdiction over both grievances,[75] proceeded to resolve the apparent contradiction by a judicious examination of the historical development of article XV. It appears that the emergence of article XV coincided with the pendency of the *Flood* case. According to Seitz, it is within this context that the apparent purpose and motivating factors behind article XV's genesis can best be understood.[76] Thus, article XV was an armistice of sorts; the parties agreed to a temporary suspension of hostilities until Curt Flood's Supreme Court battle was decided.

This construction of article XV is buttressed by the Players' Association's further explanation of the article's intended purpose. During the "cease fire" period the Players' Association had temporarily acquiesced, however reluctantly, to the reserve system. The Association expressed concern that this acquiescence rendered it susceptible to legal attack by any player who is alleged to be adversely affected by the player reservation system. Wary of adverse legal consequences flowing from a suit charging complicity in an agreement which was possibly violative of the antitrust laws, the "does not deal" language was incorporated as a legal barrier or defense. Thus, the Association's reluctant compliance with the reserve

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Rules, *i.e.*, rule 4-A (reserve list) and rule 3(g) (tampering). Also, the players directly agreed to the clubs "renewal right" contained in section 10(a) of the Uniform Players Contract. Thus, the players contended that by virtue of section III of the BASIC AGREEMENT, which incorporates the terms of the Uniform Players Contract, rules 3(g) and 4-A and section 10(a) are not immune from the grievance and arbitration provisions of the BASIC AGREEMENT.

74. *In re* Messersmith, Grievance No. 75-27, Dec. No. 29, at 19 (1975).

75. *Id.* at 31.

> I find nothing in that Basic Agreement or in any other document evidencing the agreements of the parties, to exclude a dispute as to the interpretation or application of Section 10(a) of the Uniform Players Contract or the Major League Rules dealing with the Reserve System from the reach of the broad grievance and arbitration provisions of Article X.

76. Clearly, in the 1968 and the 1970 agreements, the Association signalled its dissatisfaction with the reserve system as then constituted and as the league desired to maintain it for the future; but pending . . . the conclusion of the Association's broadside court attack on the reserve system in the *Flood* litigation, the resolution of disputes as to the meaning, extent and modifications (if any) of the reserve system was to be held in abeyance.

Id. at 21. Also lending credence to this construction was the fact that Arthur Goldberg, counsel for Curt Flood, originally suggested insertion of the exclusionary language in article XIV of the 1970 BASIC AGREEMENT, the predecessor of article XV. Goldberg felt such a clause would avoid the possibility of prejudicing the *Flood* litigation if the Association were charged with having agreed to the reserve system.

system was deemed immune from possible attack. Seitz found the proffered explanation credible although one might find it dubious in light of the Association's feverish support of the petitioner in the *Flood* case. Seitz expressly refrained from passing on the soundness of the claimed defense against a possible charge of federation with the proponents of the reserve system. Thus, article XV was denied a literal reading.

Also supporting the chairman's holding was the fact that the broad provisions of article X of the 1970 Agreement defining grievance, while expressly excluding certain disputes from its coverage, conspicuously omitted any reference to the reserve system in the list of exclusions.[77] Further evidence of the article's intended purpose was the fact that no jurisdictional objection was voiced before the panel in the *Hunter* case.[78] Notwithstanding article XV, a number of prior disputes concerning the reserve system were arbitrated without jurisdictional protestation. The league, relying on its dichotomization of "core" and "peripheral" reserve clause elements, argued that only "core" aspects were excluded from the grievance procedure, a nice distinction which article XV fails to make. Seitz concluded that a tribunal's jurisdiction is not determined by the legal importance or possible consequences of a dispute but from the nature of "essence" of the dispute.[79] The last important basis for the jurisdictional holding concerned a confirmatory letter of understanding from the Association to the League presidents, which they acknowledged. Seitz interpreted this as an indication that the reserve system was within the scope of the Basic Agreement.[80]

Seitz's next task, having disposed of the jurisdictional issue, was to evaluate the merits of the alleged wrong upon which the grievant's complaints were grounded. The Association, taking a novel position, claimed Messersmith's completion of his renewal year effectively severed any previously existing contractual bond with the Dodgers and, therefore, as a free agent, he was denied the right to freely negotiate with other clubs due to a league conspiracy designed to confine employment opportunities within the exclusive sphere of the Dodgers. If Messersmith had brought an antitrust action, the restrictive and cooperative arrangement presently

77. *Id.* at 27-28 (Seitz relied on the legal maxim, *inclusio unius, exclusio alterius, i.e.,* the inclusion of one is the exclusion of another).

78. *Id.* at 27 n.1. In *Hunter,* Decision No. 23 (1974) (Seitz, Arbitrator) (unpublished) James "Catfish" Hunter, once a pitcher for the Oakland Athletics, had arranged with Charles O. Finley, general manager and owner of the club, for a particular deferred compensation arrangement wherein Hunter could select the initial recipient of his salary. Finley refused when Hunter requested that the money be paid to an insurance company. Thereafter, Hunter elected to terminate his contract under UPC section 7(a) which provides in part:

> The player may terminate this contract upon written notice to the Club, if the Club shall default in the payments to the Player . . . or shall fail to perform any other obligation agreed to be performed.

The arbitration panel declared Hunter a free agent and the issue of jurisdiction was not raised until appeal.

79. *In re* Messersmith, Grievance No. 75-27, Dec. No. 29, at 27 n.1 (1975).

80. *Id.* at 29-30.

alleged would probably have been pleaded as a group boycott or concerted refusal to deal. In sum, the Association argued that a condition precedent to the exercise of Major League Rules 4-A(a) and 3(g)[81] is the existence of a contractual relationship between a player and a club and that such a relationship terminated at the expiration of the first renewal year.

The league's position, stated as an affirmative defense, was based on their once authoritative construction of the Uniform Players' Contract construed in light of the Major League Rules. Relying on the concept of exclusivity of reservation made possible by Major League Rule 4-A(a) which provides for the filing and promulgation of the "reserve list," which is supplemented by the constraints of Rule 3(g) which prohibits other clubs from negotiating with listed players, the league maintained that Los Angeles had the exclusive right to Messersmith's services.[82] According to the league, retention of the right to renew, by virtue of Rules 4-(A)(a) and e(g), remains in force regardless of the panel's ultimate interpretation of section 10(a) of the Uniform Contract. Thus, even if section 10(a) is expended upon its original exercise in creating the first "renewal year" contract, *i.e.*, not self-perpetuating, the Major League Rules would independently restrict subsequent player mobility. Therefore, the central issue was whether the alleged consequences of the Major League Rules were thereby rendered nugatory.

Seitz sustained the Association's position.[83] He conceded that the law of contract construction permitted successive renewals of the terms of an agreement if the parties actually manifested such an intention by explicit and definite provisions to that effect. If such an agreement is not expressly dealt with in an integrated writing, it will not be constructed by implication. Seitz held there was nothing in section 10(a) which expressly allowed for extended renewal periods.[84] Thus, the chairman, by drawing an analogy to real estate leases, adopted a cannon of construction which precluded successive renewals absent an express agreement to that effect.

Seitz also labored under difficulties trying to imply a right of successive renewals from the "on the same terms" language of section 10(a). In a contract calling for the rendition of personal services such an implication

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81. *See* Major League Rules 4-A(a) and 3(g), *supra* note 15.

82. *In re* Messersmith, Grievance No. 75-27, Dec. No. 29, at 40 (1975), wherein the league contended that when a club renews a player's contract for the renewal year, the contract in force during that year contains the "right of renewal" clause as one of its terms, entitling the club to renew the contract for successive years.

83. "I have reached the conclusion that, as a matter of contract construction, the position of the Players Association in the dispute has merit and deserves to be sustained." *Id.* at 35-36.

84. *Id.* at 42, the chairman cited Brown, Weelock, Harris, Vought & Co., v. One Park Ave. Corp., 134 Misc. 313, 315, 235 N.Y.S. 297, 298 (1929), wherein the court held that an option to renew contained in a lease will be interpreted as expended upon its first exercise, absent an express agreement for successive renewals, and Albany Sav. Bank v. R. E. Gigliotti Motor Sales of Utica, 162 Misc. 468, 469, 295 N.Y.S. 779, 781 (1937), wherein the court held that an option to renew could be exercised but once absent express language allowing for successive renewals.

was felt to be incongruous and repugnant. This conclusion was bolstered by reference to recent decisions which construed almost identical renewal provisions in professional basketball contracts. In the *Barry* case,[85] the San Francisco Warriors were denied injunctive relief in their effort to enforce a renewal option beyond the first renewal year. The court, citing the *Barnett* case,[86] held the Ohio court's construction of the contract was a "reasonable, practical construction of the renewal option" and concluded that a similar construction should obtain in the *Barry* case. Seitz also cited section 35 of the N.B.A. Constitution as a provision whose purpose and effect was analogous to baseball's "tampering rule" but found the Basketball Association's prohibition only applicable to players under contract. Thus, if a contractual bond was a functional prerequisite to the application of the N.B.A. reserve system, the league's contention that a player is subject to reservation regardless of characterizing the prior contract as expired seemed even less persuasive. Conversely, the Association's contention that there can be no exclusive reservation in the absence of a "nexus" or "linkage" in the form of a continued contractual bond, gained cogency.[87]

By examining other league rules which pre-conditioned their application on a "nexus" or contractual bond, Seitz concluded, "that, absent a contractual connection between Messersmith and the Los Angeles Club . . . the Club's action in reserving his services . . . was unavailing and ineffectual in prohibiting him from dealing with other clubs."[88]

The impelling effects of this decision will be discussed at a later point.[89] However, the holding was not inevitable and one may question whether the chairman drew upon enough external circumstances which could have substantiated the league's position.[90] The long history of the reserve system

85. Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969).

86. In Central N.Y. Basketball, Inc. v. Barnett, 88 Ohio L. Abs. 40, 181 N.E.2d 506 (1961), the court held the renewal option could be exercised for only one additional year, and therefore, the renewal provision was not deficient in mutuality and was supported by adequate consideration.

87. *In re* Messersmith, Grievance No. 76-27, Dec. No. 29, at 56 (1975).

88. *Id.* A similar result was reached regarding the McNally grievance.

89. In Kansas City Royals v. Major League Players Ass'n, 409 F. Supp. 233, 251 n.12 (W.D. Mo. 1976), Judge Oliver stated that because of the absence of positive assurances to the contrary, the panel's jurisdiction would be sustained. He also refused to reconsider the merits of the substantive dispute and held that the award would not be set aside because it drew its essence from the collective bargaining agreement. The club owners blasted Seitz, claiming:

> the arbitrator arrogated to himself jurisdiction of the purported grievance . . . determined that the historic Reserve System was something quite different from what everyone had thought it was [and] with a stroke of a pen . . . adopted a baseless and disingenuous 'theory' of the Association . . . fundamentally upsetting baseball's status quo and putting at risk millions of dollars; [that] the Reserve System has been destroyed, as utterly as if by antitrust decree and that if the arbitrator's award is permitted to stand, the clubs will have lost — by a spurious and arrogant theory of contract 'interpretation' — the very thing they successfully defended in Flood.

90. However, a few comments seem appropriate at this time. Although the words "interpretation" and "construction" are sometimes used interchangeably, referring to

certainly bears upon the league's actual intent regarding the renewal right. Nevertheless, such considerations were irrelevant in that subjective intention is plainly inapposite in the law of contract construction. Seitz's holding was most likely attributable to poor draftsmanship of the pertinent provisions and/or the league's state of complacency generated from years of success and positive reinforcement in the antitrust arena. The owners may have overconfidently assumed that the reserve system was so ensconced in legalized perpetuity as to become unassailable in any context.

However, that Seitz performed his duties in a professional manner was vindicated on appeal when J. Oliver stated: "this court can find nothing in any of the words spoken by the impartial Arbitrator . . . which can fairly be said to support the charge that Mr. Seitz did anything other than discharge his duties . . . with the highest sense of fidelity, responsibility and intelligence."[91] The circuit court agreed.[92]

Prudence dictates that one should not overstate the significance of the *Messersmith* decision. It neither approximates legal precedent nor does it remove the protective canopy of stare decisis. The jurisdictional grant and authority of the panel are derived solely from the collective bargaining agreement. The viability of the present award is uncertain. Its future impact could be mitigated by good faith collective bargaining. Although highly unlikely, the parties are free to disregard at any time the decision of the quasi-judicial arbitration tribunal. However, it is improbable that the reserve system will ever regain the exclusive control over play allocations that distinguished it as one of the foremost anomalies in antitrust history.

BEYOND MESSERSMITH

Predictably, the *Messersmith* decision spurred an unprecedented number of players to opt for free agency in the open market by refusing to sign 1976 contracts. It has been estimated that at least eighty-five players immediately took advantage of the situation.[93] During the existence of the Basic Agreement and prior to the *Messersmith* decision, there were only three players in such circumstances.[94] Whether this state of affairs has prompted owners with readily disposable financial resources to overextend themselves in reckless bidding "wars" and thereby dislocate the competitive balance of the league, remains to be seen. Although many eligible players

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the process of determining the meaning of written instruments and statutes, a technical distinction exists regarding the methodology employed. Conceptually, interpretation consists in constructing the "four corners" or written text only, while construction utilizes extrinsic considerations and related circumstances as an aid in determining the parties' intentions. Seitz certainly was cognizant of this distinction, and he utilized numerous extraneous factors in arriving at his holding.

91. Kansas City Royals v. Major League Players Ass'n, 409 F. Supp. 233, 251 n.12 (W.D. Mo. 1976).

92. Kansas City Royals v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976).

93. TIME, April 26, 1976, at 73.

94. *In re* Messersmith, Grievance No. 75-27, Dec. No. 29, at 57 n.1 (1975).

were distributed throughout the leagues in the October of 1976 free-agent draft, only the 1977 divisional playoff races will accurately reflect a shift in interteam competition on the playing field.

The ramifications of the *Messersmith* decision are complex. Investments in player personnel contracts represent a significant part of every club's capital investments.[95] Therefore, an essential aspect of the business of professional baseball is the buying, trading, selling and assigning of player personnel contracts. Access to the exclusive players' market is regulated and restricted by a set of rules, foremost of which is Rule 10 (waiver rule) of the Major League Rules. Rule 10 prohibits a club from selling, assigning or trading a player between June 16 (12:01 a.m.) and midnight of the last day of the championship season except if various waiver procedures are followed. Once a club relinquishes their exclusive rights to a player, the rule provides that he must first "clear waivers" before he can freely negotiate with another club. To clear waivers, the potential transferee club must first purchase the exclusive right to negotiate with the player by payment of a sum fixed by the Rule. Thus, after June 15 a player cannot be traded or sold for more than the $20,000 waiver price.

Prior to the *Messersmith* decision, the waiver rule only affected marginal players in that a club never relinquished their exclusive right to talented and valuable players because of the perpetual nature of the reserve system. Since the collapse of the reserve system, any talented player who is unsigned during his option year (nearing free-agent status) must be sold or traded before the June 15 deadline if the team owner is to realize a return on his investment. After that date the marketable value of such a player is artificially fixed by the waiver rule. The rights to a player's services are then virtually worthless. Once such a player attains free-agent status, he is totally valueless to his former employer who receives no compensation.

On June 15, 1976, Charles O. Finley, owner of the Oakland Athletics, sold and assigned all rights to the services of Joe Rudi, Rollie Fingers and Vida Blue. Rudi and Fingers were sold to the Boston Red Sox for $1,000,000 each while Blue went to the New York Yankees for $1,500,000. Each sale was consummated a few hours before the aforementioned spring trading deadline. If Finley had failed to strike a bargain, the waiver rule would have rendered properties worth millions of dollars virtually valueless in that each player was playing out their options.

On June 18, 1976, Bowie Kuhn, acting in his capacity as baseball commissioner, ordered all three transactions voided. The grounds for disapproval were, inter alia, that the transactions were "inconsistent with the best interest of baseball, the integrity of the game and the maintenance of public confidence in it."[96] Kuhn felt that the present "unsettled circumstances" of the reserve system and the "highly competitive circum-

95. Owners anticipate the free assignability of players' contracts when negotiating salary terms and related matters. Also, player development costs in the form of subsidized "farm systems" run well over a million dollars a year.

96. Plaintiff's exhibit the complaint, Charles O. Finley & Co. v. Kuhn, No. 76 C 2358 (N.D. Ill., June 25, 1976). The exhibit consisted of a Western Union Informaster

stances" of professional baseball militated against the endorsement of these transactions, which are usually perfunctorily approved.[97] The commissioner in defending his actions, argued that if such transactions were permitted, it would encourage the buying of success, by the more affluent clubs, arouse public suspicion, undermine the traditional and sound methods of player development and acquisition, and vitiate the earnest effort to preserve the competitive balance in the league.

Charles Finley was not disposed to commiserate over the Hobson's choice which had faced the commissioner. On June 25, 1976, Finley filed suit against Kuhn in the United States District Court in Chicago.[98] Justice McGarr, desirous of limiting the issues involved, left only 2 counts standing out of the original five.[99] Essentially, Finley alleged that Kuhn acted beyond his authority as commissioner, with malice, in an arbitrary and capricious manner directly contrary to historical precedent and prior rulings of the office of the commissioner. Finley sought a declaration that the assignments of Rudi, Fingers and Blue were lawful and enforceable. Thus, he requested an injunction restraining the defendant from interfering with such assignments. In the alternative, three to five million dollars in damages were requested.

Regardless of the ultimate determination of the issues involved, the ramifications of the *Messersmith* decision illustrate the need for the promulgation of new rules and regulations to govern the dispersal of free agents. One would be foolhardy to fault Charles Finley in the manner in which he disposed of his players' contracts. As previously discussed, professional sports are unique in that they treat employment contracts as

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which was sent to Finley by the Commissioner and contained the text of Kuhn's decision which voided the transactions.

97. *See* rule 9, Major League Rules, *supra* note 15. UPC section 6(a) provides, "The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules."

98. Charles O. Finley & Co. v. Kuhn, No. 76 C 2358 (N.D. Ill., June 25, 1976).

99. The original complaint alleged: (1) breach of contract, (2) violation of the Sherman Antitrust Act, (3) deprivation of due process, (4) denial of equal protection, and (5) inducing breach of contract. Only counts (1) and (5) were standing. Finley had alleged a violation of section 1 of the Sherman Act and based his right to relief on sections 9 and 16 of the Clayton Act. The essence of the particular count concerned an alleged conspiracy, on the part of Kuhn and the Major League Executive Council, to boycott and restrain trade with Finley's business through concerted action. However, the second count was involuntarily stricken on a motion to dismiss for failure to state a claim upon which relief could be granted. The court relied on *Federal Baseball, Toolson* and *Flood* in holding baseball immune from the provisions of the Sherman Act. Finley had urged that the aforementioned cases limited the exemption of baseball to the extent of the reserve system. The court refuted this contention by citing *Salerno* and Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004, 1007 (D. Ore. 1971), *aff'd, per curiam,* 491 F.2d 1101 (9th Cir. 1974), which upheld the exemption within the context of a territorial compensation agreement. Thus, once again, baseball had remained unscathed after a brief encounter with the antitrust acts. *See,* Charles O. Finley & Co. v. Kuhn, No. 76 C 2358 (N.D. Ill., June 25, 1976) (unpublished memorandum opinion and order granting motion to dismiss counts (2), (3) and (4)).

capital assets. In signing players, owners must evaluate whether their financial investments will be recovered by a sufficient rate of return upon termination of the investment. At the same time, the consequences of the sale may produce undesirable results in terms of the preservation of a competitive balance on the field.

APPLICATION OF THE PER SE RULE

Professional baseball has cogently defended its institutionalized controls over player mobility. The leagues have on many occasions expounded plausible business justifications in support of the reserve system. Similarly, only the most cynical would doubt the sincerity of those who subscribe to the propriety of some form of player control mechanisms. Certainly the *Finley* case lends credence to those who foresaw the spectacle of the wealthier teams purchasing championships through unrestrained procurement of player contracts. However, the crucial question is not the sincerity of those who support the reserve system, but rather, the reasonableness of that systems' inhibitory effects upon player mobility and competition in the labor market.

The courts and Congress have often maintained the professional sports are sui generis, and as such, the controls over player mobility are designed to respond to the unique economic and structural conditions of the industry. In baseball, the reserve system reflects this state of affairs. However, a necessary and inevitable consequence of the reserve system is to restrain trade, and the rules and regulations which effectuate the reserve systems' purpose closely approximate the contracts, combinations and conspiracies that the Sherman Act was designed to prevent. Thus, the prohibitions which force a player to comply with the reserve system, and which are made effective by the combined action of the leagues' clubs, closely approximate the "unfair" methods of competition which are widely condemned as group boycotts or concerted refusals to deal. Such concerted action, similar to the barriers and sanctions which Andy Messersmith encountered, have been held to so disrupt the normal play of competitive forces as to constitute a per se violation of the Sherman Act. If the practices are held to fall within the direct condemnation of the statute, they could not be removed by the interposition of collateral factors urged in justification and defense of the challenged practice.

Thus, it has often been suggested that Major League Rules 3(a) and (g),[100] which are agreements among owners to act jointly towards reserved players by not competing for or dealing with any player placed on the reserve list and by utilizing uniform contracts, are similar to the practices condemned as group boycotts in the *Famous Laskey* and *First National Pictures* cases.[101] Commentators have categorized the practices condemned

100. *See* note 11 *supra.*

101. In Paramount Famous Laskey Corp. v. United States, 282 U.S. 30 (1930), ten corporate competitors who controlled the distribution of motion picture films agreed not to contract with exhibitors unless they accepted the arbitration provisions and

in the aforementioned cases as group boycotts or concerted refusals to deal although neither case actually employed such terminology.

A classic group boycott usually consists of either a horizontal combination among traders which exclude direct competitors from the market by impeding their entry, or vertical combinations which effectively exclude the competitors of some of the combinations members. However, the concept of a boycott is flexible and often embraces the practices of combinations which are designed to exert a persuasive influence over the trade practices of powerless victims rather than extinguish competition altogether. Thus, by acting in unison, the competitors are able to exact superior non-price trade terms than if they were to cross swords and compete. This third category, into which the reserve system loosely fits, must be distinguished from the first two categories. Concerted action which sets and maintains trade terms may not necessarily have only undesirable consequences, whereas the concerted barring of market entry can only have an anticompetitive effect. This third type of combination is saying "either play the game by my rules or don't play at all," and only the unwilling would be divested or indispensable trade relations. The pivotal question is whether the rules are necessary and reasonable procedures for industrial self-regulation or whether the ends to be achieved solely coincide with the interest of those who frame the rules. Any answer to this entails a systematic analysis of the social cost and benefits involved and a balancing of the two.

Baseball's private policing mechanisms and sanctions which compel compliance with the reserve system should not be characterized as practices to which a per se response should be ascribed. Even if the reserve system is classified as a concerted refusal to deal or a group boycott, it should be categorized and assayed under the Rules of Reason. Under such an analysis the competitive evils and abuses the reserve system was designed to eradicate could be used to vindicate the challenged practice. Conversely, if the alleged benefits derived from the system could be achieved through less restrictive methods which would allow from more competitive opportunities among players, it should be struck down as unreasonable. But to preclude analysis is to fall victim to the slavery of labels and epithets. One court took pains to emphasize this point.[102] As previously suggested, the term "group boycott" is a very flexible label which encompasses divergent types of concerted activity. The court warned that to proscribe certain types of business activity merely by attaching the "per se" label opens the doors to the outlawing of certain types of reasonable concerted activity. The court further emphasized:

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other conditions of the standard exhibition contract. Similarly, in United States v. First Nat'l Pictures, Inc., 282 U.S. 44 (1930), the distributors agreed to use a standard contract which required security against default provisions. The distributors refused to deal with any exhibitor who refused to provide the required security.

102. Worthen Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974).

> It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally the more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden.[103]

CONCLUSION

The judicial system has traditionally been the medium employed in attempting to resolve antitrust disputes over player control devices between owners and players. The dismal performance of this forum has been discouraging. The judicial system has been plagued by a critical backlog which leads to protracted litigation and increased costs. In the past, these factors have had an inhibitory effect on disgruntled players who lacked the time and money to engage in lengthy court battles. Similarly, the extravagancy of the court system often resulted in the resolution of disputes in favor of the more economically secure party. The recent growth of the trade union sector in professional sports, with players associations in all four major team sports, has alleviated most of the financial burdens inherent in the judicial system. However, as in the *Flood* case, the protracted length of litigation has often resulted in the premature retirement of players. Additionally, the compendium of irreconcilable and illogical decisions that the court system has amassed militates against the utilization of that forum as the medium for resolution of player-owner disputes.

It has been suggested that the disputes enveloping professional sports could be effectively resolved by the creation of a sports regulatory commission that would oversee and scrutinize the operating procedures of the various sports leagues.[104] The administrative intractability of the ill-fated Federal Sports Commission was readily apparent. Inevitably, incursions into the established regulatory mechanisms of the N.L.R.B., the Department of Justice, the F.T.C., the F.C.C., the Congress and the courts, which already enjoy many concomitant jurisdictional powers, would have lead to bureaucratic infighting and the tremendous waste of tax dollars. Additionally, professional sports are not fungible and do not lend themselves to the uniform application of the external controls of a homogeneous regulatory commission. Also, the delineation of mandatory modes of performance within a given industry is in derogation of the underlying principles of our antitrust legislation, *i.e.*, the avoidance of

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103. Elman, *"Petrified Opinions" and Competitive Realities*, 66 COLUM. L. REV. 625, 627 (1966) *quoted in* Albrecht v. Herald Co., 390 U.S. 145, 170 n.3 (1968) (Stewart, J., dissenting), *quoted in* Worthen Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119, 125 (8th Cir. 1973).

104. Federal Sports Act of 1972: Hearings on S. 3445 Before the Comm. on Commerce, 92nd Cong., 2d Sess. (1972).

governmental intervention by the establishment of legislative boundaries within which the private sector can freely operate.

The players associations have enjoyed great success in exacting numerous concessions from owners. They have provided their members with increased salaries, greater fringe benefits and increased job security. However, the players associations primary objective, like other unions, is to acquire for their members a greater percentage of the profits produced within their industry. Thus, while they ardently attack the reserve and option systems, it is highly unlikely they would assail other monopolistic practices in the areas of broadcasting, franchise location and concessions, which generate greater profits but are unrelated to player mobility. More importantly, it is also doubtful whether the associations would support major changes in the operating procedures of the leagues that would eliminate the need for player retention but would not allow for an increase in player salaries. This would not be correct if the players primary objection to player retention was the often espoused freedom issues or the motion of quasi-peonage. Thus, one commentator has suggested that all three alleged benefits of baseballs reserve system, *i.e.,* balanced competition, financial security for weaker teams and players' salaries commensurate with a player's value to the league, could be secured by mechanisms other than a reserve system.[105] However, since the suggested approach would not entail a concomitant increase in salaries, it may not be particularly appealing to the players associations. Similarly, in sports which utilize a college draft, it is questionable whether veteran players would disagree with owners as to the merits of a system which effectively eliminates interteam competition in the non-veteran markets.

Nevertheless, between the immediate parties in a dispute, grievance arbitration and collective bargaining appear to be the most feasible and equitable methods of dispute resolution in professional sports. We have every reason to anticipate that the future evolutionary changes in player control devices and team equalization mechanisms will be wrought out through good faith efforts at the collective bargaining table. Such were the sentiments expressed by the court in the *Mackey* case, wherein the court stated:

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105. Noll, *supra* note 14, at 416-17, wherein the author contends that the policy objectives of the reserve system could be accomplished by implementing two changes. First, teams should divide income more evenly by sharing gate receipts and broadcasting fees. He suggests that 50 percent be allotted to the home team, 25 percent to the visitor, and the remaining sum be placed in a league-wide fund to be divided equally among all teams. Professor Noll also suggests that owners would be disposed toward lower salaries if the revenue such a player generated were subject to a sharing arrangement. Second, to prevent over-zealous owners from monopolizing playing talent, a ceiling would be placed on a teams' budget for player salaries. The limit on total salaries would prevent a single team from signing a large number of superior players, would allow for the annual growth in the average compensation of players, and would reduce the spread among teams in total player salaries and player quality.

We encourage the parties to resolve this question through collective bargaining. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts.[106]

Marc Ronald Abrams
Michael Matthew Cimino

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106. Mackey v. Nat'l. Football League, 543 F.2d 606, 623 (8th Cir. 1976).