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# BLACKOUT OR BLACKMAIL? HOW *GARBER V. MLB* WILL SHED LIGHT ON MAJOR LEAGUE BASEBALL'S BROADCASTING CARTEL

## INTRODUCTION

Baseball fans across North America are all too familiar with seeing the same message displayed across the screen of their TV, computer, tablet, or other electronic device: “We’re sorry, this game is not available in your area.”<sup>1</sup> Even Bud Selig, Major League Baseball’s longtime commissioner, is not impervious to antiquated and complicated blackout policies that leave millions of baseball fans in the dark while league executives, teams, and media outlets continue to bring in billions of dollars in revenue.<sup>2</sup> Major League Baseball (MLB or the League) and its member teams can continue to drive up the cost for consumers and prevent fans from watching their favorite teams through anticompetitive, exclusive broadcasting license agreements because baseball is in the unique position of being exempt from antitrust law.<sup>3</sup>

In 1922, the Supreme Court held in its landmark ruling, *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*, that professional baseball is exempt from federal antitrust law.<sup>4</sup> Nearly a century later, the exemption still stands, largely unchanged, despite Justice Douglas referring to it as “derelict in the stream of the law,”<sup>5</sup> and Justice Clark stating it “at best was of dubious validity . . . , unrealistic, inconsistent, or illogical.”<sup>6</sup> As the broad exemption has continued to be upheld by the Supreme Court and various lower courts, so has the League’s ability to limit the broadcasting of live games.<sup>7</sup> However, more recent jurisprudence in *American Needle v. NFL* on the application of antitrust law to professional sports has put this

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1. Dylan McLemore, *Sports Blackout Rules Don’t Fit Internet Age*, DYLANMCLEMORE.COM (Jun. 25, 2012), <http://dylanmclemore.com/2012/06/25/sports-blackout-rules-dont-fit-internet-age/>.

2. Jeff Passan, *Selig’s Promise*, YAHOO! SPORTS (July 11, 2006), <http://sports.yahoo.com/mlb/news?slug=jp-blackouts071106> [hereinafter Passan, *Selig’s Promise*] (At a 2006 luncheon with the Baseball Writers Association of America, Selig responded to a question about blackout policies by stating, “I don’t understand (blackouts) myself . . . . I get blacked out from some games . . . . I don’t know what to do about it. We’ll figure it out.”).

3. See J. Gordon Hylton, *Why Baseball’s Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391 (1999).

4. *Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Base Ball Clubs*, 259 U.S. 200, 208 (1922).

5. *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting).

6. *Radovich v. NFL*, 352 U.S. 445, 450, 452 (1957).

7. Jeff Passan, *MLB’s Blackout Problem Keeps Sport in Dark Ages*, YAHOO! SPORTS (Jun. 22, 2012, 10:06 AM), <http://sports.yahoo.com/news/mlb%E2%80%99s-blackout-problem-keeps-sport-in-dark-ages.html> [hereinafter Passan, *Blackout Problem*].

antitrust exemption in jeopardy.<sup>8</sup> As a result, four fans are taking on the League to challenge these non-competitive agreements in *Garber v. MLB*.<sup>9</sup>

This Note contends that the Southern District of New York should rule in favor of the *Garber* plaintiffs in their suit against MLB and should hold that the League's broadcasting policies unreasonably restrain trade. Part I explores the legal precedent and history of MLB's antitrust exemption from *Federal Baseball*, including the Supreme Court's recent decision in *American Needle*. Part II describes how the various baseball broadcasting agreements for in- and out-of-market games operate. Part III argues that the *Garber* plaintiffs should prevail in their suit against the League because the court should apply *American Needle* to MLB and its member clubs, overturn professional baseball's antitrust exemption, and hold that the League's noncompetitive broadcasting policies unreasonably restrain trade in violation of the Sherman Antitrust Act. Finally, Part IV proposes steps that the League can take in future broadcasting procedures, whether or not the *Garber* plaintiffs are victorious in their suit, for the mutual benefit of the League and fans, as well as to maintain the competitive balance among the MLB clubs.

## I. HISTORY OF THE ANTITRUST EXEMPTION

In order to properly understand the issues being raised in *Garber*, it is necessary to first examine the basis for MLB's antitrust exemption and its scope under current law. This muddled history can be traced through two distinct periods: the creation and preservation of the exemption through its first fifty years from 1922 to 1972, and a narrowing of the exemption from 1972 to the present through various lower court decisions and federal legislation.<sup>10</sup>

### A. 1922–1972: CREATION AND PRESERVATION OF THE EXEMPTION

In 1922, the Supreme Court created the League's exemption from antitrust law in *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*.<sup>11</sup> Although the first professional

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8. *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

9. Complaint, *Garber v. Office of the Comm'r of MLB*, No. 12 Civ. 3704 (S.D.N.Y. 2012), 2012 WL 1609215 [hereinafter *Garber Complaint*].

10. See Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557 (2010).

11. *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200, 208 (1922).

baseball team, the Cincinnati Red Stockings, played as early as 1869,<sup>12</sup> the League as we know it was not formed until 1903 when the independent American and National Leagues signed the “National Agreement” to work together in furtherance of the sport.<sup>13</sup>

During these early stages of professional baseball, the American and National Leagues were challenged by rival independent leagues, which fought for players, fans, and business.<sup>14</sup> Many of these smaller independent leagues, the most popular of which was the eight-team Federal League, were driven out of business by the more renowned American and National Leagues.<sup>15</sup> In 1915, the American and National Leagues reached a settlement with the Federal League in which some Federal League owners would accept a buyout or be allowed to buy franchises in one of the two major leagues.<sup>16</sup>

The publicly owned Baltimore Terrapins (the Baltfeds) opted out of this settlement,<sup>17</sup> instead initiating the *Federal Baseball* lawsuit in 1917 against the American and National Leagues.<sup>18</sup> In that case, the plaintiffs alleged under section 4 of the Clayton Act<sup>19</sup> that the defendants “conspir[ed] to destroy its franchise by monopolizing the baseball business and restraining trade therein.”<sup>20</sup> In the brief opinion by Justice Oliver Wendell Holmes—writing on behalf of a unanimous Court—the Supreme Court denied application of federal antitrust law to organized baseball on the grounds that it did not constitute commerce under the scope of congressional authority.<sup>21</sup> The Court specifically stated that the

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12. Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 34 J. SUP. CT. HIST. 183, 185 (2009).

13. *Id.* at 186.

14. *Id.* at 185.

15. *Id.* at 186.

16. *Id.* at 189.

17. *Id.* As part of the settlement, the Baltfeds were only offered their “equitable distribution” of the Federal League’s value: a sum of \$50,000—a disappointment compared to the Brooklyn franchise’s owner who received a \$400,000 buyout. *Id.* In fact, transcripts from the settlement meeting imply that the Baltfeds did not even have a representative present, in part because

[t]he major leagues did not need to eliminate every franchise in order to hobble their competitor. Moreover, the Baltimore market did not appeal to organized baseball, which had already left the market once in 1903. Charles Comiskey, owner of the White Sox, expressed the view that Baltimore was “a minor league city, and not a hell of a good one at that.”

*Id.* (quoting Brief on Behalf of Defendants in Error at 155, *Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Base Ball Clubs*, 259 U.S. 200 (1922) (No. 204)).

18. *Id.* at 190.

19. 15 U.S.C. § 15 (2012).

20. Alito, *supra* note 12, at 190.

21. *Fed. Baseball*, 259 U.S. at 208–09.

“business is giving exhibitions of base ball, which are purely state affairs.”<sup>22</sup> First, the Court reasoned that, because of the nature of baseball as a sporting event that is “personal effort, not related to production,” it could not be considered commerce.<sup>23</sup> Second, even if baseball games did constitute commerce, according to the Court, transportation of players and equipment across state lines, as well as attendance of fans from out of state, were “a mere incident.”<sup>24</sup> As stated more clearly by the Circuit Court, “[n]ot until [the players] come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end.”<sup>25</sup>

By the time the Supreme Court reviewed baseball’s antitrust exemption again in *Toolson v. New York Yankees*<sup>26</sup> thirty-one years later, the way baseball was presented to the public, as well as jurisprudence behind *Federal Baseball*, had changed significantly.<sup>27</sup> Through technological developments in the 1930s and 1940s, baseball games were now being broadcast across state lines using radio and television.<sup>28</sup> Furthermore, in the decades following *Federal Baseball*, Supreme Court jurisprudence on the scope of congressional power had expanded drastically—the Court shifted away from the narrow concepts of interstate commerce in *E. C. Knight*<sup>29</sup> and *Hammer v. Dagenhart*<sup>30</sup> to its more expanded view in *United States v. Darby*<sup>31</sup> and *Wickard v. Filburn*,<sup>32</sup> which rejected the direct/indirect standard of commerce from *Dagenhart*.<sup>33</sup>

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22. *Id.* at 208.

23. *Id.* at 209.

24. *Id.* at 208–09.

25. Nat’l League of Prof’l Baseball Clubs v. Fed. Baseball Club of Balt., 269 F. 681, 685 (D.C. Cir. 1920).

26. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953).

27. Hylton, *supra* note 3, at 395.

28. *Id.*; Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 23 J. SUP. CT. HIST. 89, 90 (1998).

29. *United States v. E. C. Knight Co.*, 156 U.S. 1, 12 (1895) (holding that a sugar manufacturer did not violate the Sherman Act because manufacturing occurred before the goods entered the stream of commerce and, therefore, was only incidentally and indirectly related to commerce).

30. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (holding that a law barring child labor in factories was invalid because manufacturing has no direct effect on commerce and, therefore, cannot be regulated by Congress).

31. *United States v. Darby*, 312 U.S. 100, 118–19 (1941) (holding that some intrastate activities affect interstate commerce and can be regulated by Congress, overruling *Dagenhart*, and abandoning the “stream of commerce” argument).

32. *Wickard v. Filburn*, 317 U.S. 111, 123–24 (1942) (holding that a farmer growing extra wheat for personal consumption would have a significant aggregate effect on interstate commerce and rejecting the direct/indirect test from *Dagenhart*).

33. See Hylton, *supra* note 3, at 395 (“[T]he 1922 United States Supreme Court decision which had held that baseball was not a form of interstate commerce, had been seriously

Nevertheless, in a one-paragraph, 7-2 opinion, the Supreme Court found in *Toolson* that baseball's antitrust exemption should be upheld.<sup>34</sup> First, the Court cited stare decisis as a ground for upholding the exemption.<sup>35</sup> Because Congress had not done anything to alter the decision of the Supreme Court in *Federal Baseball*, "[t]he business has thus been left for thirty years to develop, on the understanding that it was not subject to antitrust legislation."<sup>36</sup> The *Toolson* Court then held that, because over thirty years had passed since the Court's decision in *Federal Baseball*, and no legislation was passed to remove the judicially created exemption (even though it was not enumerated in the Sherman Antitrust Act in the first place), "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."<sup>37</sup>

This last section of the opinion is significant because it effectively changed the core of the Court's holding in *Federal Baseball*.<sup>38</sup> Instead of saying that baseball was not part of interstate commerce, and thus could not be regulated by Congress, the *Toolson* Court held that it was never the intent of Congress to regulate baseball through the Sherman Act at all.<sup>39</sup> In fact, despite stating that the opinion was based almost completely on the opinion of *Federal Baseball*,<sup>40</sup> the Court in 1922 did not discuss congressional intent at all, prompting one critic to call the *Toolson* opinion "the greatest bait-and-switch scheme in the history of the Supreme Court."<sup>41</sup>

In spite of the Supreme Court's preservation of the exemption on completely different grounds, the Court continued to sustain organized baseball's antitrust exemption over the next several decades.<sup>42</sup> During this time, the Court considered four separate cases that discussed and solidified the antitrust exemption without involving organized baseball at all.<sup>43</sup> In the 1955 case, *United States v. Shubert*, the Court considered an antitrust suit brought against a theater company and held that the *Toolson* decision was a "narrow application of the rule of stare decisis."<sup>44</sup> However, the Supreme Court did not just refuse to apply *Toolson* to non-sporting events.<sup>45</sup> Over the next sixteen years the Court

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eroded by the Court's expanded definition of interstate commerce in the 1930s and 1940s . . . .").

34. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953).

35. *Id.*

36. *Id.*

37. *Id.*

38. See Hylton, *supra* note 3, at 397.

39. Grow, *supra* note 10, at 570.

40. *Toolson*, 346 U.S. at 357.

41. Grow, *supra* note 10, at 570-71.

42. *Id.* at 571-73.

43. *Id.*

44. *United States v. Shubert*, 348 U.S. 222, 230 (1955).

45. Grow, *supra* note 10, at 571-73.

refused to extend the exemption to boxing,<sup>46</sup> football,<sup>47</sup> and basketball,<sup>48</sup> and thus continued to hold that it was only baseball that received this preferred status. In fact, despite stating in *Radovich v. NFL* that the *Federal Baseball* holding “at best was of dubious validity,” and was “unrealistic, inconsistent, or illogical,”<sup>49</sup> the Court maintained its puzzling position and continued to uphold baseball’s antitrust status.<sup>50</sup>

The last time the Supreme Court specifically addressed baseball’s exemption was in the 1972 case, *Flood v. Kuhn*.<sup>51</sup> Curt Flood, an all-star outfielder who earned success while playing for the St. Louis Cardinals for twelve seasons, was traded to the Philadelphia Phillies in 1969 without any type of notice.<sup>52</sup> Disappointed about the trade, he unsuccessfully appealed to the Commissioner of Baseball, arguing that he should be allowed to try and strike his own bargain with a major league team of his choosing as a free agent.<sup>53</sup> Although today the ability for athletes to form their own contracts with teams as a free agent is commonplace, at that time baseball operated under the “reserve clause” system, where players’ rights were kept by the team with which they had been playing when their original contract expired.<sup>54</sup> As a result, Flood brought a suit against the League, charging violations of federal antitrust law, civil rights statutes, and the Thirteenth Amendment’s prohibition of involuntary servitude.<sup>55</sup>

Following Justice Blackmun’s sweeping glorification of baseball in the opinion’s introduction,<sup>56</sup> the Court fully conceded that “[p]rofessional baseball is a business and it is engaged in interstate commerce.”<sup>57</sup> Nevertheless, the Court stubbornly upheld baseball’s exemption again by stating:

We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when

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46. *United States v. Int’l Boxing Club*, 348 U.S. 236, 244 (1955).

47. *Radovich v. NFL*, 352 U.S. 445, 447–48 (1957).

48. *Haywood v. NBA*, 401 U.S. 1204, 1205–06 (1971).

49. *Radovich*, 352 U.S. at 450, 452.

50. *Id.* at 453.

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

52. *Id.* at 265.

53. *Id.*

54. See Simon Rottenberg, *The Baseball Players’ Labor Market*, 64 J. POL. ECON. 242, 245 (1956).

55. *Flood*, 407 U.S. at 265–66.

56. Justice Blackmun begins his opinion with a look back at the history of baseball, including information about the 1869 Cincinnati Red Stockings, who had only one Cincinnati on the roster and traveled over 11,000 miles that season. *Id.* at 260–62. He then goes on to list over eighty former players, reference works about sports such as *Casey at the Bat*, refer to baseball as the “national pastime,” and cite from the lower court’s opinion that “[t]he game is on higher ground; it behooves every one to keep it there.” *Id.* at 260–67 (citing *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

57. *Id.* at 282.

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. . . . 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 the Congress and not by this Court.<sup>58</sup>

The crux of Justice Blackmun's holding was that even though the precedent from *Federal Baseball* was an "anomaly" and an "aberration," organized baseball had grown and flourished for so many decades because of its reliance on this antitrust exemption.<sup>59</sup> As a result, the Court was concerned with retroactivity problems and believed that Congress would be the best forum to make any adjustments.<sup>60</sup>

#### B. 1972–PRESENT: LOWER COURT LIMITS ON THE SCOPE OF BASEBALL'S EXEMPTION

Since the ruling came down in 1972, the Court's decision in *Flood* has been highly criticized.<sup>61</sup> As a result, the years following this decision were marked primarily by a rolling back of the scope of baseball's exemption through judicial action and legislation.<sup>62</sup>

The most notable area where baseball's antitrust status began to decline was in regard to labor.<sup>63</sup> The *Flood* decision not only raised awareness to the public about the reserve clause, but also ignited the players to take action.<sup>64</sup> In 1975, players Andy Messersmith and Dave McNally argued that, under the reserve clause, they were free to negotiate their own contracts with other teams because neither of them had signed a contract during that year.<sup>65</sup> Messersmith and McNally, supported by the MLB Players' Association, were able to convince baseball's arbitrator, Peter Seitz, that the reserve clause should be

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58. *Id.* at 283–84.

59. *Id.* at 282–83.

60. *Id.*

61. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1381 (1988) ("*Flood v. Kuhn* is an almost comical adherence to the strict rule against overruling statutory precedents, particularly considering that the Sherman Act has developed essentially through a common law process."); David Greenberg, *Baseball's Con Game: How Did America's Pastime Get an Antitrust Exemption?*, SLATE (July 19, 2002, 10:36 AM), [http://www.slate.com/articles/news\\_and\\_politics/history\\_lesson/2002/07/baseballs\\_con\\_game.html](http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html) ("The opinion—for which Blackmun would long be ridiculed—included a juvenile, rhapsodic ode to the glories of the national pastime, sprinkled with comments about legendary ballplayers and references to the doggerel poem 'Casey at the Bat.'").

62. Grow, *supra* note 10, at 575–89.

63. *Id.* at 575–76.

64. Nick Acocella, *Flood of Free Agency*, ESPN CLASSIC, [http://espn.go.com/classic/biography/s/flood\\_curt.html](http://espn.go.com/classic/biography/s/flood_curt.html) (last visited Nov. 17, 2013).

65. *Silver Anniversary: Baseball Salaries Have Skyrocketed Since 1975 Ruling*, CNN SPORTS ILLUSTRATED (Dec. 23, 2000, 2:38 AM), [http://sportsillustrated.cnn.com/baseball/mlb/news/2000/12/22/free\\_agency\\_ap/](http://sportsillustrated.cnn.com/baseball/mlb/news/2000/12/22/free_agency_ap/).



overturned.<sup>66</sup> The decision was upheld by the Eighth Circuit one year later, effectively ending the reserve clause system and allowing players to act as free agents when their contracts expired.<sup>67</sup>

Over twenty years later, Congress finally took action by passing the Curt Flood Act of 1998 (the Curt Flood Act)<sup>68</sup>—one year after Flood’s death.<sup>69</sup> Under this law, Congress reacted to *Flood v. Kuhn* and designated that, at least in the limited area of labor, baseball was not immune to antitrust laws.<sup>70</sup> In doing so, Congress declared that employment of professional players is subject to antitrust law “to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.”<sup>71</sup> However, section 3 of the Curt Flood Act specifically limited these changes from affecting minor league players, the relationship between major and minor league teams, franchise expansion and relocation, ownership issues, broadcasting, and the employment of umpires.<sup>72</sup>

This act of Congress has been interpreted many ways, with some seeing it as an endorsement of the Court’s precedent thus far on antitrust; others deem Congress’s actions as mere indifference.<sup>73</sup> To make matters more confusing, the Curt Flood Act specifically says that “[n]othing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws.”<sup>74</sup> During deliberation over the bill in Congress, Senate co-sponsors Orrin Hatch and Patrick Leahy stated that the intention of the Act was “to have no effect other than to clarify the status of major league players under the antitrust laws. With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today.”<sup>75</sup> Therefore, the Act largely left the League’s antitrust exemption intact.

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66. *Id.*

67. *Kan. City Royals Baseball Corp. v. MLB Players Ass’n*, 532 F.2d 615, 632 (8th Cir. 1976). Although the court stated that “we intimate no views on the reserve clause system,” it deferred to the decision of the arbitrator, which effectively ended the use of the reserve clause. *Id.*

68. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (codified as amended at 15 U.S.C. § 26b (2012)).

69. Acocella, *supra* note 64.

70. Grow, *supra* note 10, at 575–76.

71. 15 U.S.C. § 26b(a).

72. *Id.*

73. Grow, *supra* note 10, at 576.

74. 15 U.S.C. § 26b(d)(4).

75. Martin M. Tomlinson, *The Commissioner’s New Clothes: The Myth of Major League Baseball’s Antitrust Exemption*, 20 ST. THOMAS L. REV. 255, 287 (2008) (quoting 144 CONG. REC. 18,459 (1998) (statements of Sens. Wellstone, Hatch & Leahy)).

During floor debate on the Curt Flood Act, Senator Paul Wellstone was concerned that passing the Act would have a chilling effect on decisions from lower courts, including then-pending litigation in the Senator's home state of Minnesota, which held a more limited view of the antitrust exemption.<sup>76</sup> Indeed, sixteen years before debate on the Curt Flood Act, a federal district court in Texas considered *Henderson Broadcasting Corp. v. Houston Sports Ass'n*.<sup>77</sup> In that case, a local radio station that broadcasted baseball games for the Houston Astros sued the owner of the team.<sup>78</sup> The station contended that, because the team cancelled their broadcasting contract and gave exclusive broadcasting rights to a competing station, it had violated the Sherman Act and state antitrust law.<sup>79</sup> The franchise's owner moved to dismiss the case on the basis of the antitrust exemption laid out in the *Federal Baseball* trilogy.<sup>80</sup> The court denied the dismissal and instead relied on the narrow "unique characteristics and needs" standard that the Supreme Court articulated in *Flood*.<sup>81</sup> The court went on to say:

The fact that interstate broadcasting has on the one hand subjected other professional sports to the antitrust laws, but has not on the other hand affected the baseball exemption, is perplexing . . . . Radio broadcasting is not a part of the sport in the way in which players, umpires, the league structure and the reserve system are.<sup>82</sup>

Ten years later, the Southern District of New York also interpreted the Supreme Court precedent in *Flood* as limiting the scope of the antitrust exemption solely to baseball's "unique characteristics and needs."<sup>83</sup> However, lower courts have disagreed as to what aspects of baseball were included in this standard.<sup>84</sup>

Notably, in 1993, the Eastern District of Pennsylvania considered the case *Piazza v. MLB*.<sup>85</sup> Here, the League thwarted two Pennsylvania businessmen, as part of a larger partnership, in their attempt to buy the San Francisco Giants franchise for \$115 million and relocate the team to a stadium in St. Petersburg, Florida.<sup>86</sup> The League did not approve the

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76. 144 CONG. REC. 18,459 (1998).

77. *Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982).

78. *Id.* at 264–65.

79. *Id.* at 264.

80. *Id.* at 265.

81. *Id.* at 268–69.

82. *Id.*

83. *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1488–89 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993) (citing *Flood v. Kuhn*, 407 U.S. 258, 282 (1972)); *see also* Grow, *supra* note 10, at 589–91 (describing the *Postema* decision as only applying the exemption to the League structure and reserve system).

84. Grow, *supra* note 10, at 589–91.

85. *Piazza v. MLB*, 831 F. Supp. 420 (E.D. Pa. 1993).

86. *Id.* at 422–23.

sale, claiming that there were concerns about the financial backgrounds of the businessmen, and sold the team instead for \$100 million to another investor who agreed to keep the team in San Francisco.<sup>87</sup> Among the many claims brought by the plaintiffs was a claim of violation of the Sherman Antitrust Act based on the League's "direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such teams."<sup>88</sup> The League moved to dismiss the suit because of their antitrust exemption under *Federal Baseball, Toolson*, and *Flood*.<sup>89</sup> The court, however, denied the League's motion on the grounds that the Supreme Court precedent on baseball's antitrust exemption was limited to cases that dealt with the reserve clause.<sup>90</sup>

The *Piazza* court was not alone in holding that the exemption was limited to the reserve clause.<sup>91</sup> Over the next two years, Florida state courts reached similar decisions on the same issue discussed in *Piazza* regarding the relocation of a franchise to Tampa Bay.<sup>92</sup> In the 1994 case *Butterworth v. National League*, the Florida Supreme Court not only reached the same decision but was extremely clear in doing so, stating specifically, "[W]e find that baseball's antitrust exemption extends only to the reserve system."<sup>93</sup> One year later, in *Morsani v. MLB*, plaintiffs filed an antitrust suit against the League for again thwarting their plans to have a baseball franchise in Tampa Bay.<sup>94</sup> Here, the court upheld the *Butterworth* decision and also ruled that the antitrust exemption was limited to the reserve clause.<sup>95</sup>

What is clear, however, is that, consistent with the standard articulated in *Henderson Broadcasting*, federal courts have not applied the baseball exemption to cases involving baseball entities and licensing with third parties. In 1972, the Northern District of California applied federal antitrust law to assess a contract between the Oakland Athletics and a concessions company.<sup>96</sup> In 1981, about one year before *Henderson Broadcasting*, the Third Circuit applied antitrust law to a suit regarding

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87. *Id.* The League expressed concerns about "out-of-state money" and that the "Pennsylvania People" had "dropped out." *Id.* at 422. The two plaintiffs, Vincent Piazza and Vincent Tirendi, were the only investors from Pennsylvania, and they believed that the League's comments, along with the fact that they were both of Italian descent, gave the implication that they had some association with organized crime. *Id.* at 422-23.

88. *Id.* at 424.

89. *Id.* at 433.

90. *Id.* at 438; *cf.* *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

91. *Grow*, *supra* note 10, at 585-89.

92. *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1022 (Fla. 1994).

93. *Id.* at 1022.

94. *Morsani v. MLB*, 663 So. 2d 653, 654 (Fla. Dist. Ct. App. 1995).

95. *Id.* at 655.

96. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

licensing agreements between the players' union and a baseball card manufacturer.<sup>97</sup> Three years later, the Eastern District of New York applied antitrust law to evaluate a broadcast licensing contract between Cablevision and the two New York professional baseball teams (as well as other New York professional sports teams), eventually dismissing the claims because the plaintiff (a competing cable company) failed to show injury as a result of these agreements.<sup>98</sup> In a more recent decision, the Second Circuit evaluated the case *MLB Properties v. Salvino*, where a stuffed animal manufacturer brought an antitrust suit against the League in response to a cease-and-desist letter for the unlicensed use of MLB Club logos.<sup>99</sup> The League did not even raise the antitrust exemption as a defense, instead moving for judgment on the merits to avoid having the exemption reviewed in court and running the risk of losing it altogether.<sup>100</sup>

In contrast, federal courts have readily applied the antitrust exemption in cases that fall more squarely within the "business of baseball," such as those involving league structure and relocation of franchises. In 1974, citing *Flood*, the Ninth Circuit upheld the lower court's dismissal of an antitrust claim against the League by the owner of a minor league team in Portland who wanted compensation for the League's expansion into the team's exclusive territory.<sup>101</sup> In 1982, the Eleventh Circuit held that the League's player assignment and franchise location system "plainly concerns matters that are an integral part of the business of baseball" and upheld the exemption.<sup>102</sup> Two subsequent federal court decisions regarding franchise relocation, *New Orleans Pelicans Baseball v. National Ass'n of Professional Baseball Leagues* and *MLB v. Crist*, also upheld the exemption on the same grounds.<sup>103</sup> Most recently, in *City of San José v. Office of the Commissioner of Baseball*, an antitrust claim was brought against the League for rejecting relocation of the Oakland Athletics to San José, California.<sup>104</sup> Although

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97. *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 459 U.S. 1009 (1982).

98. *Nishimura v. Dolan*, 599 F. Supp. 484, 488–91, 500 (E.D.N.Y. 1984).

99. *MLB Props. v. Salvino, Inc.*, 542 F.3d 290, 294–95 (2d Cir. 2008).

100. Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball's Antitrust Exemption After American Needle*, 2 HARV. J. SPORTS & ENT. L. 265, 283 (2011).

101. *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101, 1103 (9th Cir. 1974).

102. *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982).

103. *MLB v. Crist*, 331 F.3d 1177, 1189 (11th Cir. 2003); *New Orleans Pelicans Baseball, Inc. v. Nat'l Ass'n of Prof'l Baseball Leagues, Inc.*, No. 93-253, 1994 WL 631144, at \*9 (E.D. La. Mar. 1, 1994); *cf. Piazza v. MLB*, 831 F. Supp. 420, 438 (E.D. Pa. 1993).

104. *See* Order Granting-in-Part and Denying-in-Part Defendants' Motion to Dismiss Plaintiffs' Complaint Under Federal Rule of Civil Procedure 12(b)(6), *City of San José v. Office of the Comm'r of Baseball*, No. C-13-02787, 2013 WL 5609346, at \*3 (N.D. Cal. Oct. 11, 2013) [hereinafter *San José Order*]; Andrew Longstreth, *Baseball's Antitrust*

Judge Whyte admitted that “[t]he exemption is an ‘aberration’ that makes little sense given the heavily interstate nature of the ‘business of baseball’ today,” he still dismissed the antitrust claim, holding that “[t]he alleged interference with a baseball club’s relocation efforts presents an issue of league structure that is ‘integral’ to the business of baseball, and thus falls squarely within the exemption.”<sup>105</sup> The court’s decision in *Piazza*, the only franchise location case in which the exemption was not upheld, was explicitly rejected in both the *New Orleans Pelicans* and *San José* decisions.<sup>106</sup>

### C. 2010: *AMERICAN NEEDLE V. NFL*

In 2010, the Supreme Court issued a landmark decision in *American Needle v. NFL* that could put baseball’s unique antitrust position in jeopardy.<sup>107</sup> The dispute arose when National Football League Properties (NFLP)—the organization formed by teams in the National Football League (NFL) to market and license their intellectual property and merchandise—granted an exclusive ten-year license to Reebok to “manufacture and sell trademarked headwear for all 32 teams.”<sup>108</sup> American Needle, a headwear manufacturer, designer, and dealer,<sup>109</sup> enjoyed the benefit of a non-exclusive license with the NFL until 2000.<sup>110</sup> That year, the company filed a suit against the NFL, its member teams, NFLP, and Reebok for violation of section 1 of the Sherman Act<sup>111</sup> because the license to Reebok effectively shut down this portion of their business.<sup>112</sup>

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*Exemption Lives On in San Jose*, REUTERS LEGAL (Oct. 15, 2013), available at <http://t.co/GZ1NEQTMhC> (Westlaw).

105. San José Order, *supra* note 104, at \*10–11 (citing *Flood v. Kuhn*, 407 U.S. 258, 282 (1972); *Prof’l Baseball Sch. & Clubs, Inc.*, 693 F.2d at 1086); see Bob Egelko, *Judge’s Ruling on A’s a Win and Loss for San Jose*, SFGATE (Oct. 11, 2013, 8:00 PM), <http://www.sfgate.com/athletics/article/Judge-s-ruling-on-A-s-a-win-and-loss-for-San-Jose-4888296.php>.

106. *New Orleans Pelicans*, 1994 WL 631144, at \*8–9 (“This Court cannot accept the cramped view of *Flood* that *Piazza* takes.”); San José Order, *supra* note 104, at \*10 (“The court disagrees with the Eastern District of Pennsylvania’s opinion in *Piazza* that *Federal Baseball, Toolson* and *Flood* can be limited to the reserve clause because the reserve clause is never referenced in any of those cases as part of the Court’s holdings.”).

107. *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

108. *Id.* at 187.

109. *About*, AM. NEEDLE, <http://shop.americanneedle.com/pages/about> (last visited Nov. 17, 2013).

110. *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007).

111. 15 U.S.C. § 1 (2012).

112. *Am. Needle*, 496 F. Supp. 2d at 942.

In defending its actions, the NFL relied on the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*<sup>113</sup> and argued that because the thirty-two individual NFL teams acted as a single entity for the same common interests of the whole league, they were therefore unable to violate antitrust laws.<sup>114</sup> The basis of this argument arose from Justice Rehnquist's dissent from a denial of certiorari in the case *North American Soccer League v. NFL*, arguing that sports leagues do not compete with themselves and instead compete with "other forms of entertainment."<sup>115</sup> This framework was picked up by the Seventh Circuit decision, *Chicago Professional Sports Ltd. Partnership v. NBA*, holding that sports leagues operate as a single entity because of the need to cooperate in the competition and scheduling of games.<sup>116</sup>

After the lower courts accepted this argument,<sup>117</sup> American Needle appealed the case to the Supreme Court, sought a reversal of the lower courts' decisions, and petitioned the Court to hold that antitrust law applies to all concerted actions of the NFL's teams rather than just licensing agreements.<sup>118</sup> The respondents—as well as the National Basketball Association (NBA) and National Hockey League (NHL)—welcomed this petition, since prevailing in the suit would have allowed the NFL to act as a single entity and be exempt from antitrust laws in all of its actions.<sup>119</sup>

In the end, American Needle succeeded in their suit, but the Supreme Court's unanimous decision did not broaden its holding in accordance with the requests of the parties in their respective appeals.<sup>120</sup> First, the Court rejected the NFL's single entity argument from *Copperweld Corp.* and held that

[t]he NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business . . . . The teams compete with one another, not only on the playing field, but to attract fans, for

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113. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that a parent company and its wholly owned subsidiary are incapable of conspiring, even though they are separately incorporated, because they act as a single entity).

114. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 194–96 (2010).

115. *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982).

116. *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 597–600 (7th Cir. 1996).

117. *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743–44 (7th Cir. 2008) ("Simply put, nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers.").

118. Brief for Petitioner at 16, *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010) (No. 08-661), 2009 WL 3004479, at \*16–17.

119. *Mozes & Glicksman*, *supra* note 100, at 286.

120. *Am. Needle*, 560 U.S. at 195–204.

gate receipts and for contracts with managerial and playing personnel.<sup>121</sup>

Second, the Court rejected the argument that there was no antitrust violation because the teams granted the exclusive license under the legally separate entity of NFLP, opining that an organization cannot evade antitrust law by simply operating under a different name.<sup>122</sup> The third argument put forth by the NFL stated that it operated as a joint venture, since no team could fully operate without cooperation with the other teams in the league.<sup>123</sup> The Court quickly dispatched this argument because although “participation of others is necessary” in a joint venture, parties’ actions can still violate section 1 of the Sherman Act when their interests in a joint venture differ from the interests of the firm as a whole.<sup>124</sup>

The limitations in the Supreme Court’s opinion—in opposition to the broad arguments put forth by the parties—are particularly relevant in this third point. The Court held that the exclusive licensing of intellectual property at issue in this case constituted illegal concerted activity under section 1 of the Sherman Act.<sup>125</sup> However, it also conceded parts of the NFL’s argument that, in order for it to be economically successful, teams need to cooperate without being “trapped by antitrust law.”<sup>126</sup> The Court went on to say that “the interest in maintaining a competitive balance among athletic teams is legitimate and important,”<sup>127</sup> and as such it is necessary to have cooperation between teams in some areas—including production and scheduling of games—in order for the NFL to operate effectively.<sup>128</sup> Although this may suggest that sports leagues and teams can engage in some collective decisions in order for the league as a whole to be successful and profitable, the Court did not indicate, other than the two limited areas of production and scheduling of games that were specifically mentioned,<sup>129</sup> where sports leagues and teams could cooperate without regard to antitrust laws.

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121. *Id.* at 196–97.

122. *Id.* at 197.

123. *Id.* at 198.

124. *Id.* at 199–200.

125. *Id.* at 199–202.

126. *Id.* at 202.

127. *Id.* at 204 (internal quotation marks omitted) (citing *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

128. *Id.* at 202.

129. *Id.*

## II. MAJOR LEAGUE BASEBALL'S BROADCASTING POLICIES

The current broadcasting procedures of the League are as intricate and confusing as they are archaic.<sup>130</sup> To fully understand the issue at the heart of *Garber*, it is also necessary to break down MLB's different broadcasting concepts regarding team territorial rights, in-market games, out-of-market games, and blackout agreements.

### A. TEAM TERRITORIAL RIGHTS

The anticompetitive broadcasting policies alleged by the plaintiffs in *Garber* are manifested through both cable and Internet broadcasts by using the League's "demarcated territories."<sup>131</sup> The League developed these territorial-rights rules over forty years ago in order to protect a team's marketing area, and they were based on the purported local fan base for each MLB team.<sup>132</sup> For example, most of New England is currently listed in the Boston Red Sox market, and much of the Pacific Northwest is part of the Seattle Mariners market.<sup>133</sup>

Each of these territories is used to determine what games are designated as "in-market" or "out-of-market" broadcasts based on what team is playing and where the consumer is located.<sup>134</sup> A fan who lives in Seattle and is trying to watch the Mariners—regardless of whether they were actually playing in Seattle or in some other city—would be in-market.<sup>135</sup> However that same fan would be out-of-market if he tried to watch the San Francisco Giants play the Los Angeles Dodgers.<sup>136</sup> Although some territories are only claimed by one MLB team, there is a great deal of overlap—some territories have up to six teams that are in-market.<sup>137</sup> Both in-market and out-of-market games, as well as the fans who watch them, are affected by the anticompetitive broadcasting practices that MLB employs.<sup>138</sup> Therefore, the plaintiffs in *Garber* address both types of baseball broadcasts in their complaint.<sup>139</sup>

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130. Passan, *Blackout Problem*, *supra* note 7.

131. *Id.*

132. Passan, *Selig's Promise*, *supra* note 2.

133. Map of Major League Baseball's Broadcasting Markets, <http://sports.yahoo.com/news/mlb%E2%80%99s-blackout-problem-keeps-sport-in-dark-ages.html> (last visited Nov. 17, 2013) [hereinafter Blackout Map] (follow "in demarcated territories" hyperlink).

134. Passan, *Blackout Problem*, *supra* note 7.

135. Blackout Map, *supra* note 133; *Blackouts FAQ*, MLB.COM, [http://mlb.mlb.com/mlb/help/faq\\_blackout.jsp](http://mlb.mlb.com/mlb/help/faq_blackout.jsp) (last visited Nov. 17, 2013).

136. *Id.*

137. *Id.*

138. Passan, *Blackout Problem*, *supra* note 7.

139. *Garber Complaint*, *supra* note 9, at 23–34.



### **B. IN-MARKET BROADCASTING**

First, the *Garber* complaint discusses the anticompetitive exclusive license agreements for in-market broadcasts.<sup>140</sup> For most in-market games, MLB teams enter into exclusive broadcasting agreements with Regional Sports Networks (RSNs) such as Comcast Sportsnet Chicago, which broadcasts White Sox and Cubs games, or Yankees Entertainment and Sports (YES) Networks, which broadcasts Yankees games.<sup>141</sup> These exclusive agreements are meant to “divide the market geographically, permitting only the video presentations of a local team’s television partner to be shown in that team’s ‘exclusive territory.’”<sup>142</sup> In doing so, these RSNs have the exclusive right to broadcast games in their designated territory and do not have to be concerned with other broadcasting networks encroaching on their target audience.<sup>143</sup> As a result, consumers who are in-market do not have access to games broadcast by the RSN of another territory and need to purchase out-of-market packages in order to watch these games.<sup>144</sup>

### **C. OUT-OF-MARKET BROADCASTING**

The second aspect of the League’s noncompetitive policies that are alleged by the *Garber* plaintiffs surrounds the broadcasting of out-of-market live baseball games.<sup>145</sup> As discussed above, the RSNs carry only the local teams that are included within their territorial areas and agree with other sports networks not to broadcast games of other teams.<sup>146</sup> Therefore, consumers who are out-of-market and wish to watch their favorite teams—with a few exceptions—are required to purchase specific “out-of-market packages.”<sup>147</sup>

Currently, there are only two such packages available, both of which are controlled by the League.<sup>148</sup> The first offers a paid subscription to MLB.tv that is streamed on the Internet and provided directly from the League.<sup>149</sup> For the 2013 season, a subscription to the MLB.tv Premium package cost \$129.99 for the year, while the basic MLB.tv package cost

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140. *Id.* at 23.

141. *Id.* at 15, 24.

142. *Id.* at 24.

143. *Id.* at 63. Each team has a designated RSN as their television partner, and this partner has an exclusive monopoly over one team’s games in that territory, except for the cities that have two different teams. *Id.* Only one out of these four two-team cities—New York City—has two independent RSNs that broadcast baseball games. *Id.*

144. *Id.* at 27.

145. *Id.* at 27–31.

146. *Id.* at 15, 24.

147. *Id.* at 27. Consumers do not need to purchase out-of-market packages for nationally broadcasted games. See *Blackouts FAQ*, *supra* note 135.

148. *Garber Complaint*, *supra* note 9, at 27.

149. *Id.*

\$109.99 yearly.<sup>150</sup> However, the League requires customers to purchase a premium MLB.tv subscription, instead of the basic package, in order to watch live games on mobile devices.<sup>151</sup> The second option is the MLB Extra Innings package, a premium television subscription offered only through cable and satellite distributors.<sup>152</sup> In 2013, DirectTV offered the MLB Extra Innings package for a fee of \$139.96 per half season, amounting to \$279.92 for the full season.<sup>153</sup>

Yet, despite advertisements that claim out-of-market packages offer “every game . . . everywhere,”<sup>154</sup> or “your season ticket to every MLB game,”<sup>155</sup> these subscriptions are subject to blackout restrictions that prevent customers from watching certain games.<sup>156</sup> The blackout agreements take two different forms: national and territorial blackouts.<sup>157</sup> National blackouts prevent MLB.tv and MLB Extra Innings customers from watching games where the League has licensed exclusive broadcasting rights to national networks, such as the Entertainment and Sports Programming Network (ESPN) and Fox.<sup>158</sup> National broadcasting blackouts occur for any Saturday game starting within three hours before or after a nationally broadcasted game on Fox, any Sunday games beginning after 5:00 PM EST, as well as any other games broadcast on national networks, such as the All-Star Game and postseason games.<sup>159</sup> However, an Internet subscription for postseason games (with the exception of the World Series and National League Championship Series) is available from the League’s postseason.tv

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150. Mark Newman, *MLB.TV Opens 11th Season of Live Baseball*, MLB.COM (Feb. 5, 2013, 9:23 AM), [http://mlb.mlb.com/news/article.jsp?ymd=20130204&content\\_id=41394212&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20130204&content_id=41394212&vkey=news_mlb&c_id=mlb) [hereinafter Newman, *MLB.TV*].

151. *Mobile FAQ*, MLB.COM, [http://mlb.mlb.com/mlb/help/faq\\_alerts.jsp?c\\_id=mlb#](http://mlb.mlb.com/mlb/help/faq_alerts.jsp?c_id=mlb#) (last visited Nov. 17, 2013) (“If you purchased MLB.TV at MLB.com and you cannot access At Bat Premium features when accessing Subscriber Login with your MLB.com credentials, you likely purchased MLB.TV Basic, which does not include At Bat Premium access.”).

152. Garber Complaint, *supra* note 9, at 27.

153. *What’s Included in the 2013 MLB Extra Innings Package?*, DIRECTV, [https://support.directv.com/app/answers/detail/a\\_id/29/](https://support.directv.com/app/answers/detail/a_id/29/) (last visited Nov. 17, 2013) [hereinafter *2013 MLB Extra Innings Package*].

154. *MLB at Bat*, MLB.COM, <http://mlb.mlb.com/mobile/atbat/> (last visited Nov. 17, 2013).

155. *MLB Extra Innings*, DIRECTV, <http://www.directv.com/sports/mlb> (last visited Nov. 17, 2013).

156. *Blackouts FAQ*, *supra* note 135.

157. *Id.*

158. *Id.*; *Why Are Some Saturday and Sunday Games Blacked Out of MLB Extra Innings?*, DIRECTV, [https://support.directv.com/app/answers/detail/a\\_id/36/](https://support.directv.com/app/answers/detail/a_id/36/) (last visited Nov. 17, 2013); *How Do Blackouts Work?*, DIRECTV, [https://support.directv.com/app/answers/detail/a\\_id/1702/](https://support.directv.com/app/answers/detail/a_id/1702/) (last visited Nov. 17, 2013).

159. *Blackouts FAQ*, *supra* note 135.

package for a fee of \$4.99 for customers in the United States and Canada and \$24.99 for all other customers.<sup>160</sup>

Territorial blackouts are more common and are based on the territorial rights restrictions for RSNs.<sup>161</sup> For these types of restrictions, “live games will be blacked out in each applicable Club’s home television territory, regardless of whether that Club is playing at home or away.”<sup>162</sup> This means that, using the same hypothetical fan from Seattle, he or she could watch any televised baseball game, so long as the Seattle Mariners are not one of the teams playing, regardless of where the game is held.<sup>163</sup> For these games, fans have to subscribe to in-market packages through their local cable provider to watch the game on the local RSNs.<sup>164</sup>

### III. THE CASE FOR *GARBER V. MLB*

Against this backdrop of baseball’s antitrust exemption and the League’s complex broadcasting policies, the U.S. District Court for the Southern District of New York will consider *Garber v. MLB*.<sup>165</sup> The complaint was filed as a class action by two different classes of plaintiffs, both of which were allegedly charged supra-competitive prices and encountered unreasonable blackout restrictions because of baseball’s antitrust exemption: (1) a television class for those who purchased a cable package through Comcast, DirectTV, or their subsidiaries in order to watch live baseball games within the past four years and (2) an Internet class who purchased a subscription to watch live games through MLB.tv within the past four years.<sup>166</sup>

The four plaintiffs in the case who represent these two different classes brought antitrust actions for anticompetitive broadcasting practices under sections 1 and 2 of the Sherman Act against the Commissioner of Baseball, the League itself, nine of the thirty individual baseball teams,<sup>167</sup> and several broadcasting companies,

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160. Mark Newman, *With Postseason.TV, Fans Get All the Angles*, MLB.COM (Oct. 3, 2012, 11:53 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20121003&content\\_id=39452986&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20121003&content_id=39452986&vkey=news_mlb&c_id=mlb).

161. Maury Brown, *The Ledger Domain: Blackout Blues*, BASEBALL PROSPECTUS (July 24, 2006), <http://www.baseballprospectus.com/article.php?articleid=5335>.

162. *Blackouts FAQ*, *supra* note 135.

163. *See* Blackout Map, *supra* note 133.

164. Brown, *supra* note 161.

165. Garber Complaint, *supra* note 9; Laumann v. NHL, 907 F. Supp. 2d 465, 471 (S.D.N.Y. 2012) (The *Garber* case has been consolidated with a similar class-action antitrust lawsuit against the NHL involving many of the same plaintiffs.).

166. Garber Complaint, *supra* note 9, at 18–19.

167. *Id.* at 13–14. Of the thirty MLB teams, the *Garber* complaint only lists the following nine teams as defendants: Oakland Athletics, Seattle Mariners, Chicago Cubs, Chicago White Sox, Colorado Rockies, New York Yankees, Philadelphia Phillies, Pittsburgh Pirates, and San Francisco Giants. *Id.* at 10–11.

including Comcast, DirectTV, Fox Sports Net, Turner Broadcast System (TBS), and ESPN.<sup>168</sup> The Sherman Act makes unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”<sup>169</sup> The *Garber* complaint alleges that the broadcasting agreements of the League are in violation of the Act because of the League’s anticompetitive agreements, blackout policies, and supra-competitive prices.<sup>170</sup> In pursuing this action, the plaintiffs hope to receive damages and injunctive relief in order to reclaim the excessive costs of purchasing cable and Internet broadcasting packages, as well as prevent the defendants from furthering any anticompetitive broadcasting policies.<sup>171</sup>

On December 5, 2012, U.S. District Judge Shira Scheindlin rejected the League’s motion to dismiss against the *Garber* plaintiffs, stating that the plaintiffs have “plausibly alleged” that they have been harmed by the League’s anticompetitive broadcasting policies.<sup>172</sup> In the opinion, Judge Scheindlin held that “[m]aking all games available as part of a package, while it may increase output overall, does not, as a matter of law, eliminate the harm to competition wrought by preventing the individual teams from competing to sell their games outside their home territories in the first place.”<sup>173</sup>

The Southern District of New York should ultimately rule in favor of the plaintiffs in deciding this case for two reasons. First, after the Supreme Court’s decision in *American Needle*, baseball’s antitrust exemption should no longer apply or should be narrowed such that it does not include broadcasting of professional baseball games.<sup>174</sup> Second, the League’s broadcasting procedures unreasonably restrain trade in violation of the Sherman Antitrust Act.<sup>175</sup> As a result of these anticompetitive actions, consumers and fans of baseball pay supra-competitive prices for cable and Internet subscriptions, undergo unfair blackout policies, and subscribe to excessive amounts of broadcasts in order to watch their favorite in-market and out-of-market teams. Accordingly, the League should discontinue anticompetitive

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168. *Id.* at 13–17.

169. 15 U.S.C. § 1 (2012).

170. *Garber Complaint*, *supra* note 9, at 2.

171. *Id.* at 40–41.

172. *Laumann v. NHL*, 907 F. Supp. 2d 465, 491–92 (S.D.N.Y. 2012) (The court rejected the plaintiffs’ section 2 claim against the RSN and Multichannel Video Programming Distributor (MVPD) defendants for failure to allege any monopoly power on the part of these defendants, but the section 2 claims against the NHL and MLB were not dismissed.).

173. *Id.*

174. *Mozes & Glicksman*, *supra* note 100, at 288–95.

175. Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 465–68 (1990).

broadcasting policies and allow fans to subscribe to more targeted viewing packages for the mutual benefit of fans and MLB.

**A. REMOVAL OF BASEBALL'S ANTITRUST EXEMPTION AFTER  
*AMERICAN NEEDLE***

The Supreme Court's rejection of the NFL's single entity defense in *American Needle* has put the antitrust exemption of professional baseball in jeopardy and is likely one reason why, "according to a number of sources, the league is taking [the *Garber* case] very seriously."<sup>176</sup> The antitrust exemption from *Federal Baseball* was twice upheld by the Supreme Court on the basis of stare decisis.<sup>177</sup> Although the Court's decision in *American Needle* did not involve baseball, its holding does prevent future courts from simply hanging their hat on stare decisis when reviewing challenges to the League's antitrust exemption. Furthermore, the Supreme Court's holding that baseball did not constitute interstate commerce, which created the exemption in the first place, is no longer true—it can be argued it never was—as the Court admitted in *Flood*.<sup>178</sup>

This is not to say that the League should be prevented from engaging in anticompetitive measures entirely. Indeed, the Court conceded in *American Needle* that sports leagues are allowed some degree of cooperation with one another in order to schedule and hold games.<sup>179</sup> However, in terms of licensing, a court presumably would not be so lenient. In fact, the League likely assumed this would be the case when it refused to raise the exemption as a defense in the *Salvino* case.<sup>180</sup> Any licensing case reviewing the exemption following *American Needle* would almost certainly pose an even greater risk to the exemption's removal. As Judge Scheindlin noted in her opinion rejecting the defendants' motion to dismiss, "[t]he fact that the NHL and MLB are lawful joint ventures does not preclude plaintiffs from challenging the Leagues' particular policies under the rule of reason . . . . *American Needle* conclusively established that these kinds of arrangements are subject to Section 1 scrutiny."<sup>181</sup> Thus, the methodology in *American*

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176. Passan, *Blackout Problem*, *supra* note 7.

177. *Flood v. Kuhn*, 407 U.S. 258, 279 (1972); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357.

178. *Flood*, 407 U.S. at 282.

179. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202 (2010).

180. *MLB Props. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008); Mozes & Glicksman, *supra* note 100, at 283.

181. *Laumann v. NHL*, 907 F. Supp. 2d 465, 485–86 (S.D.N.Y. 2012) The court further stated that "the notion that the *exhibition* of [ ] league games on television and the Internet is clearly a league issue is contrary to longstanding precedent that agreements limiting the telecasting of professional sports games are subject to antitrust scrutiny, and analyzed under the rule of reason." *Id.* at 488 (internal quotation marks omitted).

*Needle* for applying antitrust law to licensing of merchandise serves as a strong precedent to eliminate baseball's antitrust exemption by applying the Sherman Act to the licensing of baseball broadcasts as well.

### B. NON-COMPETITIVE BROADCASTING AGREEMENTS AND BLACKOUT POLICIES

Without professional baseball's long-standing shield from federal antitrust law, the Southern District of New York should agree with the plaintiffs in *Garber* and find that the League's various broadcasting agreements unreasonably restrain trade in violation of the Sherman Act. The complaint in *Garber* first examines the exclusive broadcasting agreements between the League's member clubs and local RSNs for in-market live game broadcasts.<sup>182</sup> These exclusive broadcasting contracts bring in billions of dollars of revenue for MLB teams,<sup>183</sup> and they are now worth more to these teams than any other source of revenue, including ticket sales, merchandising, and sponsorships.<sup>184</sup>

For the RSNs, broadcasting agreements are especially valuable because sports are arguably "DVR-proof."<sup>185</sup> In today's world, many people record live TV and fast-forward through the commercials or watch prerecorded streaming video online.<sup>186</sup> However, live sporting events are one of the last television programs to be considered "DVR-proof" because audiences still feel the need to watch the events as they

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182. *Garber Complaint*, *supra* note 9, at 23–27.

183. See Joe Flint & Meg James, *Rising Sports Programming Costs Could Have Consumers Crying Foul*, L.A. TIMES (Dec. 1, 2012), <http://articles.latimes.com/print/2012/dec/01/business/la-fi-1202-ct-sports-cost-20121202> (stating that L.A. Dodgers TV rights deal is worth more than \$6 billion and nearly half of the average household's cost for cable or satellite TV is due to the high cost of sports programming); Jeff Passan, *Lawsuit Targeting MLB's Blackout Policy to Proceed*, YAHOO! SPORTS (Dec. 5, 2012), <http://sports.yahoo.com/news/lawsuit-targeting-mlb-s-blackout-policy-allowed-to-proceed-015544096.html> ("Baseball's infusion of local-television money has transformed the industry into a richer-than-ever financial behemoth. Multi-billion-dollar deals, including the Los Angeles Dodgers' expected \$6 billion windfall for 25 years of broadcasts, are the product of a system that awards territories to teams and allows them a local programming monopoly."); Richard Sandomir, *Sweet TV Deal Will Taste Bitter to Fans*, N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/sports/baseball/dodgers-sweet-tv-deal-will-taste-bitter-to-fans.html> (describing broadcasting deal between the Los Angeles Dodgers and Time Warner Cable's new RSN, SportsNet LA, worth up to \$8 billion over twenty-five years starting in 2014, and how this deal will "add up to \$5 a month to the costs of cable, satellite and telephone companies"); Bill Shaikin & Kevin Baxter, *Albert Pujols, C.J. Wilson Deals Enabled by TV Revenue*, L.A. TIMES (Dec. 8, 2011), <http://articles.latimes.com/2011/dec/08/sports/la-sp-angels-fox-tv-20111209> (discussing exclusive broadcasting contract between Los Angeles Angels and Fox Sports worth at least \$3 billion over twenty years).

184. Passan, *Blackout Problem*, *supra* note 7.

185. *Id.*

186. Dylan Stableford, *The Super Bowl: The Most DVR'd, and DVR-Proof, Broadcast on TV*, YAHOO! NEWS (Feb. 3, 2012), <http://news.yahoo.com/blogs/cutline/super-bowl-most-dvr-d-dvr-proof-broadcast-200015178.html>.

happen.<sup>187</sup> As stated by John Skipper, programming chief at ESPN, “It’s exclusive, one of a kind, and it works for us on every level.”<sup>188</sup> Therefore, live sporting events are much less affected by technological innovations that allow viewers to avoid watching commercials, and television networks can charge higher prices to advertisers.<sup>189</sup> Additionally, these high profits are not limited to just the MLB teams and local RSNs, since some games are also broadcast through national agreements between the League and national broadcasters, including ESPN, Fox, and TBS.<sup>190</sup> MLB teams and the League are making millions and billions of dollars in revenue from the RSNs and national networks, which in turn are earning huge profits from advertising revenues—and these contracts continue to skyrocket.<sup>191</sup> At the MIT Sloan Sports Analytics Conference held in 2012, a panel of sports programming chiefs from ESPN, Fox, and NBC, as well as league media heads from the NFL and MLB, all agreed that “sports media rights are rich and getting richer” and “despite some occasional haggling over game packages . . . , things are working for everyone.”<sup>192</sup>

So in the end, everyone benefits—except for the fans. While the revenues of the League and the broadcasting networks continue to increase, all of the rising costs are passed directly to the fans, who pay higher prices on their bills when subscribing to cable providers.<sup>193</sup> In

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187. *Id.*; Mark Reynolds, *Major League Baseball Has a Major Problem with Antitrust Lawsuit*, BLEACHER REP. (Mar. 9, 2013), <http://bleacherreport.com/articles/1559827-major-league-baseball-has-a-major-problem-with-antitrust-lawsuit> (“Live sports are basically DVR-proof television because games are obviously more entertaining to watch for the fans when the result is unknown.”).

188. Tom Van Riper, *Sports Media Rights Keep Rolling—For Now*, FORBES (Mar. 2, 2012, 1:42 PM), <http://www.forbes.com/sites/tomvanriper/2012/03/02/sports-media-rights-keep-rolling-for-now/>.

189. Stableford, *supra* note 186 (“Live sports is the most DVR-proof programming out there . . . , which is why advertisers pay \$100,000 a second to advertise there.”).

190. The League and national networks Fox and TBS have a deal in place through 2021 to broadcast a few national baseball games, including the World Series, various playoff games, and the All-Star Game, for a combined \$800 million annually. The League also has a new deal with ESPN to broadcast some games from 2014–2021 that would increase their annual payment from the current rate of \$360 million per year to a new rate of \$700 million per year. Garber Complaint, *supra* note 9, at 24; *MLB Completes 8-Year Deal with Fox, Turner Sports*, ASSOCIATED PRESS (Oct. 2, 2012, 1:45 PM), <http://bigstory.ap.org/article/mlb-completes-8-year-deal-fox-turner-sports>.

191. The TV rights deal between ESPN and the NFL for ESPN to broadcast Monday Night Football games went up over seventy percent from their previous agreement. Van Riper, *supra* note 188.

192. *Id.*

193. *Id.* (“[C]onsumers, ultimately the ones paying for sports programming, may be nearing their limits. When a network wins a bidding war for a sports property, they recoup that money through subscription fees from cable and satellite carriers. The carriers, in turn, try to pass those costs on to customers through higher rates.”); *see also* Brian Stelter & Amy Chozick, *Paying a ‘Sports Tax,’ Even If You Don’t Watch*, N.Y. TIMES (Dec. 15, 2011),

fact, some commentators believe that “American television subscribers pay, on average, about \$100 a year for sports programming—no matter how many games they watch.”<sup>194</sup> Other media analysts have explained that sports programming only makes up about twenty percent of the television viewing for an average household, but it represents about fifty percent of the costs for cable or satellite television subscriptions.<sup>195</sup>

Unfairly high subscription fees resulting from restraining trade are not limited to just in-market packages, as the League can “exploit their illegal monopoly by charging supra-competitive prices” for the out-of-market Internet and premium cable packages as well.<sup>196</sup> Due to the League’s exemption from antitrust laws and “the clubs’ horizontal elimination of competition,” the same anticompetitive pricing that fans are subjected to for in-market baseball broadcasts through subscriptions to local cable providers also apply to how the League can set prices for the Internet and premium cable packages for out-of-market broadcasts.<sup>197</sup> In just the short period of time since the filing of the *Garber* lawsuit, the yearly price of the out-of-market packages has increased by ten percent or more.<sup>198</sup> Furthermore, both the MLB.tv and MLB Extra Innings packages are offered on an “all-or-nothing” basis, meaning that “[p]urchasers of MLB.TV must buy all out-of-market games for all teams even if they are only interested in watching the games of a particular team.”<sup>199</sup> And because both MLB.tv and MLB Extra Innings are licensed directly from the League, subscription fees paid by customers are funneled directly into the coffers of the League and its thirty teams.<sup>200</sup>

Yet, “[a]t the core of Defendants’ restraint of competition in the video programming market are the regional blackout agreements.”<sup>201</sup>

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<http://www.nytimes.com/2011/12/16/business/media/for-pay-tv-clients-a-steady-diet-of-sports.html>; Passan, *Blackout Problem*, *supra* note 7; Sandomir, *supra* note 183.

194. Stelter & Chozick, *supra* note 193; *see also* Reynolds, *supra* note 187 (“Major League Baseball (MLB) and other sports leagues are charging cable companies and networks more for the rights to broadcast their games on television, and those costs are being passed on to consumers—even those who don’t watch sports.”).

195. Van Riper, *supra* note 188.

196. Garber Complaint, *supra* note 9, at 6.

197. *Id.* at 6, 29.

198. *Compare id.* at 28, 30 (describing the price of the 2011 season of MLB.tv as \$99.99 for the basic MLB.tv, \$119.99 for MLB.tv Premium, and approximately \$200 for the 2011 season of MLB Extra Innings), with 2013 MLB Extra Innings Package, *supra* note 153, and Newman, *MLB.TV*, *supra* note 150 (showing 2013 prices of \$109.99 and \$129.99 for MLB.tv and \$139.96 per half season of MLB Extra Innings).

199. Garber Complaint, *supra* note 9, at 28.

200. Passan, *Blackout Problem*, *supra* note 7 (describing how “every dollar that goes through MLBAM [Major League Baseball Advanced Media], the league’s digital arm that runs MLB.tv, is distributed evenly among the 30 teams”); Barry M. Bloom, *Senate Holds Hearing on TV Deal*, MLB.COM (Mar. 27, 2007, 4:52 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20070327&content\\_id=1861562&vkey=news\\_mlb&c\\_id=mlb&fext=.jsp](http://mlb.mlb.com/news/article.jsp?ymd=20070327&content_id=1861562&vkey=news_mlb&c_id=mlb&fext=.jsp).

201. Garber Complaint, *supra* note 9, at 24.



This is because in many situations, fans who attempt to watch live baseball broadcasts are unable to avoid paying for the supra-competitive local television subscriptions due to the League's blackout restrictions.<sup>202</sup> Because the MLB teams and the League are able to enter into exclusive contracts with local and national television networks based on territorial broadcasting rights, fans who wish to watch live games are often required to purchase cable subscriptions at the supra-competitive prices *and* purchase out-of-market sports packages, rather than having access to games directly from the teams.<sup>203</sup>

The problem with these blackout policies is twofold. Baseball fans who want to watch both in-market and out-of-market games are forced to purchase *both* out-of-market packages and local cable subscriptions in order to watch these games.<sup>204</sup> As a result, fans that are already paying upwards of \$109 for out-of-market packages from the League are now required to also purchase cable subscriptions at their supra-competitive rates in order to watch in-market games.<sup>205</sup> As troubling as this double-dipping by the League may be for fans, the situation is even direr for baseball fans in other market areas. In those areas where a fan is technically within a team's broadcasting territory but their local RSN does not subscribe to that team's games, even buying the in-market package would not give access to that team's games.<sup>206</sup> For example, the territory-rights of much of central and western North Carolina have the Cincinnati Reds listed as one of their in-market teams.<sup>207</sup> However, not only do cable companies in North Carolina have no incentive to carry Fox Sports Ohio (the Reds' RSN), but that area is already covered by Fox Sports Carolinas, which does not broadcast Reds games.<sup>208</sup> Thus, a Reds fan living in Charlotte would have no possible way of watching live games without making the over seven-hour, 477-mile trip to the Great American Ball Park in Cincinnati.<sup>209</sup> Additionally, nationally televised games—some weekend games, the All-Star Game, and all of the playoffs—are also blacked out for MLB.tv or MLB Extra Innings subscribers.<sup>210</sup>

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202. Passan, *Blackout Problem*, *supra* note 7.

203. Garber Complaint, *supra* note 9, at 24–27.

204. *Id.*

205. Garber Complaint, *supra* note 9, at 24–27; Passan, *Blackout Problem*, *supra* note 7.

206. Passan, *Blackout Problem*, *supra* note 7.

207. Blackout Map, *supra* note 133.

208. Passan, *Blackout Problem*, *supra* note 7; *see also* Fox Sports Local Map, FOX SPORTS, <http://msn.foxsports.com/home/page/fsn> (last visited Nov. 17, 2013) (showing map of Fox Sports Regional Sports Networks and the teams that are broadcasted by those networks).

209. *Driving Directions to Great American Ball Park*, GOOGLE MAPS, <http://goo.gl/maps/aL3nG> (last visited Nov. 17, 2013); Blackout Map, *supra* note 133.

210. *Blackouts FAQ*, *supra* note 135.

The second and most troublesome problem with the League's blackout policies relates to how many of the demarcated broadcasting territories overlap one another. Although some territories only have one team, other territories that do not have a local team and are geographically in-between different teams' local markets—such as the entire state of Iowa and the greater Las Vegas area—have as many as six teams claiming in-market broadcasting rights.<sup>211</sup> Outside of the contiguous United States, the blackout policies are even broader; the entire Canadian market is blacked out from Toronto Blue Jays games (in addition to other teams in certain areas), and the U.S. territories of Guam and the Virgin Islands are blacked out from *every* game.<sup>212</sup> Additionally, because the blackouts are enforced “regardless of whether that Club is playing at home or away,”<sup>213</sup> fans in a market like Las Vegas, which has six different teams claiming territorial rights, can have up to twelve different teams that are blacked out on any given day.

Based on this information, both the non-competitive agreements and the blackout policies in the way the League broadcasts games restrain trade in violation of the Sherman Act. Yet, even with a removal of baseball's preferred antitrust status, the *Garber* plaintiffs must still overcome the hurdle of the Sports Broadcasting Act of 1961 (the SBA).<sup>214</sup> The SBA, passed in 1961 to facilitate an agreement where the NFL would sell a package of games to CBS, provides that

antitrust laws . . . shall not apply to any joint agreement by or among persons . . . conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in [these sports] sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.<sup>215</sup>

Yet, there are two specific reasons why the SBA should not be applied here. The first comes from the Supreme Court's analysis of sports broadcasting in *NCAA v. Board of Regents of the University of Oklahoma*.<sup>216</sup> In this decision, the Court stated that, for broadcasts, “[p]rice is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since Congress designed the Sherman Act

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211. Blackout Map, *supra* note 133.

212. *Blackouts FAQ*, *supra* note 135.

213. *Id.* (concluding that if each of the six teams claiming territorial-rights were playing six completely different teams, all twelve of those teams would be blacked out).

214. Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. §§ 1291–95 (2012)).

215. 15 U.S.C. § 1291; Ross, *supra* note 175, at 468–69.

216. 468 U.S. 85 (1984).

as a consumer welfare prescription.”<sup>217</sup> Thus, to meet this “Rule of Reason” standard, the *Garber* plaintiffs would have to prove that the price of broadcasting is higher on consumers and the output of games is “lower than it would otherwise be.”<sup>218</sup> As previously described, the skyrocketing broadcasting contracts that are passed on to consumers, as well as those consumers who are blacked out from watching games entirely, would easily meet this standard.

In the *NCAA* case, however, the Supreme Court did not consider the SBA at all because it only applies to professional sports. The Seventh Circuit considered the SBA in the 1992 case *Chicago Professional Sports Ltd. Partnership v. NBA*.<sup>219</sup> In this case, the Chicago Bulls filed an antitrust suit against the NBA because of a rule limiting the number of games that individual teams could license to network “superstations.”<sup>220</sup> The court held that the SBA only applies “when the league has transferred a right to sponsored telecasting,” and the NBA’s national broadcasting contracts did not give a “right to limit broadcasting of other contests.”<sup>221</sup> Another federal court reviewing the SBA specifically held that “[s]ponsored telecasting’ under the SBA pertains only to network broadcast television and does not apply to non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.”<sup>222</sup> Judge Scheindlin’s opinion of the *Garber* case also addressed this point, stating that the rule of reason “does not give league agreements regarding television rights blanket immunity from antitrust scrutiny” and “may constitute an antitrust violation.”<sup>223</sup>

Therefore, in light of these interpretations of the SBA’s scope, as well as the “Rule of Reason” standard from *NCAA*, the Southern District of New York should not apply the SBA to the anticompetitive broadcasting agreements at issue here. Any court reviewing a challenge to the exemption must consider that “[a]ntitrust law is concerned with the market, and hence, the needs of the consumers. The final decision, then, should be more about protecting the rights of another stakeholder, the fans of baseball.”<sup>224</sup> Accordingly, the court should find in favor of the *Garber* plaintiffs, and hold that the League does not have an exemption from antitrust law and conspired to restrict trade in violation of the Sherman Act.

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217. *Id.* at 107 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979)).

218. Ross, *supra* note 175, at 478.

219. *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667 (7th Cir. 1992).

220. *Id.* at 669.

221. *Id.* at 671.

222. *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002).

223. *Laumann v. NHL*, 907 F. Supp. 2d 465, 488–89 (S.D.N.Y. 2012).

224. *Mozes & Glicksman*, *supra* note 100, at 291.

#### IV. PROPOSAL FOR FUTURE BROADCASTING PROCEDURES

This Note has highlighted why the Southern District of New York should rule in favor of the *Garber* plaintiffs and hold that (1) baseball no longer enjoys the status of being exempt from antitrust law and (2) the broadcasting policies of the League unreasonably restrain trade in violation of the Sherman Act. If the court does rule in favor of the plaintiffs, it would no doubt be a huge blow to the League going forward. However, no matter what the outcome of this case is, there are steps the League can take to change its anticompetitive policies for the mutual benefit of the League and its fans.

Although there are some avid baseball fans who would watch any game being broadcast, arguably the vast majority of fans simply want to watch their favorite team.<sup>225</sup> As a result, the solution that commentators suggest “makes so much sense it’ll never happen” is to offer “a-la-carte” pricing on games.<sup>226</sup> Using this method, fans could have access to just the games they want by being able to purchase packages directly from their favorite teams. As Stephen Ross and Stefan Szymanski write (who were also cited in the *Garber* complaint):

Absent the exclusive territorial arrangements agreed to by league owners, individual teams would either directly, or more likely through intermediaries, arrange for their own games to be available to out-of-market fans . . . . Fans wishing to see only their favorite team now pay for more games than they want, so sports leagues are currently using their monopoly power to effectuate a huge wealth transfer . . . . [L]ess fanatic consumers would be willing to pay a more modest sum for their favorite teams’ games only. As to these fans, the current scheme reduces output.<sup>227</sup>

Thus, while broadcasting packages may bring in less revenue on an individual basis, the League would increase output to many more fans by offering them the ability to see the games they want, and this increase in viewership could compensate for lower per capita revenues.

Additionally, there is nothing keeping the League from providing this system to fans because the technology is already available.<sup>228</sup> Through MLB Advanced Media (MLBAM), the League has the ability to stream every live baseball game through the Internet on virtually any device, and MLBAM is already used to show games through the MLB.tv

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225. STEPHEN F. ROSS & STEFAN SZYMANSKI, *FANS OF THE WORLD, UNITE!: A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS* 25 (2008).

226. Passan, *Blackout Problem*, *supra* note 7.

227. ROSS & SZYMANSKI, *supra* note 225, at 15.

228. Jack Stuef, *Inside the Major League Baseball Tech Startup That Could Change Television*, BUZZFEED (Oct. 31, 2012), <http://www.buzzfeed.com/jackstuef/inside-the-major-league-baseball-tech-startup-that>.

package.<sup>229</sup> If fans were allowed to purchase packages directly from the teams they want to watch, the League could make every game available through MLBAM.

Lastly, as stated in the *American Needle* opinion, “the interest in maintaining a competitive balance among athletic teams is legitimate and important.”<sup>230</sup> If live games were offered on an individual basis, it would aid in the competitive balance of the League and make games more interesting to watch.<sup>231</sup> As previously mentioned, the vast majority of teams’ revenues come from the massive local television contracts that are arranged with RSNs.<sup>232</sup> Because of this, teams that play in larger television markets, such as Los Angeles or New York, can reach agreements for massive television deals and afford to have more elite players.<sup>233</sup> On the other hand, MLBAM is equally owned by all thirty of the League’s member clubs,<sup>234</sup> and every dollar that goes through the company is distributed evenly.<sup>235</sup> Thus, by circumventing the need to go through RSNs entirely, each team would receive an equal share of the broadcasting revenue and not be concerned with the size of the television market where that team is located. In turn, cable companies would not have to be locked into huge contracts with RSNs, where the high costs are passed on to consumers who may not even watch baseball at all.<sup>236</sup>

## CONCLUSION

In this lawsuit, the *Garber* plaintiffs have the chance to make history and bring about significant changes that would improve baseball for years to come. As stated most poignantly by *Yahoo! Sports* writer Jeff Passan:

*Garber et al v. MLB* is the workaround code for the working person. It is the suit behind which every baseball fan should stand. It’s 2012, where everything is available everywhere, and pure greed is keeping baseball off our TVs, our tablets, our laptops and our phones. If baseball refuses to budge on an issue so archaic, so absurd and so blatant in its indifference toward people who want to buy one of their products, the league should suffer through the embarrassment of getting clowned by the fans whom it clowns with black TV screens. It

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229. *Id.*

230. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010) (internal quotation marks omitted) (citing *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984)).

231. Stuef, *supra* note 228.

232. *Id.*

233. See Shaikin & Baxter, *supra* note 183.

234. Stuef, *supra* note 228.

235. Passan, *Blackout Problem*, *supra* note 7.

236. Stelter & Chozick, *supra* note 193.

may move slowly – most antitrust lawsuits do—but if this succeeds, it will be a decades-forward leap in one fell swoop.<sup>237</sup>

*Garber v. MLB* is the chance for the League to finally reexamine their antiquated broadcasting policies and develop a new strategy that works for an increasingly technological and international new generation of baseball fans. No matter the outcome of the case, MLB has the opportunity to make ground-breaking modernizations that would shake up the sports world and solidify its namesake as the “national pastime” for decades to come.

*Nathan M. Hennagin*\*

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237. Jeff Passan, *TV Blackouts Case Against MLB at Critical Point*, YAHOO! SPORTS (Sept. 21, 2012, 1:41 AM), <http://sports.yahoo.com/news/tv-blackout-case-against-mlb-at-critical-point.html>.

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